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| CITY OF NORTH WILDWOOD,<br>CAPE MAY COUNTY,<br><br>PETITIONER,<br><br>V.<br><br>BOARD OF EDUCATION OF THE<br>CITY OF WILDWOOD,<br>CAPE MAY COUNTY,<br><br>RESPONDENT. | : | COMMISSIONER OF EDUCATION<br><br>DECISION |

## SYNOPSIS

The City of North Wildwood (North Wildwood) filed a petition in June 2014 seeking removal of pre-kindergarten and kindergarten school programs run by the Wildwood Board of Education (Wildwood BOE) within the jurisdictional limits of the City of North Wildwood, claiming that Wildwood BOE lacks authority to engage in such action outside of its own district boundaries. Wildwood BOE has leased space for early childhood school programs from St. Simeon's Episcopal Church – which is located one block from the Wildwood city line, within the municipal limits of North Wildwood – for about thirteen years. Petitioner pursued its case against Wildwood BOE for more than a year before submitting a letter in July 2015 requesting to withdraw the petition, stating that it intended to seek the same relief in Superior Court. Wildwood BOE subsequently filed a motion seeking to have the case dismissed with prejudice. On August 21, 2015, North Wildwood filed a complaint against Wildwood BOE in Superior Court; the petitioner seeks the same or similar relief that it sought in the appeal it had just withdrawn from the Commissioner and Office of Administrative Law (OAL).

The ALJ found, *inter alia*, that: this matter is governed by *N.J.A.C.* 1.1-19.2, which is silent on whether a voluntary withdrawal is with or without prejudice; the parallel Superior Court rule directs that an action may be dismissed by the plaintiff "without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment"; pursuant to *Shulas v. Estabrook,* 385 *N.J. Super.* 91, 97 (App. Div. 2006), the determination of whether to dismiss with or without prejudice, as well as whether to impose terms that are fair under the circumstances, lies within the court's discretion; in the instant case, Wildwood BOE went through the expense of hiring counsel, filing responsive pleadings, holding public hearings, participating in settlement conferences, and submitting a motion for summary decision, only to have North Wildwood abruptly withdraw the matter one day before oral argument involving dispositive motions was to begin; such withdrawal and re-filing with the Superior Court under the *Declaratory Judgment Act, N.J.S.A.* 2A:16-50 *et seq.*, was strategic, tactical in nature, and jurisdictionally improper; the Commissioner of Education has primary jurisdiction over education matters. The ALJ granted Wildwood BOE's motion to dismiss the petition with prejudice. In so doing, he emphasized that, while North Wildwood's remedies now rest exclusively with the Superior Court, the fact that the matter has been dismissed "with prejudice" at the administrative level is not intended to create or manufacture a basis for the Superior Court to assert jurisdiction over matters it would ordinarily not take.

The Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter, but declined to make any finding as to the merits of the petitioner's pending Superior Court action. The Commissioner stated that petitioner can elect to pursue its claim elsewhere, but may not leave the door open to duplicative future litigation before the Commissioner. Accordingly, the petition was dismissed with prejudice.

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

**#1-16**

OAL DKT. NO. EDU 11718-15
(EDU 8018-14 ON REMAND)
AGENCY DKT. NO. 146-6/14

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|---|---|---|
| CITY OF NORTH WILDWOOD, CAPE MAY COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY, | : | |
| RESPONDENT. | : | |

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions, and respondent's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been reviewed. Upon full consideration of the record and the parties' submissions, the Commissioner concurs with the Administrative Law Judge (ALJ) that the instant petition is appropriately dismissed with prejudice.

Petitioner's exceptions, which substantially reiterate the arguments it presented to the ALJ, are unpersuasive. Although petitioner faults the ALJ for failing to discuss the unpublished decisions it cited, those decisions are neither controlling nor precedential – and contain facts and circumstances which are wholly distinguishable from the present matter.[1] The Commissioner finds that the ALJ applied the relevant law to the facts and circumstances of this case – as discussed within his comprehensive Initial

[1] *D&P Liquor Corp. v. Hillside Twp. Alcohol Beverage Control Bd.*, OAL Dkt. No. ABC 17603-13, Initial Decision (August 21, 2014) (withdrawal without prejudice following commencement of OAL hearing after testimony from petitioner's expert witness was excluded due to petitioner's failure to serve expert report upon respondent); *J.G. o/b/o J.G. v. Bd. of Educ.*, OAL Dkt. No. EDS 9178-03, Initial Decision (February 26, 2004) (petitioning parent in special education case permitted to withdraw request contesting child's change in placement without prejudice); *DeBose v. Prozy's Army and Navy*, OAL Dkt. No. CRT 5856-97, DCR Dkt. No. EB23WB38230-E, Administrative Decision (June 20, 2011) (*pro se* petitioner permitted to withdraw without prejudice prior to matter proceedings on its merits, where record contained "no evidentiary material" regarding the claims, "no legal argument addressing substantive issues of law, or certifications of undisputed facts which might support a summary decision the merits without a hearing.").

Decision – and that the ALJ's determination to dismiss the petition with prejudice was not an abuse of discretion.

In short, this matter proceeded for over a year – with its merits having been fully briefed in connection with the parties' respective motions for summary decision. The day before oral argument was to occur on those dispositive motions, petitioner requested withdrawal of its petition and expressed intent to pursue its claim for relief in Superior Court. In addition to the preparation of its motion for summary decision and supporting brief, respondent spent time and money preparing answers to petitioner's discovery requests, participating in settlement conferences, and telephone pre-hearing conferences with the ALJ. Based upon the present record, it cannot be disputed that this case was nearing its conclusion; therefore, the Commissioner disagrees with petitioner's contention that this matter was somehow in its early stages, and that a withdrawal without prejudice is appropriate.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons stated therein – with one caveat: the Commissioner makes no findings as to the merits of petitioner's pending Superior Court action. Certainly, the petitioner can elect to pursue its claim elsewhere at this juncture – but not while leaving the door open to duplicative future litigation before the Commissioner. Given this late stage, and the well-documented efforts already expended by respondent to defend against and resolve this action, petitioner should be precluded from returning to the Commissioner with the same claim. Consequently, respondent's motion is granted and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/16

Date of Mailing: 1/05/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 11718-15
(ON REMAND EDU 8018-14)
AGENCY DKT. NO. 146-6/14

**CITY OF NORTH WILDWOOD, CAPE MAY COUNTY**
Petitioner,
v.
**BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY**
Respondents.

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**Joseph F. Betley,** Esq., for petitioner (Capehart & Scatchard, attorneys)

**William S. Donio,** Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: November 9, 2015 Decided: November 20, 2015

BEFORE **W. TODD MILLER**, ALJ:

## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The Board of Education of the City of Wildwood (WBOE or respondent) provides pre-kindergarten and kindergarten (pre-k and k) educational services and programs at facilities located within the jurisdictional limits of North Wildwood under a lease

arrangement with St. Simeon's Episcopalian Church (St. Simeon's building). The leased building is about one block inside the jurisdiction of North Wildwood or conversely one block from Wildwood. The pre-k and k services have been provided at the St. Simeons location for about thirteen years.

On June 6, 2014, North Wildwood filed a petition with the Commissioner of Education seeking to remove the WBOE's pre-k and k school functions and programs from within North Wildwood claiming WBOE's lack authority to engage in such action outside its borders. On June 25, 2014, WBOE filed responsive pleadings to the petition.

On June 27, 2015, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A telephone prehearing conference was held on September 10, 2014. Thereafter a plenary hearing was scheduled for April 27, 2015. Several telephone and in person settlement conferences followed, to no avail. On January 12, 2015, substitute counsel entered the case for North Wildwood.

On March 11, 2015, counsel for the WBOE filed a motion of summary decision. On April 21, 2015, North Wildwood filed its opposition and a cross-motion for summary decision. Oral argument on the motions was scheduled for July 24, 2015.

Then, by letter dated July 23, 2015, North Wildwood abruptly withdrew its petition and indicated that it intended to seek the same form of relief in the Superior Court. On July 23, 2015, WBOE submitted a letter objecting the North Wildwood's withdrawal of the petition. Unfortunately, the matter was promptly returned to the Commissioner of Education by the undersigned, since the petition was withdrawn.

On July 29, 2015, WBOE filed a more formal motion with the undersigned seeking to have the case dismissed "with prejudice." The undersigned advised WBOE Counsel that the case was returned to the Commissioner so the motion would have to be filed with the Commissioner, and the Commissioner could either rule on the motion

or return the matter to the OAL. On August 5, 2015, the Commissioner returned to the case to the OAL under Docket No. EDU 11718-15 with instructions to address WBOE's motion seeking to have case dismissed "with prejudice."

On August 21, 2015, North Wildwood filed a complaint against the WBOE in the Superior Court, Law Division, Cape May County under Docket No. CPM L-402-15 seeking the same or similar relief that it had just withdrawn from the Commissioner and the OAL.

On November 9, 2015, oral argument was held on the WBOE's motion for the petition to be marked dismissed "with prejudice." For the reasons explained below, WBOE's motion seeking to have the North Wildwood's petition dismissed "with prejudice" is **GRANTED**.

## CONCLUSIONS

The withdrawal of an OAL matter is governed by N.J.A.C. 1:1-19.2 which states:

> (a) A party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.
>
> (b) When a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition.
>
> (c) After the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

The OAL rule is silent on whether a voluntary withdraw is with or without prejudice.

The parallel Superior Court rule is found at R. 4:37-1 and it states:

> (a) **By Plaintiff;** By Stipulation. Subject to the provisions of R. 4:32-2(e) (class actions), R. 4:53-1 (receivership actions) and R. 4:60-18 (attachment actions), an action may be dismissed by the plaintiff **without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment**, whichever first occurs; or by filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice.
>
> **(b) By Order of Court**. Except as provided by paragraph (a) hereof, an action shall be dismissed at the plaintiff's instance only by leave of court and **upon such terms and conditions as the court deems appropriate**. If a counterclaim has been filed and served by a defendant prior to being served with plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. **Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice**.

The scope and intent of the withdraw is rule explained in Shulas v. Estabrook, 385 N.J. Super. 91, 97 (App. Div. 2006), where the court explained:

> Whether to dismiss with or without prejudice, whether to impose terms, and the crafting of terms that are fair and just in the circumstances, are all matters that lie within the court's sound discretion. See Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 258, 581 A.2d 1372 (App. Div.1990). In exercising that discretion, the court is chiefly required to protect "the rights of the defendant." Burke v. Central R. Co., 42 N.J. Super. 387, 398, 126 A.2d 903 (App. Div.1956). As explained by Judge Matthews, Fed. R. Civ. P. 41(a)(2) --upon which R. 4:37-1(b) was patterned-- was adopted to protect defendants from the duplication of litigation costs:
>
> The evil aimed at by the rule "Is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever (if there is a

> dismissal without prejudice) of having the suit determined in his favor." McCann v. Bentley Stores Corporation, 34 F. Supp. 234 (W.D. Mo.1940). The obvious purport of our rule is to protect a litigant where a termination of the proceedings without prejudice will place him in the probable position of having to defend, at additional expense, another action based upon similar charges at another time.
>
> [Union Carbide Corp. v. Litton Precision Products, Inc., 94 N.J. Super. 315, 317, 228 A.2d 99 (Ch. Div. 1967).]

The Court added in Shulas v. Estabrook, supra that:

> If there is a legitimate basis for granting a voluntary dismissal without prejudice, the trial judge should impose such terms as are appropriate. Those terms **should at least encompass plaintiff's payment of the counsel fees incurred by defendants for services that will be duplicated should plaintiff be permitted to pursue the new complaint**. In so holding, we do not mean to suggest that no other terms would be appropriate if the action takes this alternative course; **a proper exercise of discretion requires that the judge balance the interests of the parties, but the judge must take particular care to protect defendants from the cost or other prejudice resulting from the duplication of their previously expended efforts**.
>
> [Emphasis added]

The WBOE urges the undersigned to dismiss the petition filed by North Wildwood "with prejudice", because of its last minute withdrawal of the matter on the eve of oral argument involving dispositive motions. WBOE went through the expense of hiring counsel, filing responsive pleadings, holding public hearings, participating in settlement conferences and most significantly, submitting a motion for summary decision.

The City of North Wildwood relies upon Aldrich v. Manpower Temporary Services, 277 N. J. Super. 500 (App. Div. 1994), cert. denied 139 N.J. 442. In Aldrich

petitioner filed an administrative civil rights action with the New Jersey Division of Civil Rights. Thereafter the administrative complaint was withdrawn prior to the prehearing conference, and it was re-filed in the Superior Court asserting the same or similar claims pursuant to the Law Against Discrimination. Both actions arose under N.J.S.A. 10:5-13, therefore the Superior Court and Division of Civil Rights had concurrent subject matter or primary jurisdiction by statue.

The present matter is distinquisable from Aldrich. Here, the WBOE filed an answer; participated in a prehearing conference that was held on September 10, 2014; a plenary hearing was scheduled for April 27, 2015; several telephone and in person settlement conferences followed; WBOE filed a motion of summary decision on March 11, 2015; North Wildwood filed its opposition and a cross-motion for summary decision on April 21, 2015; and finally oral argument on the **dispositive motions** was scheduled for July 24, 2015.

It was only after the extensive case analysis, workup and motion practice that North Wildwood abruptly withdrew its petition on July 23, 2015, one day before oral argument, cognizant that the case was close to being decided with finality. And North Wildwood used a statute that is more procedural in nature and re-filed it claims with the Superior Court under the Declaratory Judgment Act N.J.S.A. 2A:16-50 et seq. Nonetheless the majority rights and obligations still must be decided under education law (title 18A and administrative code 6A). The Declaratory Judgement Act contains no substantive law on the subject at hand but merely paves a unique procedural path into the Superior Court. A Superior Court Judge would have to resort to Title 18A or Administrative Code 6A to decide the case.

The Administrative Procedure Act found at N.J.S.A. 52:14B-8 permits the filing of declaratory rulings before state agencies. The statute states:

> [An] agency upon the request of any interested person may in its discretion make a **declaratory ruling** with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. A declaratory ruling shall bind the agency and all parties to

> the proceedings on the state of facts alleged. Full opportunity for hearing shall be afforded to the interested parties. Such ruling shall be deemed a final decision or action subject to review in the Appellate Division of the Superior Court.

In Board of Education v. Asbury Park Education Asso., 145 N.J. Super. 495 (Ch. Div. 1976) modified at 155 N.J. Super. 76 (App. Div. 1977) a suit was commenced in the Superior Court by way of an order to show cause with request for temporary restraints. The filing raised two issues – 1) whether teachers could properly withhold the performance of "extracurricular" activities while continuing to perform what they contend to be their sole educational responsibility, - and 2) whether the withholding of "extracurricular" activities constitutes an illegal strike. A jurisdictional question arose as to whether the Superior Court; Chancery Division could be divested of its inherent jurisdiction to enjoin such activity by virtue of the Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Chancery Division ultimately denied the request for restraints. On appeal the Appellate Division modified the Chancery Division's ruling and stated:

> We sustain the trial court's **denial of declaratory judgment**, not for the reasons given, but because the judge should not have undertaken to decide the underlying issue in this action. **Although the original dispute was cognizable in the Superior Court, the question of extracurricular duties lay within the special competence of the Public Employees Relations Commission (PERC)**. *N.J.S.A.* 34:13A-5.2, 5.4(d). Its expertise was available, and under the doctrine of primary jurisdiction, which is concerned with "promoting the proper relationship between the courts and administrative agencies charged with particular regulatory duties," this important issue should have been transferred to that administrative body. Patrolman's Benev. Ass'n v. Montclair, 70 N.J. 130, 135 (1976); In re Hoboken Teachers' Ass'n, 147 N.J. Super. 240, 247-249 (App. Div. 1977); Plainfield Bd. of Ed. v. Plainfield Ed. Ass'n, 144 N.J. Super. 521, 525 (App. Div. 1976).
>
> [Emphasis added].

I **CONCLUDE** that the petition filed by North Wildwood must be **DISMISSED** with prejudice. North Wildwood's re-filing with the Superior Court under the Declaratory Judgment Act was strategic, tactical in nature, and jurisdictionally improper in the opinion of the undersigned. It came very late in the process and more importantly on the eve of possibly deciding the outcome of the case. The Commissioner of Education has primary jurisdiction over education matters. The Superior Court generally defers administrative matters to the respective state agencies where special expertise exists under the principle of exhaustion of administrative remedies or primary jurisdiction. R. 4:69-5. It would be unfair and prejudicial to WBOE if the Superior Court invoked the exhaustion of administrative remedies or primary jurisdiction doctrines; rejected the relief sought by North Wildwood; and only to have the case refiled before the Commissioner. The taxpayers of both cities would incur unnecessary legal expenses and an unnecessary delay in knowing the outcome of the case. Most education matters have a ninety-day statute of limitation[1] because school budgeting can be seriously undermined if unknown expenses arise that were not budgeted.

## ORDER

Based upon the foregoing, the relief sought is WBOE, designating the June 6, 2014, petition filed by North Wildwood with the Commissioner of Education, as withdrawn or dismissed **WITH PREJUDICE**, is **GRANTED**. The relief sought by North Wildwood is **DENIED**. North Wildwood's remedies, if any[2], now exclusively rest with the Superior Court.

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[1] N.J.A.C. 6A:3-1.3(h)4(i) prescribes that an appeal to the Commissioner "shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." Kaprow v. Board. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). "The limitation period gives school districts the security of knowing that administrative decisions regarding the operations cannot be challenged after ninety days." Ibid. Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relationships, thereby avoiding disruption of the educational process. Le Mee v. Bd. of Educ. of Village of Ridgewood, OAL Dkt. No. 6889-89 (Comm'r May 3, 1990).

[2] The fact that this matter is dismissed "with prejudice" at the administrative level is not intended to create or manufacture a basis for the Superior Court to assert jurisdiction over matters it would ordinarily not take.

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

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

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

11/20/15
DATE

**W. TODD MILLER**, ALJ

Date Received at Agency: 11/20/15

Date Mailed to Parties: 11/20/15

/jb

## DOCUMENTS RELIED UPON

Petition dated June 6, 2014

Respondent's June 25, 2014, Answer to the Petition

Respondent's January 16, 2015, Letter Enclosing the Lease Resolution

Respondent's March 11, 2015, Motion for Summary Judgement

Petitioner's April 21, 2015, Cross-Motion for Summary Judgement

Petitioner's July 23, 2015, Letter Withdrawing the Petition

Respondent's July 29, 2015, Letter Motion to have the Petition Withdrawn with Prejudice.

ALJ's July 31, 2015, Letter to the Parties – Case Returned to the Commissioner.

Respondent's September 25, 2015, Letter Enclosing Petitioner's Superior Court Complaint.

Petitioner's September 18, 2015, Opposition to Respondent's Motion – Seeking Withdraw with Prejudice

Respondent's September 25, 2015, Supplemental Brief

Respondent's October 23, 2015, Supplemental Brief

Petitioner's November 3, 2015, Supplemental Brief

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|---|---|---|
| KATHLEEN BOGER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL, SUSSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured Special Education teacher in respondent's employ – appealed the determination of the respondent Board to withhold her 2014-2015 salary increment, alleging that the Board failed to set forth reasons for withholding the increment in their notice to petitioner. The Board contended that petitioner's increment was withheld for good cause, and that she was properly served notice via a letter dated June 20, 2014, which referenced an enclosed corrective action plan that set forth the reasons for petitioner's increment withholding. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:29-14, a board of education may withhold, for inefficiency or other good cause, the scheduled increments of any staff member in any year; the board must provide written notice of such action within 10 days, together with the reasons for the withholding; here, the Board complied with this notice requirement when it submitted the June 20, 2014 letter with an enclosed corrective action plan for the petitioner; the corrective action plan sufficiently set forth the reasons that petitioner's increment was withheld; and there are no genuine issues of material fact herein, and the matter is ripe for summary decision. Accordingly, the ALJ granted summary decision to the respondent Board, and dismissed the petition.

Upon comprehensive review and consideration, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, for the reasons expressed therein, the Initial Decision was adopted as the final decision in this matter.

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

**January 4, 2016**

#2-16

OAL DKT. NO. EDU 12795-14
AGENCY DKT. NO. 259-9/14

| | | |
|---|---|---|
| KATHLEEN BOGER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL, SUSSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Board's June 20, 2014 letter and the enclosed corrective action plan satisfied the requirements outlined in *N.J.S.A.* 18A:29-14, and adequately provided the petitioner with the reason for her increment withholding for the 2014-2015 school year. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/16
Date of Mailing: 1/05/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 12795-14
AGENCY DKT. NO. 259-9/14

**KATHLEEN BOGER,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL, SUSSEX COUNTY,**
Respondent.

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**Sanford R. Oxfeld**, Esq., for petitioner (Oxfeld Cohen, attorneys)

**Anthony P. Sciarrillo**, Esq., for respondent (Sciarrillo Cornell Merlino, McKeever & Osborne, attorneys)

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Kathleen Boger (Boger), a teacher, challenges the determination of respondent, Board of Education of the Lenape Valley Regional High School, Sussex County (Board), to withhold her increment for the 2014-2015 school year.

On September 22, 2014, Boger's Petition of Appeal was filed with the Commissioner of Education. On September 26, 2014, the Board filed an Answer. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for determination as a contested case on October 3, 2014. Prior to the hearing, the parties filed cross-motions for Summary Decision. Respondent's motion was filed on April 20, 2015, and in support of the cross-motion, respondent submitted a brief, Joint Stipulation of Facts,[1] and Joint Exhibits.[2] Petitioner's cross-motion, filed on April 23, 2015, and an email from petitioner's attorney, dated April 21, 2015, reference both procedural and substantive issues, and during oral argument on April 23, 2015, petitioner's attorney indicated petitioner's intention to file an amended complaint. Petitioner filed a motion to amend the Petition of Appeal, and submitted a proposed Amended Petition of Appeal. Respondent opposed the motion to amend. On September 14, 2015, petitioner's motion to amend was denied.

## FINDINGS OF FACT

The parties submitted a Joint Stipulation of Facts, in accordance with which I **FIND** the following **FACTS**:

Boger is a tenured teaching staff member and was employed for the 2013-2014 school year by the Board.

On or about the latter part of the month of February 2014, an incident occurred in Boger's classroom involving a student who presented a power point project which included inappropriate and defamatory slides regarding a teacher.

On or about the latter part of the month of February 2014, an incident occurred in Boger's classroom involving a different student who presented a power point project

[1] The Joint Stipulation was noted to be subject to confirmation by petitioner's attorney and the Joint Exhibit List, for which signed originals were to be provided during oral argument.
[2] Ibid.

that portrayed a faculty member in a derogatory manner and included slides referring to alcohol consumption.

In a letter dated April 16, 2014, Superintendent/Principal Paul M. DiRupo reviewed the relevant facts relating to the incidents involving Boger and the students, concluded that the actions of Boger were grossly inappropriate, and informed Boger that he would be recommending to the Board that her increment be withheld for the 2014-2015 school year.

At a meeting held on June 18, 2014, the Board adopted a resolution approving the recommendation of the Superintendent to withhold Boger's salary increment for the 2014-2015 school year.

In a letter addressed to Boger, dated June 20, 2014, DiRupo informed Boger that the Board approved a resolution to withhold her salary increment for the 2014-2015 school year at a meeting held on June 18, 2014, and enclosed Boger's corrective action plan dated June 20, 2014, for the 2014-2015 school year.

## LEGAL ANALYSIS AND CONCLUSION

Boger's Petition of Appeal states, in its entirety, the following:

> Kathleen [Boger[3]], residing at . . . hereby asks the Commissioner of Education to hear and determine her dispute.
>
> 1. The [Board] has its principle [sic] offices at 28 Sparta Rd, Stanhope, NJ.
>
> 2. Petitioner [Boger] is a tenured teaching staff member employed in said School District as a Special Education Teacher.
>
> 3. Petitioner [Boger] was notified that the Board of Education voted to withhold her salary increment for the 2014-2015 school year. "As a result, you will remain in your

[3] The Petition of Appeal incorrect reflects petitioner's surname as "Bogar."

> current salary." Said letter also stated "Enclosed is your corrective action plan for the 2014-2015 school year."
>
> 4. N.J.S.A. 18A:29-14 mandates that when an individual has his/her increment withheld, it is the "duty of the Board of Education, within 10 days to give written notice of such action, **together with the reasons therefore** [sic], to the member concerned."
>
> 5. The action on the part of the Board in purporting to withhold the increment of Petitioner [Boger] is null and void as the District did not comply with such statutory requirement, i.e., there was no reason for the withholding of the increment as set forth in the notice given to Petitioner [Boger] within 10 days of the Board action.
>
> WHEREFORE, Petitioner [Boger] prays that the Commissioner direct the Board of Education to restore her increment for the 2014-2015 school year.

As noted in the Petition of Appeal, the statute applicable to petitioner's appeal is N.J.S.A. 18A:29-14, which provides, in pertinent part, as follows:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.

Relying upon the foregoing statute, Boger's Petition of Appeal contends that "the action on the part of the Board in purporting to withhold the increment of Petitioner [Boger] is null and void as the District did not comply with such statutory requirement, i.e., there was no reason for the withholding of the increment as set forth in the notice given to Petitioner [Boger] within 10 days of the Board action."

Here, there is no dispute that by letter dated June 20, 2014, the Board notified Boger that the Board "approved a resolution to withhold your salary increment for the 2014-2015 school year at the meeting dated Wednesday, June 18, 2014. As a result you will remain at your current salary. Enclosed is your corrective action plan for the

2014-2015 school year." There is likewise no dispute that Boger received the June 20, 2014, letter or that the June 20, 2014, corrective action plan, incorporated by reference, was enclosed therewith. The corrective action plan states, in pertinent part, as follows: "Due to disciplinary action resulting from your negligence in not previewing a public presentation for class, namely the withholding for your increment for the 2014-2015 school-year, the administration's corrective plan for you is as follows:". Further, paragraph "SECOND" of the corrective action plan states:

> Before any student, athlete, guest, or visitor makes a presentation to a class, team, group, or public forum where you are executing your duties as a teacher, coach, or representative of the Lenape Valley Regional High School, you will: preview all materials for their content and suitability, will closely monitor the presentation in order to safeguard against any defamatory, infamous, or otherwise damaging and harmful content. Upon detection of such material, you will immediately take the appropriate disciplinary action. Any material that could be deemed as harassing, intimidating, or bullying to students or staff and colleagues will be reported to the administration immediately.
>
> A. On the next occasion that students, guests, onlookers, or observers are exposed to unsuitable material as a result of your failure to have previewed the content or inability to exercise classroom management, you will receive a formal, written reprimand, and it will be recommended to the Board of Education that your increment for the following school-year be withheld.
>
> B. On the next occasion that students, guests, onlookers, or observers are exposed to unsuitable material as a result of your failure to have previewed the content or inability to exercise classroom management following the formal, written reprimand, the administration will present your name to the Board of Education for the termination of your employment.

The statute requires written notice, and I **CONCLUDE** that the June 20, 2014, letter and corrective action plan satisfy the "written notice" component of the requirement.

The corrective action plan plainly states that her increment was withheld for the 2014-2015 school year for "negligence in not previewing a public presentation for class" in its first paragraph, and paragraph SECOND plainly requires that before a student makes a presentation for class, Boger must preview it for content and suitability, and monitor the presentation to safeguard against damaging or harmful content, and she must report any such material upon detection. Paragraph SECOND also plainly refers to others' exposure to unsuitable materials "as a result of [her] failure to have previewed the content or inability to exercise classroom management." Accordingly, I **CONCLUDE** that the corrective action plan sufficiently set forth the reasons that Boger's increment was withheld. Petitioner's argument that the statute was violated because the letter enclosing the corrective action plan did not set forth the reasons is unavailing. The corrective action plan was both incorporated by reference and enclosed with the letter, and Boger was on notice, in no uncertain terms, of the reasons that the increment was withheld in the very first paragraph of the enclosure.

Applications for summary decision after a matter has been transmitted to the Office of Administrative Law shall be filed with the Administrative Law Judge (ALJ) in accordance with applicable rules of the OAL. N.J.A.C. 6A:3-1.12(b). A contested case before the Office of Administrative Law "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988).

N.J.A.C. 1:1-12.5(b) provides, in pertinent part:

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

Here, there is no genuine issue as to any material fact, as the parties do not dispute that petitioner received the June 20, 2014, letters/corrective action plan, and I **CONCLUDE** that this matter is appropriate for summary decision.

## ORDER

It is hereby **ORDERED** that summary decision is **GRANTED** in favor of the respondent, and Boger's Petition of Appeal is hereby **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

11/24/15
DATE

**KELLY J. KIRK**, ALJ

Date Received at Agency: November 20, 2015

Date Mailed to Parties: November 20, 2015

db

## EXHIBITS

Joint

J-1 Petition of Appeal

J-2 Answer to Petition of Appeal

J-3 Letter from DiRupo to Boger, dated April 16, 2014

J-4 Extract from official minutes of June 18, 2014, Board meeting and Affidavit of Robert G. Klinck

J-5 Letters (2) from DiRupo to Boger, dated June 20, 2014

3-16L

3-16

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

January 4, 2016

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Dear Counsel:

I have reviewed the Petition for Declaratory Ruling entitled *Newark Teachers Union and John Abeigon, President of NTU and Taxpayer in the City of Newark, Essex County v. Vanessa Rodriguez, Chief Talent Officer, and the State-Operated School District of the City of Newark, Essex County*, Agency Dkt. No. 348-11/15, together with the District's Motion to Dismiss in Lieu of Answer.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law (OAL). The District's Motion to Dismiss will be forwarded to the OAL for determination by the assigned Administrative Law Judge.

Sincerely,

David C. Hespe
Commissioner

MKD/DCS
c: Board Secretary
County Superintendent

4-16

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| IN THE MATTER OF THE TENURE HEARING | : | |
| OF RITA O'MALLEY, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE TOWNSHIP OF WOODBRIDGE, | : | DECISION |
| MIDDLESEX COUNTY. | : | |

## SYNOPSIS

Petitioning Board filed tenure charges of conduct unbecoming against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 1/06/16

AGENCY DKT NO. 358-11/15

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF RITA O'MALLEY, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE TOWNSHIP OF WOODBRIDGE, | : | DECISION |
| MIDDLESEX COUNTY. | : | |

For the Petitioner, Ari D. Schneider, Esq.
No appearance by or on behalf of Respondent, Rita O'Malley

This matter was opened before the Commissioner of Education on November 30, 2015[1] through tenure charges of conduct unbecoming certified by Robert Zega, Superintendant of Schools of the Woodbridge Township School District, together with supporting evidence against respondent Rita O'Malley, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address – via overnight, certified, and regular mail – on November 20, 2015. The petitioner also served a copy of the tenure charges on the respondent's attorney.

On December 1, 2015, the Commissioner directed respondent – via both certified and regular mail, with a copy to respondent's attorney – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from, or on behalf of, respondent.

[1] The District submitted sworn tenure charges against Rita O'Malley to the Commissioner on November 23, 2015, but neglected to include a copy of the Certificate of Determination in the filing. This matter was opened before the Commissioner on November 30, 2015, the date the Certificate of Determination was received.

The certified tenure charges filed by the petitioner in this matter indicate that in the 2014-2015 school year, respondent submitted inaccurate and potentially fraudulent student educational evaluation reports, jeopardizing the authenticity of the educational evaluation and disrupting the educational environment for at least twelve students. Specifically, the inaccuracies on the educational evaluation reports included inserting false test scores for subtests that had not been administered, including incorrect test results for subtests that had been completed, misplacing or failing to complete protocols, preparing write-ups regarding subtests that were not administered, failing to include test results for subtests that were completed, and failing to administer subtests and complete an educational evaluation report. The charges and supporting evidence also indicate that respondent engaged in unbecoming conduct by submitting false mileage reimbursement vouchers and receiving monetary payment for funds to which she was not entitled.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a teaching staff member have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/16

Date of Mailing: 1/06/16

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

5-16

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|---|---|---|
| JOHN SEWELL, | : | |
| PETITIONER, | : | |
| v. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a taxpayer within the Margate City School District – filed a complaint contending that the Mayor of Margate inappropriately used his influence to obtain the appointment of his daughter-in-law, Audrey Becker, as principal of the school district's Tighe Middle School. The respondent Board denied the allegations of misconduct, and filed a motion for summary decision, citing: petitioner's lack of standing to bring this action; failure to name an indispensable party; failure to timely file the petition; and failure to state a claim upon which relief can be granted by the Commissioner of Education.

The ALJ found, *inter alia*, that: while the appeal cannot be dismissed for any of the procedural arguments brought by the Board, the petitioner fails to advance a cause of action for which the Commissioner can grant relief, as it does not invoke the Commissioner's primary jurisdiction under the school laws; the within matter does not involve a nepotism policy under *N.J.A.C.* 6A:23A-6.2, as petitioner has not alleged that Audrey Becker is related to any member of the school board; rather, petitioner seemingly alleges that Board members violated the Code of Ethics of School Board Members by appointing the mayor's daughter-in-law as principal of the middle school – an issue over which the School Ethics Commission, not the Commissioner, has jurisdiction; similarly, the petition appears to raise allegations of misconduct on the part of the Mayor, and the Commissioner has no authority over the actions of an elected municipal official. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition for lack of jurisdiction.

Upon review, the Commissioner concurred with the ALJ's determination that the petition must be dismissed for lack of jurisdiction. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

OAL DKT. NO. EDU 02655-15
AGENCY DKT. NO. 8-1/15

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|---|---|---|
| JOHN SEWELL, | : | |
| PETITIONER, | : | |
| v. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the petition must be dismissed because the petitioner does not allege a cause of action under the Commissioner's jurisdiction.[1] *N.J.S.A.* 18A:6-9. Specifically, the Commissioner is in accord that the petitioner fails to allege that the Board acted in violation of *N.J.S.A.* 18A:27-4.1(a) when it appointed Audrey Becker – the mayor's daughter-in-law – as principal of Tighe Middle School (Tighe), as there is no allegation that the Board acted without the recommendation of the chief school administrator or without a recorded roll call majority vote of the full membership of the Board. Additionally, the Commissioner agrees with the ALJ that the Board did not violate *N.J.A.C.* 6A:23A-6.2, as Audrey Becker is not related to any member of the Board or the chief

[1] The Commissioner is also in accord with the ALJ's denial of summary decision on the arguments of lack of standing, failure to name an indispensable party, and failure to timely file the petition.

school administrator; rather, she is the mayor's daughter-in-law, which is not a violation of *N.J.A.C.* 6A:23A-6.2.

Instead, the Commissioner agrees with the ALJ that any allegation that certain members of the Board acted unethically by appointing the mayor's daughter-in-law as principal of Tighe falls under the jurisdiction of the School Ethics Commission and would be more appropriately brought in a complaint before the Commission for a violation of the Code of Ethics for School Board Members. *N.J.S.A.* 18A:12-24.1. Furthermore, the Commissioner is in accord with the ALJ's determination that he has no authority over allegations of conflict of interest or nepotism by the mayor, as the actions of a municipal official are not governed by the school laws of this State. *N.J.S.A.* 18A:6-9.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/16

Date of Mailing: 1/06/16

ecision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 8A:6-9.1).

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 2655-15

AGENCY DKT. NO. 8-1/15

**JOHN SEWELL**,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF MARGATE**,

Respondent.

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**John Sewell**, petitioner, pro se

**Robert A. Muccilli**, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: October 16, 2015 Decided: November 27, 2015

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

## PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law on February 4, 2015, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. On April 7, 2015, counsel for the respondent filed a motion to dismiss. On August 10, 2015, petitioner filed its opposition to the

motion to dismiss and on August 31, 2015 respondent filed reply brief to petitioner's objections.

## FACTUAL SUMMARY

On October 8, 2014 the Margate City Board of Education (Board) approved Superintendent John DiNicola's recommendation to appoint Audrey Becker as principal of the Tighe Middle School. Becker is the daughter in law of Margate Mayor Michael Becker. Margate is Type 1 Board of Education and pursuant to N.J.S.A. 18A:12-7, the members of the Board are appointed by the Chief Executive Officer of the municipality. In this case, that Chief Executive Officer was Mayor Michael Becker.

The petitioner complained that Mayor Becker used his influence to obtain his daughter in law's appointment. That influence included, among other things, replacing Board members with friends who would support the appointment of his daughter in law. The petitioner concluded by urging the Commissioner to "fully investigate the allegations set forth and rescind the actions of the Margate Board of Education".

The Board of Education filed an answer wherein it denied the allegations of misconduct contained in the petition. The Board now moves to dismiss the petition.

## LEGAL DISCUSSION

Although the Uniform Administrative Procedure Rules do not expressly prohibit a Motion to Dismiss, neither do those Rules provide for such a motion. In either event, respondent board has filed an Answer in this matter. N.J.A.C. 6A:3-1.5(G) would permit a Motion to Dismiss in lieu of filing such an answer but once the Board filed its Answer, any such motion must necessarily be considered a Motion for Summary Decision under N.J.A.C. 1:1-12.5. Accordingly, the Board's Motion will be dealt with as a Motion for Summary Decision.

The board has moved for Summary Decision on several procedural grounds. They are:

1) Lack of Standing;
2) Failure to name an indispensable party;
3) Failure to timely file the petition;
4) Failure to state a claim upon which relief can be granted by the Commissioner of Education.

Standing is "a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). In New Jersey, there exists a rather liberal approach to questions of standing. Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 101, 107-111 (1971). The "[e]ntitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation" and "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for purposes of standing." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 67 (1980).

In the case of taxpayers of a school district, standing may be found if they have a "'slight private interest, added to and harmonizing with the general public interest.'" Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427, 432-33 (App. Div. 1995) (quoting Hudson Bergen Cnty. Retail Liquor Stores Ass'n v. Bd. of Comm'rs, City of Hoboken, 135 N.J.L. 502, 510 (E. & A. 1947)). In Silverman v. Bd. of Educ. of the Twp. of Millburn, 134 N.J. Super. 253 (Law. Div. 1975), aff'd, 136 N.J. Super. 435 (App. Div. 1975), for example, which involved a dispute over a school board's proposed action to close an elementary school and lease it for use as a school for the hearing impaired, the court held that plaintiff taxpayers had standing to sue the school board because "they represent their own personal interest and the public interest of the community in the resolution of the dispute over the closing of this school." Id. at 258. And, as the court explained in Haines v. Burlington Cnty. Bridge Comm'n., 1 N.J. Super. 163, 171-72 (App. Div. 1949):

> [t]he standing of taxpayers and citizens, under appropriate circumstances and without any showing of increased tax burden, to maintain proceedings seeking to remedy wrongful acts of public officials has long been recognized in our State. Thus, in Ferry v. Williams, supra, Mr. Justice Dixon pointed out (at p. 337) that, 'our courts have exercised a large discretion in annulling the illegal acts of municipal bodies and officers, and compelling the performance of their public duties at the instance of citizens and taxpayers who were not otherwise interested in the controversy than was the rest of the community', and cited (at p. 338) 'instances of interference by the courts with official action affecting only public rights at the suit of private persons, where questions of taxation were not at all concerned, or were so remote from the matters complained of as not to be noticed in the decision.' Cf. Tube Reducing Corp. v. Unemployment Comp. Comm'n, 1 N.J. 177, 62 Atl. 2d 473, 475 (Sup. Ct. 1948). In Oliver v. Jersey City, 63 N.J.L. 96, 98 (Sup. Ct. 1899) (rev'd. on other grounds in 63 N.J.L. 634 (E. & A. 1899)) the court, in sustaining the standing of a taxpayer to attack official action without any showing of injury except as a member of the public using the highway, stated that it could find 'no consistent rule of law nor any reason of wise public policy' which would deny relief 'when the citizen at his own expense, and at the risk of burdensome costs, seeks to intervene for the purpose of averting imminent injury to the public of which he is a part.

Here, petitioner would have taxpayer or citizen standing because he seeks to void alleged wrongful acts of public officials. According to the petition, the Board improperly appointed Audrey Becker to a principal position and "[t]he faith of the public in an independent and objective school board cannot be undermined and compromised by a rogue mayor's nepotism machinations." While petitioner has not alleged that he, as a resident taxpayer of Margate, is more interested in the controversy than the rest of his community, he "seeks to intervene for the purpose of averting imminent injury to the public of which he is a part." Thus, he represents his personal interest and the interest of the community. This is sufficient to find – if this matter were properly before the Commissioner – that petitioner has taxpayer or citizen standing.

Accordingly, the Board's motion for summary decision on the basis of standing must be **DENIED**.

While petitioner failed to name an indispensable party, Audrey Becker, in his petition, he correctly argues that he should be able to amend his petition to include her as a party (if his petition is properly before the Commissioner). Under education law, an indispensable party is "a person(s) without whose inclusion a matter cannot proceed or adequate judgment cannot be entered." N.J.A.C. 6A:3-1.2. As the Supreme Court has explained, "[a]s a general proposition, it seems accurate to say that a party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). The rules for filing a petition of appeal with the Commissioner provide that "[a] petitioner shall name as a party any person or entity indispensable to the hearing of a contested case" and that the "[f]ailure to name an indispensable party may be grounds for dismissal of the petition pursuant to N.J.A.C. 6A:3-1.10." N.J.A.C. 6A:3-1.3(b).

Here, Audrey Becker is certainly an indispensable party because her interest in her job is inextricably involved in this matter and a judgment could not justly be made in this matter without necessarily affecting her interest. However, in accordance with N.J.A.C. 1:1-6.2, which allows for pleadings to be freely amended, petitioner can be allowed to amend his petition to include Ms. Becker as a party.

Consequently, the Board's Motion for Summary Decision for failure to join an indispensable party is **DENIED**.

In any motion for Summary decision, the fact must be construed most favorably to the party against whom summary decision is asserted. With that caveat in mind, we now examine the Board's contention that the petitioner should be dismissed for failure to timely file.

While it appears that petitioner filed his petition outside of the ninety-day limitations period for filing appeals with the Commissioner – there were ninety-six days between October 10, 2014, the latest date by which Petitioner could be deemed to have

had knowledge of the Board's October 8, 2014, decision, and January 14, 2015, the date on which the Bureau acknowledged Petitioner's perfected petition – relaxation of the ninety-day rule may be appropriate if this matter is not dismissed for other reasons. Under N.J.A.C. 6A:3-1.3(i), a "petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing" (ninety-day rule). The ninety-day rule may be relaxed "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16. However, the rule is relaxed only for compelling reasons, including "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Bor. of New Milford, 68 N.J. 576, 586 (1975).

The petition would be untimely if petitioner had notice of the Board's decision on October 10, 2014, but did not file a perfected appeal until January 14, 2015. However, petitioner states that "[t]he NJ D.O.E. ... sent a letter dated 12-15-2014 with [the following] directions: 'If the necessary filings are timely submitted, December 2, 2014 will be deemed the filing date of the appeal.'" If the Bureau accepted an earlier filing date than January 14, 2015, as petitioner contends (albeit with a direct quote from correspondence from that office, and not through submission of a copy of the actual document), application of the ninety-day rule might be inappropriate here. Petitioner's certification of the fact of the correspondence is enough to raise a genuine issue of material fact that would need to be determined at a hearing.

In addition, relaxation of the ninety-day rule would be appropriate if, as Petitioner alleges in his reply brief, the Executive County Superintendent contributed to any delay in the filing of Petitioner's petition with the Commissioner. See, e.g., J.M. & D.M. ex rel. J.L.M. v. Bd. of Educ. of the City of Summit, EDU 3937-98, State Bd. of Educ. (November 3, 1999) <http://njlaw.rutgers.edu/collections/oal> (relaxing ninety-day rule due to Department of Education employees' failure to timely advise petitioners of proper office for filing a petition after they asked for assistance); C.G. & R.G. ex rel. R.M.G. v.

Bd. of Educ. of the Twp. of Brick, EDU 2375-05, State Bd. of Educ. (July 19, 2006) (relaxing ninety-day rule because pro se petitioner asked Department for help in filing her petition, but employees failed to timely direct her to the appropriate office for filing). Petitioner herein alleges in his reply brief that an Executive County Superintendent received his complaint regarding the Board's decision on October 10, 2014, but did not reply until November 18, 2014, when he directed petitioner to file his complaint with the School Ethics Commission. According to petitioner, the Executive County Superintendent informed him of the proper place to file his complaint, but waited over a month to so advise him. It appears that petitioner had notice of the Board's decision by October 10, 2014, at the latest, but it also appears that he did not sit on his rights, and instead quickly attempted to appeal the Board's decision to appoint Ms. Becker as principal of Tighe. However, he may have been unnecessarily delayed in his filing with the Commissioner due to the length of time of the Executive County Superintendent's inaction. In this regard, petitioner has also raised a genuine issue of material fact that would preclude summary decision on the ninety-day rule issue if this matter is not dismissed on other grounds.

Accordingly, the Board's Motion for Summary Decision for untimely filing must be **DENIED**.

But having disposed of those procedural arguments, the question that remains is whether petitioner has set forth a cause of action for which relief may be granted by the Commissioner.

Under N.J.A.C. 6A:3-1.4(a), a petition filed with the Commissioner must include such elements as "a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws" and "the relief petitioner is seeking," and "[t]he petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen." However, the allegations in petitioner's petition do not advance a cause of action for which the Commissioner can grant relief and the petition generally cites to N.J.S.A. 18A:6-9, which announces the scope of the Commissioner's jurisdiction, rather than a

specific section under which the controversy has arisen. Nonetheless, the allegations reflect a dispute arising, not under the jurisdiction of the Commissioner, but under the jurisdiction of the School Ethics Commission, which may be able to grant relief upon consideration of petitioner's cause of action.

The cause of action advanced by petitioner does not invoke the Commissioner's primary jurisdiction under the school laws. As the Board points out in its brief, in accordance with N.J.S.A. 18A:27-1.4(a), "[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board," but petitioner has failed to allege that the Board, in violation of N.J.S.A. 18A:27-4.1(a), appointed the principal without the recommendation of the chief school administrator or without a recorded roll call majority vote of the full membership of the Board.

In addition, while under N.J.A.C. 6A:23A-6.2, a school board must implement a nepotism policy that includes "[a] provision prohibiting any relative of a school board member or chief school administrator from being employed in an office or position in that district," Petitioner has failed to allege that Audrey Becker is related to any member of the Board. Instead, Petitioner seemingly alleges that Board members violated the Code of Ethics of School Board Members by appointing the mayor's daughter-in-law, Audrey Becker, as principal of Tighe, an issue over which the School Ethics Commission, and not the Commissioner, would have jurisdiction.

Under the School Ethics Act, "[a]ny person, including a member of the commission, may file a complaint alleging a violation of the provisions of this act or the Code of Ethics for School Board Members as set forth in section 5 of P.L.2001, c.178 (C.18A:12-24.1), by submitting it, on a form prescribed by the commission, to the commission." N.J.S.A. 18A:12-29(a). Under the Code of Ethics, a school board member must "uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools;" "carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they

are well run;" "recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board;" "refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends;" and, "vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer." N.J.S.A. 18A:12-24.1(a), (d), (e), (f), and (h). The petition alleges that the Board "did appoint Margate Mayor Michael Becker's daughter-in-law Audrey Becker as the new principal of the Tighe School" and that this appointment "is a most obvious, blatant conflict of interest and flagrant nepotism," and he requests that the Commissioner "fully investigate the allegations set forth and to rescind the actions of the Margate B.O.E." Petitioner's allegations may give rise to a cause of action under the School Ethics Act, but he has failed to advance a cause of action for which the Commissioner can grant relief.

Similarly, the petition appears to raise allegations of misconduct on the part of Mayor Becker. The Commissioner of Education has no authority over the actions of an elected municipal official. The actions of a municipal official are governed by the Local Government Ethics Law (N.J.S.A. 40A:9-22.1 et seq). Under that statutory scheme the Mayor's conduct would be subject to review by the Municipal Ethic Board, if one exists, or if not, by the State Local Finance Board. Any complaint about Mayor Becker's conduct must be venued there, and not with the Commissioner of Education. The Commissioner of Education has no authority over the actions of Mayor Becker.

Accordingly, the Board's motion for summary decision must be **GRANTED** because the petitioner has failed to set forth a cause of action for which relief can be granted.

## ORDER

I **ORDER** that the petitioner be **DISMISSED** for failure to set forth a cause of action for which relief can be granted.

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

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

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

11/27/15
DATE

**BRUCE M. GORMAN**, ALJ

Date Received at Agency: 11/27/15

Date Mailed to Parties: 11/27/15

/jb

## DOCUMENTS RELIED UPON

Respondent's motion to dismiss, dated April 7, 2015

Petitioner's response to motion to dismiss, dated August 1, 2015

Respondent's reply, dated August 1, 2015

6-16

OAL DKT. NO. EDU 3904-15
AGENCY DKT. NO. 13-1/15

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| H.Z. AND C.C., on behalf of minor children, C.Z. and D.Z., | : | DECISION |
| RESPONDENTS. | : | |

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the first settlement payment was due within fifteen days of Board approval, which occurred at a meeting on November 23, 2015. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/06/16

Date of Mailing: 1/06/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 3904-15
AGENCY DKT. NO. 13-1/15

**TOWNSHIP OF MILLBURN**
**BOARD OF EDUCATION, ESSEX COUNTY,**
Petitioner,

v.

**H.Z. AND C.C. ON BEHALF OF**
**MINOR CHILDREN, C.Z. AND D.Z.**
Respondents.

---

**Scott Zucker,** Esq. for petitioner (Sciarrillo, Cornell, Merlino, McKeever and Osborne, attorneys)

**H.Z and C.C.,** pro se. for respondents

Record Closed: December 2, 2015 Decided: December 2, 2015

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

This matter was transmitted to the Office of Administrative Law on March 23, 2015 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves both disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

December 2, 2015
DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: 12-4-15

Mailed to Parties: DEC - 4 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

**SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC**
**238 St. Paul Street**
**Westfield, N.J. 07090**
**(908) 481-5000**
**Attorneys For Petitioner**
**Millburn Board of Education**

| | | |
|---|---|---|
| MILLBURN BOARD OF EDUCATION,<br><br>Petitioner,<br><br>-vs-<br><br>H.Z. and C.C. o/b/o C.Z. and D.Z.,<br><br>Respondents. | : | BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY<br><br>AGENCY DOCKET NO.: 13-1/15<br>OAL DOCKET NO.: EDU-3904-15 |

WHEREAS, H.Z. and C.C. ("Parents") are the parents of C.Z. and D.Z. ("Students"), who were students enrolled in the Millburn Township School District until April 12, 2014; and

WHEREAS, a dispute arose between the Millburn Township Board of Education ("Board"/"District") and the Parents regarding the Parents and Students' domicile; and

WHEREAS, a Board hearing was convened before the Board on April 7, 2014; and

WHEREAS, April 7, 2014, the Board voted to remove the Students from the District; and

WHEREAS, there is a dispute between the parties regarding amount of tuition due and owing for the Students' attendance for the period of time prior to the hearing; and

NOW THEREFORE, the parties hereby agree as follows:

1. The Parents shall pay the District seventeen thousand, five hundred dollars ($17,500) in full and final settlement of any and all tuition monies that may be due and owing to the District for the Students to attend school within the District up until April 12, 2014.

Payment of the seventeen thousand, five hundred dollars ($17,500) shall be made as follows:

a. Parents shall make a payment of five thousand, eight hundred, thirty-three dollars and thirty-three cents ($5,833.33) within fifteen days of Board approval;

b. Parents shall make a payment of five thousand, eight hundred, thirty-three dollars and thirty-four cents ($5,833.34) no later than March 1, 2016.

c. Parents shall make a payment of five thousand, eight hundred, thirty-three dollars and thirty-three cents ($5,833.33) no later than June 30, 2016.

2. Prior to Board approval of this Agreement, the Parents agree to execute and provide the Board with a promissory note and warrant of attorney which shall allow the Board to seek enforcement of the payment provisions outlined herein in an appropriate Court of Law, and the Parents shall agree to pay the District for all reasonable attorney's fees and costs incurred by the District to collect payment in such an action.

3. The parties have entered into this Settlement Agreement to avoid the expense and inconvenience of a hearing for the assessment of tuition.

4. In consideration of the settlement of this matter, the Parents shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorneys' fees, compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of the execution of this Settlement Agreement.

5. In consideration of the settlement of this matter, the District shall release the Parents from any and all claims, rights and liability including, but not limited to, any and all claims for attorneys' fees, money damages, civil liability or any other equitable or legal relief through the date of the execution of this Settlement Agreement.

6. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.
7. This Agreement shall be governed by the laws of the State of New Jersey.
8. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.
9. This Agreement shall be construed as if it were drafted by both parties contemporaneously.
10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative, if any, and fully understand its requirements and limitations.
11. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
12. This Agreement shall be incorporated into a Final Order by the Honorable Ellen S. Bass, A.L.J.
13. This Agreement is subject to ratification by the Millburn Township Board of Education.

Hongbing Zou, ~~Parent~~ Date: 11/10/2015

Chen Cai a/k/a Cathy Chen Cai, Parent Date: 11/10/2015

ON BEHALF OF THE MILLBURN TOWNSHIP BOARD OF EDUCATION

Date: 11/23/15

**Millburn Township Schools**
**434 MILLBURN AVENUE, MILLBURN, NJ 07041**
**www.millburn.org**

Office of the Business Administrator
Telephone 973-376-3600 x156
FAX 973-376-2363

EXTRACT from the minutes of a regular meeting of The Board of Education of the Township of Millburn in the County of Essex, New Jersey held at the Education Center of the School District, 434 Millburn Avenue, Millburn, NJ on Monday, November 23, 2015:

## B. SILENT COUNT OF BOARD MEMBERS

| | | | |
|---|---|---|---|
| Present: | Rick Gray | Emily Jaffe | Michael King |
| | Jesse Liu | Eric Siegel | Regina Truitt |
| | John Westfall-Kwong | Raymond Wong (7:55pm) | |
| Absent: | Rupali Wadhwa | | |

## M. BOARD ACTION ITEMS (Roll Call Votes)

3. Business Agenda Items

Mr. Wong moved and Dr. Siegel seconded approval of the Business Agenda Item, M.3.f.:

f. Resolve to approve the Stipulation of Settlement with the parents/guardians of Students # 13032 and # 13048.

The item passed by the following roll call vote:

| | | | |
|---|---|---|---|
| Yes: | Mr. Gray | Ms. Jaffe | Mr. King |
| | Mr. Liu | Dr. Siegel | Ms. Truitt |
| | Mr. Wong | Mr. Westfall-Kwong | |
| Absent: | Dr. Wadhwa | | |

I certify that this is a true and accurate copy of an approval by the Millburn Township Board of Education at its Public Meeting of Monday, November 23, 2015, and reflected in said minutes.

J. Steven DiGeronimo
Business Administrator / Board Secretary

7-16

# Joyce M. Klein

Arbitrator & Mediator

**VIA ELECTRONIC MAIL**

January 5, 2016

Tara L. Humma, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, NJ 08108

Cosmas P. Diamantis, Esq.
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, NJ 08034

Re: In the Matter of the Tenure Hearing of Chet Churchill, State Operated School District of the City of Camden, Camden County
Agency Dkt. No. 340-11/15

Ms. Humma and Mr. Diamantis:

This letter responds to Respondent Chet Churchill's (Respondent's) Motion for Summary Decision and the arguments raised in response by the State Operated School District of the City of Camden (District).

Respondent Chet Churchill is a tenured biological life science education teacher in the District. Respondent received summative ratings of partially effective for the 2013-2014 and 2014-2015 school years. His summative evaluation for the 2014-2015 school year took place on May 26, 2015. By letter dated June 8, 2015, Respondent was assigned by the District to teach at Camden High School for the 2015-2016 school year. On August 31, 2015, Churchill received an email from the District and a letter rescinding his teaching assignment for the 2015-2016 school year. That letter provided in pertinent part:

> In or around mid-July 2015, you may have received a letter advising you of your proposed location and assignment as a teaching staff member with the Camden City School District for the 2015-2016 school year. The Superintendent has advised that letter was sent to you in error and is hereby rescinded. To the extent your 2015-2016 placement, which was made in error, appears on a Superintendent's Report, it will be corrected at a future Board meeting. Also, consistent with the Superintendent's decision, any communication you received stating that you should show up to work or professional development for the 2015-2016 school year was also in error.

PO Box 186, Ocean Grove, New Jersey 07756
Tel. (732) 775-5677 ● Fax (732) 775-8551 ● Email: JoyceMKlein@gmail.com
4871 28th Street South, Arlington, VA 22206

> This letter is also to advise you that effective *immediately*, the Superintendent is placing you on administrative leave with pay due to issues including, but not limited to, your evaluation scores. Thus, you are **not to report** to any Camden City School District location on or after September 1, 2015. When the matter surrounding your administrative leave is resolved, you will receive more specific instructions. [emphasis in original].

On or about October 14, 2015, the District served a Notice of Inefficiency on Respondent Chet Churchill (Respondent). With that Notice, Paymon Rouhanifard, State District Superintendent with the Camden City School District, filed notice of charges based on inefficiency pursuant to N.J.S.A. 18A:6-17.3 against Respondent. On October 26, 2015, Respondent filed a Statement of Position and Statement of Evidence in opposition to the tenure charges. On November 2, 2015, State Superintendent Rouhanifard certified tenure charges against Respondent. Those charges were served on the Commissioner of Education and Respondent on November 3, 2015. The charges were received in the Department of Education's Bureau of Controversies and Disputes on November 4, 2015, and on that same date, the Commissioner of Education acknowledged "receipt of certified tenure charges filed with the Commissioner on November 4, 2015." That acknowledgement provided specifically that "Respondent is required to file written response to the charges within 15 days of date filed with Commissioner." The acknowledgement provided the following "IMPORTANT NOTICE" set off in a separate box:

> Pursuant to *N.J.A.C. 6A:3-5.3* and *6A:3-5.4*, an individual against whom tenure charges are certified *shall* ***have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner.***
> (emphasis in original).

On November 19, 2015, Respondent filed a Motion for Summary Decision with the Commissioner of Education. On November 30, 2015, the tenure charges were referred to me for decision. On that same date, the Department of Education advised the parties:

> Please be advised that, following receipt of the Respondent's motion for summary decision on November 19, 2015, the above captioned tenure charges have been reviewed pursuant to *N.J.S.A. 18A:6-17.3c.* Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to these charges shall be made pursuant to *N.J.S.A. 18A:6-17.2*, subject to determination by the arbitrator of the motion for summary decision. Should the arbitrator deny the motion,

> Respondent's answer should be filed directly with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under *N.J.S.A. 18A:6-17.2*, subject to the determination by the arbitrator of Respondent's defenses and any motions which may be filed with the arbitrator.

On December 16, 2015, the District filed a brief in Opposition to Respondent's Motion for Summary Decision. On December 23, 2015, Respondent filed a Letter Brief in reply to the District's Brief in Opposition.

Respondent has filed a Motion for Summary Decision in response to the tenure charges filed against him asserting that the charges were not filed "promptly" pursuant to N.J.S.A. 18A:6-17.3(b). Specifically, Respondent asserts that because the tenure charges were not filed until October 14, 2015, approximately 141 days from the summative conference held on May 26, 2015, the tenure charge must be dismissed.

In response to this Motion, the District asserts that it, as well as Respondent's position statement filed on the same date, is improper and untimely pursuant to N.J.A.C. 6A:5-1(c)(5) and therefore the tenure charges should be admitted and sustained. The District asserts that Respondent's Motion for Summary Decision is improper because neither his position statement nor his motion were timely filed under N.J.A.C. 6A:3-5.1. The District bases it's argument on N.J.A.C. 6A:3-5.1(c)(5), which provides that Respondent "shall have ten days to submit to the Commissioner a written response to the charge," as well as N.J.A.C. 6A:3-5.3, which sets forth procedures for seeking an extension within ten day period. The District asserts that the tenure charges were served on Mr. Churchill on November 3, 2015 and he had ten days to respond, so Churchill's response was due no later than November 13, 2015. The District points out that Mr. Churchill's position statement and motion were not filed and served until November 19, 2015, almost a week late, in violation of N.J.A.C. 6A:3-5.1. Accordingly, the District asserts that pursuant to the regulation, "the charges shall be deemed admitted by the charged employee." As a result, the District asserts that the inefficiency tenure charges in this matter must be deemed admitted and therefore sustained.

Respondent emphasizes the acknowledgement of receipt of the charges from the Department of Education. That acknowledgement provided specifically that "Respondent is required to file written response to the charges within 15 days of date filed with Commissioner." As detailed above, the acknowledgement provided Respondent with fifteen days "from the date such charges are filed with the Commissioner to file a written response."

N.J.A.C. 6A:3-5.1(c)(5) does provide the Respondent with ten days to submit a response to the charges to the Commissioner where the "tenure charges are charges of inefficiency." Subsection (c)(5) provides specifically,

> 5. Upon receipt of the charge, the Commissioner or his or her designee shall examine the charge. The charge shall again be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charges. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

In contrast, N.J.A.C. 6A:3-5.3 provides the Respondent with fifteen (15) days to provide a written response in cases other than inefficiency.

> (a) Except as specified in N.J.A.C. 6A:3-5.1(c)5, an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. ...
>
> 1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.
>
> (b) Upon written application by the person against whom charges are filed, the Commissioner may extend the time period for the filing of an answer upon a finding of good cause shown consistent with the provisions of N.J.S.A. 18A:6-16. Such application shall be received prior to the expiration of the 15-day answer period, or the 10-day answer period specified in N.J.A.C. 6A:3-5.1(c) and a copy shall be served upon the charging district board of education or the State district superintendent. The district board of education or State district superintendent shall promptly notify the Commissioner or any opposition to the request.

The District aptly notes that N.J.A.C. 6A:3-5.1(c)(5) provides ten (10) days rather than fifteen (15) days for a Respondent to submit a response to tenure charges to the Commissioner of Education. Similarly, N.J.S.A. 18A:6-17.3(c)

provides that "the individual against whom the charges are filed shall have 10 days to submit a written response to the Commissioner."

In this instance, Respondent received written direction from the Department of Education that provided "an individual whom tenure charges are certified *shall* ***have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner***." (emphasis in original). Respondent complied with the direction received from the Department of Education and filed his response to the charges together with his Motion for a Summary Decision on November 19, 2015, or on the 15th day after the charges were received by the Department of Education.[1]

Under the circumstances present here, where the Respondent complied with the fifteen (15) days for a response as required by Department of Education's acknowledgement of the charges, the Department of Education's acceptance of the Motion and its specific determination to refer it to me for decision, the Respondent should not be penalized for following the direction of the Department of Education. Under these circumstances, I find the Motion and Position Statement can not be deemed admitted and sustained due to untimeliness.

The District also asserts that Respondent's Motion for Summary Decision is improper because N.J.S.A. 18A:6-17.3(c) provides only for submission of a written response to tenure charges for inefficiency that have been certified to the Commissioner and does not provide for the filing of a motion to dismiss or for summary decision in lieu of a written response. The District emphasizes that additional qualifications not included in the statute should not be added and asserts that if the legislature had intended to allow for motions to dismiss or summary decision in lieu of a filing of a written response to tenure charges for inefficiency, it would have done so explicitly. In support, the District cites N.J.S.A. 18A:6-16 which provides in pertinent part:

> The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner ...
>
> If, following receipt of the written response to the charges, the commissioner ... shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator ... for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

[1] This period included Election Day.

Respondent emphasizes the direction from the Commissioner that "[t]he arbitrator's decision with regard to those charges shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of respondent's motion for summary decision." Respondent also cites numerous inefficiency cases arising under TEACHNJ where motions for summary decision or motions to dismiss has been heard and decided by arbitrators exercising their inherent powers and discretion. For example, IMO the Tenure Hearing of Elena Brady, State Operated School District of the City of Newark, Essex County, 9/11/15 (#294-15); IMO the Tenure Hearing of Nancy Mastriana, School District of the Township of Hillsborough, Somerset County, 10/9/15 (#343-15); and IMO Sherlene Thomas, State Operated School District of the City of Newark, Essex County, 11/16/15 (#383-15).

The District's assertion that resolution of Respondent's Motion for Summary Decision is not within my authority because the statute does not expressly provide for the filing of a dispositive motion in lieu of an answer is not persuasive. In several previous arbitration awards addressing inefficiency cases, including those cited above, arbitrators have exercised their discretion to decide dispositive motions such as Respondent's Motion for Summary Decision. Further, in this instance, the Commissioner has expressly delegated that authority to me by providing me with the authority to address these inefficiency charges, "subject to determination by the arbitrator of respondent's motion for summary decision." Accordingly, I find the District's argument that the statute does not expressly provide for the filing of a dispositive motion in lieu of a written response is not cause for denial of the motion.

Turning to the merits of Respondent's Motion for Summary decision, I note that my authority is defined and limited by N.J.S.A. 18A:6-17.2(a)(1)-(4), which provides four factors to be considered by an arbitrator in rendering a decision as to whether the tenure charges warrant dismissal of the educator.

In this instance, Respondent asserts that the amended tenure charge must be dismissed because the District failed to promptly file the written tenure charge pursuant to N.J.S.A. 18A:6-17.3(b). Respondent points out that the requirement that charges of inefficiency be "promptly" filed also is incorporated into the Administrative Code in N.J.A.C. 6A:3-5.1(c)(1), which provides "[w]hen the conditions described in N.J.S.A. 18A:6-17.3.a(1) or (2) have been satisfied, the Superintendent shall promptly file with the Secretary of the District Board of Education a charge of inefficiency."

Acknowledging that the word "promptly" is not defined with TEACHNJ or its rules, Respondent points to numerous definitions of the word "promptly" including Black's Law Dictionary 1093 (5th Ed.) which defines promptly as "ready and quick to act as occasion demands ... [t]o do something "promptly" is to do it without delay and with reasonable speed."

Additionally, Respondent would rely upon case law in interpreting the use of "prompt" within the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-14, which provides that minutes kept by public bodies "shall be promptly available to the public ..." Respondent cites several cases providing that statutory words should be given their "ordinary and understood meaning" unless there is an indication that a special meaning is intended. See Matter of schedule of rates for Barnert Memorial Hospital, 92 NJ 31, 40 (1983); Levin v. Parsippany-Troy Hills Township, 82 NJ 174, 182 (1980).

The Respondent relies on Matawan Regional Teachers Association v. Matawan Regional Board of Education, 212 NJ Super 328, 333 (Law Div. 1986) which found that a thirty (30) day delay in releasing meeting minutes where the Board of Education met every two weeks violated the OPMA because under the circumstances, meeting minutes were not "promptly" made available. The Court in Matawan considered five factors, including 1) the prior experience in publication of board minutes; 2) the subject matter of the minutes and their importance to the Association and others directly affected by Board action; 3) the subject matter of the minutes and their importance to the public in general; 4) the intervals at which regular meetings were scheduled; and 5) whether meetings complained of were regularly scheduled or were, due to an exigency, held so close together that the Board could not reasonably be expected to abide by the Act's requirement.

Respondent would, to the extent applicable, analyze whether tenure charges were filed against Churchill "promptly" using the Matawan factors. Based upon this analysis, Respondent emphasizes that the District was fully informed of his summative score for the 2014-2015 school year by at least May 26, 2015 when the summative conference occurred and the District had been aware of the possibility that the Respondent might be subject to tenure charges since the end of the 2013-2014 school year when he was rated "partially effective." Respondent points out that the Superintendent had the authority to decide and file tenure charges against Churchill and was not restrained from acting at regularly scheduled meetings. Under these circumstances, Respondent asserts that a 141 day delay cannot be considered "prompt" under TEACHNJ. Specifically, acknowledging that the District does not have extensive experience in filing inefficiency tenure charges pursuant to TEACHNJ, Respondent asserts that because the District is subject to the OPMA requirements, it should have known that a delay in filing of the tenure charge of at least 141 days would not be "prompt" under TEACHNJ because that length of time has never been "prompt" under the OPMA.

Applying the second Matawan factor, Respondent points out that both the District and Churchill have a strong interest in expediting the tenure process. Respondent asserts that the public also has a strong interest in prompt tenure filings because children suffer if instruction is provided by an alleged inefficient

teacher. Further, the public suffers due to an unnecessary waste of public funds by delaying the filing of tenure charges by 141 days.

Because the School District is under State intervention, there is no board of education and no formal meeting required for the State Superintendent to take action and he may act at any time, thus providing support under the fourth and fifth Matawan factors in favor or prompt tenure charge filings, according to Respondent.

The District asserts that it "promptly" filed tenure charges for inefficiency in accordance with N.J.S.A. 18A:6-17.3(b) and N.J.A.C. 6A:3-5.1(c)(1). Specifically, the District asserts that the promptness requirement of TEACHNJ is not analogous to the requirements of the OPMA. The District asserts that Respondent's efforts to analogize the use of the term "promptly" in TEACHNJ with the OPMA is misguided and there are no cases or administrative decisions that have relied upon the OPMA to interpret the term "promptly" in TEACHNJ.

The District asserts that the requirement for the filing of tenure charges for inefficiency are significantly different from any efforts required to generate meeting minutes under OPMA and they are not analogous. Further, the District asserts that tenure charges for inefficiency were "promptly" filed in accordance with both the statue and regulations. The District emphasizes that when determining whether tenure charges for inefficiency should be filed against a teacher, the school district must evaluate the summative evaluations scores and if they warrant tenure charges for inefficiency under TEACHNJ, the District must then review the evaluation process of the particular teacher and assess and evaluate each document related to the process, including those related to training and professional development. Further, the District must interview all parties involved in coaching, training and observing those teachers within the two year time period and then determine whether tenure charges are warranted. Further, in a case where a teacher was rated partially effective in two years as is the case here, the District must also determine whether there are any exceptional circumstances which might warrant a teacher another year to show that he is able to be an effective teacher. Given the size of the District's staff and its financial pressures, the District was able to review each tenure charge case during the summer months while continuing to prepare for the upcoming academic year and subsequently to file tenure charges against its inefficient teachers in the moths of September and October. Under these circumstances and given the complexity of the tenure charge review process, the District maintains that the tenure charges filed in this instance on October 14, 2015 were promptly filed.

The District also points out that the claim that the District did not "promptly" file the tenure charges for inefficiency under TEACHNJ is not grounds for dismissal under N.J.S.A. 18A:6-17.2. That statutory provision limits the factors that may be considered by the arbitrator when rendering tenure charges for inefficiency. For

these reasons, the District asserts that Respondent's Motion for Summary Decision must be denied.

N.J.S.A. 18A:6-17.2(a) limits an arbitrator's review of a District's determination to review charges of inefficiency to four factors:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for consideration of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

If any of those factors apply, then pursuant to N.J.S.A. 18A:6-17.2(b), the arbitrator "shall then determine if that fact materially affected the outcome of the evaluation." Respondent's Motion for Summary Determination seeks dismissal of the tenure charges against him because they were not filed "promptly" as required by N.J.S.A. 18A:6-17.3(a)(1). Respondent acknowledges that the requirement that tenure charges be filed "promptly" is not one of the four factors to consider when determining to revoke a teacher's tenure. However, the failure to file tenure charges "promptly" could lead to undue delay that may be prejudicial to Respondent.

Respondent would apply factors adopted by the court for determination of whether publication of the minutes of public meetings have been published promptly pursuant to the OPMA to define "promptly" in reference to tenure charges filed pursuant to N.J.S.A. 18A:6-17.3. Transcription and publication of the minutes of public meetings is not an apt analogy to the requirements of filing tenure charges. Publication of meeting minutes is a ministerial duty. The determination to file tenure charges requires compilation and substantive review of records, interviews with supervision and determination of whether the proper procedures were followed. In short, publication of meeting minutes and filing of tenure charges are not comparable.

Respondent also points to dictionary definitions of the word "promptly" which include "without delay and with reasonable speed." In this instance, Respondent asserts that the 141 days that elapsed between Respondent's summative conference of May 26, 2015 and October 14, 2015 when he was served with tenure charges is sufficient to establish that the District failed to file tenure charges "promptly" as required by N.J.S.A. 18A:6-17.3. That time lapse by itself

does not establish that the District failed to act promptly. Rather, the time lapse relied upon by the Respondent must be considered in light of the four factors subject to review pursuant to N.J.S.A. 18A:6-17.2(a). Neither this Motion nor the pleadings responsive to the Motion address whether the time lapse here was "without delay and with reasonable speed" or whether it materially supports one or more of the four factors to be considered in determining whether the tenure charges filed against Respondent are sustained.

Accordingly, determination of Respondent's Motion for Summary Decision shall remain pending during the arbitration process. Both parties shall have the opportunity to further address whether the District's failed to file tenure charges against Respondent "promptly" in the context of the factors for review in N.J.S.A. 18A:6-17.2(a).[2] The hearing in this matter remains scheduled for January 14, 2016. Given the brief period between this letter and the scheduled hearing date, Respondent's answer is due filed on Monday, January 11, 2016.is due filed on Monday, January 11, 2016.

Sincerely,

Joyce M. Klein

JMK/glb

c. Kathleen Duncan, Director
Bureau of Controversies and Disputes

[2] Respondent sought oral argument regarding its Motion for Summary Decision. That request is denied, but Respondent remains free to address this issue on the record at hearing.

8-16

OAL DKT. NO. EDU 13607-15
AGENCY DKT. NO. 220-8/15

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|---|---|---|
| COLENS PIERRE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter, with the following observation. Item #1 of the Settlement Agreement references an action which may have already taken place, and has therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Provided that the parties have either successfully implemented the settlement terms or have agreed upon a mutually satisfactory alternate date for the effectuation of same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/07/16
Date of Mailing: 1/07/16

[1] Although the Initial Decision refers to petitioner as "Pierre Colens," the record reflects that petitioner's proper name is Colens Pierre.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 13607-15
AGENCY DKT. NO. 220-8/15

**PIERRE COLENS,**
Petitioner,
v.
**CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY**
Respondent.

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**Gregory T. Syrek,** Esq. for petitioner (Bucceri and Pincus, attorneys)

**Deborah J. Bracaglia,** Esq. for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: December 8, 2015 Decided: December 8, 2015

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 3, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

December 8, 2015
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: 12-10-15

Mailed to Parties: DEC 10 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

Schwartz Simon
Edelstein & Celso LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
P: (973) 301-0001; F: (973) 993-3152
Attorneys for Respondent,
Elizabeth Board of Education

| | | |
|---|---|---|
| COLENS PIERRE,<br>Petitioner,<br><br>v.<br><br>ELIZABETH<br>BOARD OF EDUCATION,<br>Respondent. | : | BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION<br><br>ADMINISTRATIVE ACTION<br><br>AGENCY REF. NO. 220-8/15<br>DOCKET NO. EDU 13607-2015 N<br><br>SETTLEMENT AGREEMENT AND RELEASE |

This Agreement and General Release (the "Agreement") is made this 24 day of November 2015, by and between the Elizabeth Board of Education (the "Board") and Colens Pierre ( "Pierre") (collectively, the "Parties").

**WHEREAS,** Colens Pierre is employed by the Board as a tenured teaching staff member, teaching French; and

**WHEREAS,** on or about May 15, 2015, Superintendent Olga Hugelmeyer notified Pierre that for reasons of economy and efficiency the Board would not reappoint him to a world language teaching position for the 2015-2016 school year; and

**WHEREAS,** Pierre filed a Petition of Appeal on or about August 10, 2015 challenging his reduction in force; and

**WHEREAS,** the parties to this Agreement wish to resolve this matter amicably;

**NOW THEREFORE,** in consideration of the mutual covenants contained herein and for good and other valuable consideration, the sufficiency of which is hereby acknowledged and agreed to by all parties hereto, Pierre and the Board do agree as follows:

1. Reappointment

Mr. Pierre shall be appointed to the position of World Language/French teacher at

Halsey High School with an appointment date retroactive to September 1, 2015. Mr. Pierre shall commence his position at Halsey High School effective November 23, 2015. Pierre will be paid retroactive to September 1, 2015, subject to deductions for any income earned in mitigation of his damages.

2. Placement on Guide

Mr. Pierre will be placed on the Regular Day Professional Development Teachers' Guide, Step 6, BA level, at a rate of $61,620.00, subject to any adjustments due to collective bargaining between the Board and the Elizabeth Education Association.

3. Upon the full execution of this Settlement Agreement and Release as well as the approval of same by the Elizabeth Board of Education, the above referenced Petition of Appeal will be withdrawn with prejudice.

4. Nothing contained in this Agreement shall constitute an admission of wrongdoing by any party. Instead, this Agreement is reached to resolve the pending dispute.

5. Pierre agrees not to initiate or process any further grievances, charges, petitions and/or litigation against the Board with regard to any disputes relating to the above referenced Petition of Appeal, up to the date of the execution of this Agreement.

6. In exchange for the above consideration, Pierre specifically waives and releases any and all claims against the Board, its members, agents and employees, which were or could have been raised in the above-referenced Petition of Appeal up to the date of the execution of this Agreement.

7. This Agreement constitutes the entire agreement between these parties and constitutes full and final settlement as identified herein. The terms of this Agreement shall be interpreted in accordance with the laws of the State of New Jersey.

8. The parties each affirm and represent that they had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and they are entering in to this Agreement and Release voluntarily and with full understanding of its meaning.

9. This Agreement is subject to the approval by the Elizabeth Board of Education. This Agreement will be submitted to the Board of Education for consideration of approval at the Board's regular monthly meeting.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this Settlement Agreement and Release as of the dates indicated.

**FOR THE PETITIONER, COLENS PIERRE:**

Colens Pierre — Dated: 11/16/15

Colens Pierre

Witness: — Dated: 11/16/15

**FOR THE ELIZABETH BOARD OF EDUCATION:**

Date: 11/24/15

Ana Maria Amin, Board President

*ATTEST:*

Date: 11/24/2015

Harold Kennedy, Bd. Sec./Bus. Admin.

C
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**BOARD OF EDUCATION**

**RESOLUTION**

**BE IT RESOLVED** that the Elizabeth Board of Education hereby approves the Settlement Agreement and Release with employee Colens Pierre; and

**BE IT FURTHER RESOLVED** that Colens Pierre shall be appointed to the position of World Language/French teacher retroactive to September 1, 2015; and

**BE IT FURTHER RESOLVED** that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Settlement Agreement and Release on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Settlement Agreement and carry out this action of the Board.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **November 24, 2015**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
November 24, 2015

9-16

**COMMISIONER OF EDUCATION**
**NEW JERSEY DEPARTMENT OF EDUCATION**

**Agency Docket No.: 292-9/15**
**Tenure Hearing**
**Ralph H. Colflesh, Jr., Esq./ Arbitrator**

**IN THE MATTER OF TENURE CHARGES AGAINST ANNE HERRING,**

**BY THE ELIZABETH BOARD OF EDUCATION, UNION COUNTY, NEW JERSEY**

Appearances
For the Elizabeth Board of Education:
*John G. Geppert, Jr., Esq.*
*Schwartz, Simon, Edelstein & Celso, LLC*
*Whippany, New Jersey*
For Anne Herring:
*Gail Oxfeld Kanef, Esq.*
*Oxfeld Cohen, LLC*
*Newark, New Jersey*

**WHEREAS,** on August 26, 2015,the Superintendent of Schools for Elizabeth Board of Education ("the Board") filed Tenure Charges against Anne Herring, a tenured teacher then employed by the Board; and,

**WHEREAS,** on September 17, 2015, the Board, having found probable cause to credit evidence presented in support of the said Charges and that the Charges, if true, warranted her dismissal or reduction in salary; and,

**WHEREAS,** on September 22, 2015 the Board forwarded said Charges to the Commissioner of Education; and,

**WHEREAS,** on October 5, 2015 Anne Herring responded to the Charges with the Commissioner, denying in material part the substance of the Charges, thereafter causing this

10-16L

10-16

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

January 13, 2016

William S. Donio, Esq.
Cooper Levenson
1125 Atlantic Avenue
Atlantic City, New Jersey 08401

Michael P. Stanton, Esq.
Law Offices of McCrosson & Stanton
200 Asbury Avenue
Ocean City, New Jersey 08226

Re: *Board of Education of the Township of Upper Township, Cape May County v. Board of Education of the City of Ocean City, Cape May County, and Kathleen Taylor, Superintendant, and Joseph Clark, President of the Ocean City Board of Education, and Jacqueline McAllister, Member of the Ocean City Board of Education, Agency Docket No. 367-12/15*

Dear Parties:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

11-16

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| ALI FETI, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN CARROLL, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

In this case, petitioner – formerly employed as a custodian for the respondent Board – challenged the termination of his employment and sought reinstatement, back pay, and compensation for unused sick and vacation days. Petitioner contended, *inter alia*, that he acquired tenure when he was appointed via Board resolution on June 26, 2012 to the position of custodian for an indeterminate term, effective July 1, 2012; accordingly, petitioner argued that he was improperly terminated in violation of his tenure rights at the end of the 2012-2013 school year. The respondent Board asserted that – pursuant to the collective bargaining agreement (CBA) and Board Policy Number 4360, both of which expressly state that custodians are not entitled to acquire tenure – petitioner had been employed under a series of annual contracts with fixed terms since his initial hiring in 2001, and never acquired tenure with the Board.

The ALJ found, *inter alia*, that: for each year prior to 2012-2013, petitioner had been appointed via a one-year fixed term contract; he was initially appointed in 2001 as a custodian, but promoted in his second year to head custodian – a position he retained via annual reappointment through the 2011-2012 school year; petitioner was demoted to custodian effective July 1, 2012 because of performance issues; although the Board's resolution appointing petitioner as custodian for the 2012-2013 school year – at an annual salary of $46,000 – did not expressly state that his appointment was for a one-year term, the Board does not grant tenure to custodial staff, and routinely appoints custodians for a one year term; petitioner had always been appointed via a one-year contract until July 2012; although no fully executed contract for 2012-2013 could be produced by either party, any failure to execute such a contract was clearly not intended to confer tenure upon petitioner; in fact, a contract could not be produced only due to the dysfunction of the Board's business office, and the misfeasance of its prior administrators; the CBA expressly stipulates that custodians in the Netcong school district will not earn tenure; records produced by the Board confirm that petitioner was already paid for 20 unused vacation days; and no further vacation pay is due or owing to petitioner. The ALJ concluded that petitioner was not tenured at the time of his discharge, and that his claims are meritless and/or outside of the Commissioner's jurisdiction. The ALJ noted that at hearing, the Board did concede that petitioner should have been paid at the rate of $46,000 for the 2012-2013 school year, and was paid only $45,000. Accordingly, the ALJ ordered the Board to compensate petitioner in the amount of $1,000 for the amount owed him for his last year of employment. The remaining claims were dismissed.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter.

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

January 14, 2016

11-16

OAL DKT. NO. EDU 14826-13
AGENCY DKT. NO. 231-9/13

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|---|---|---|
| ALI FETI, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN CARROLL, | : | DECISION |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Ali Feti, and the respondents' reply thereto. In this matter, the petitioner is challenging the Board's non-renewal of his employment as a custodian in the school district following the 2012-2013 school year.

The petitioner takes exception to the Administrative Law Judge's (ALJ) determination that he did not have tenure as a custodian at the time of his discharge. Specifically, the petitioner maintains that since he had no written contract for the 2012-2013 school year, he was a custodian with no fixed term of employment and entitled to tenure under *N.J.S.A.* 18A:17-3 as a matter of law. The petitioner emphasizes that the intent of the Netcong Board of Education (Board) is not relevant to whether he acquired tenure pursuant to *N.J.S.A.* 18A:17-3, and where a board of education does not invoke its power to prevent tenure for custodians, it accrues by default.

Additionally, the petitioner asserts that his demotion from head custodian to custodian for the 2012-2013 school year violated his newly acquired tenure rights. Therefore, the ALJ

wrongfully found that he was covered by the collective bargaining agreement[1] (CBA) because the anti-tenure strictures of the CBA do not include head custodians and, since his demotion violated his tenure rights, he should have remained head custodian. Finally, the petitioner contends that the ALJ's decision on the claim for unpaid wages and vacation pay misinterprets the documentary evidence and is incorrect.

In reply, the respondents maintain that the ALJ had the opportunity to review numerous documents, as well as the opportunity to assess the credibility of the witnesses at the hearing. There is nothing in the petitioner's exceptions that points to any inappropriate or incorrect findings or conclusions made by the ALJ. The respondents stress that it would have been completely illogical for the Board to decide to grant tenure to the petitioner when it had been appointing him and other custodians on annual contracts for at least a dozen years. Further, the CBA and Board Policy Number 4360[2] both expressly state that custodians are not entitled to acquire tenure. In light of the petitioner's employment history – coupled with the relevant provisions of the CBA and Policy Number 4360, and the applicable case law – it was reasonable for the ALJ to conclude that the petitioner's 2012-2013 contract was for a fixed one-year period. As a result, the petitioner did not acquire tenure under *N.J.S.A.* 18A:17-3 and his non-renewal in 2013 was consistent with the law.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not have tenure as a custodian at the time of his discharge. The Commissioner is also in accord with the ALJ's determination that the Board did not violate the petitioner's due process rights when it non-renewed his employment. Finally, based on the Board's concession at the hearing, it is undisputed that

[1] The CBA states that, "[c]ustodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure."

[2] Board Policy Number 4360 states that, "[p]ersons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions."

the Board is required to pay the petitioner $1000.00 that is owed to him based on the miscalculation of the payment he received for his accrued vacation time.[3]

Pursuant to *N.J.S.A.* 18A:17-3, boards of education have the discretion to deny tenure to custodial staff or to confer that status upon them. In order to exercise the discretion to deny tenure to custodial staff, a board of education must appoint the custodians for a fixed term. In this case, it is undisputed that in each year – beginning in 2001 and continuing through the 2011-2012 school year – the Board awarded the petitioner a fixed term, one-year contract; thus, he did not acquire tenure during those years. The dispute concerns whether the petitioner acquired tenure pursuant to *N.J.S.A.* 18A:17-3 when he was reappointed on July 1, 2012, in light of the fact that neither party was able to produce a written contract that included the fixed term of his appointment.[4]

In reaching her conclusion, the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility.

The ALJ found the petitioner's theory of what happened in connection with the circumstances of his reappointment for the 2012-2013 school year to be nonsensical. In contrast, the Board's witnesses testified consistently regarding the events leading up to the petitioner's

[3] The Commissioner also agrees with the remaining determinations made by the ALJ regarding various claims advanced by the petitioner, including his entitlement to additional compensation for vacation and sick time.

[4] The record contains a copy of the Board resolution approving the petitioner's employment as a custodian effective July 1, 2012, with an annual salary of $46,000; however, the resolution does not include any additional terms of his employment.

reappointment for the 2012-2013 school year, and the intention of the Board to again appoint the petitioner to a fixed one-year term. The ALJ found that a contract for the 2012-2013 school year could not be produced because of dysfunction in the Board's business office and misfeasance on the part of prior administrative staff; the Board's intention would have been to again enter into a one-year fixed contract with the petitioner for the 2012-2013 school year. As a result, the petitioner was not tenured under *N.J.S.A.* 18A:17-3 when his employment was non-renewed following the 2012-2013 school year. The totality of the evidence in the record amply supports the ALJ's determination, including petitioner's contractual history with the Board and the anti-tenure provisions outlined in both the CBA and Board Policy Number 4360. Finally, the Commissioner finds the petitioner's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and the documentary evidence.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to pay the petitioner $1000.00 owed to him for the miscalculation of the payment received for his accrued vacation time. The remaining claims in the petition of appeal are hereby dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/16

Date of Mailing: 1/14/16

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 14826-13
AGENCY DKT. NO. 231-9/13

**ALI FETI,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN J. CARROLL,**
Respondents.

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**Noel Crowley**, Esq., for petitioner (Crowley and Crowley, attorneys)

**Derlys Gutierrez**, Esq., for respondents (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: September 25, 2015 Decided: October 14, 2015

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ali Feti (Feti), challenges the termination of his employment as a custodian by the Netcong Board of Education (the Board). He seeks reinstatement, back pay, and compensation for unused sick and vacation days. Feti's petition of

appeal was filed with the Commissioner of Education (the Commissioner) on September 24, 2013. An answer was filed by respondents on October 15, 2013, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on October 16, 2013. The case was initially assigned to the Honorable Tahesha Way, ALJ, and was reassigned to me on August 20, 2014.

A motion to amend the petition was denied via letter order dated October 16, 2014. A motion for summary decision was filed by respondents on January 6, 2015. Petitioner responded via cross-motion on February 27, 2015. Respondents replied via letter brief on March 16, 2015. Oral argument took place on April 16, 2015. Finding that the parties' submissions revealed disputed material facts, the motions were both denied via order dated April 21, 2015. Feti sought interlocutory review of the April 21, 2015, order; his request was denied by the Commissioner via letter dated May 13, 2015.

Hearings were conducted on July 13, 2015, and August 3, 2015. Post-hearing submissions were received on August 31, 2015, September 1, 2015, and September 25, 2015, at which time the record closed.

## ISSUES PRESENTED

1. Did Feti hold his position of employment under tenure, pursuant to N.J.S.A. 18A:17-3?

2. If not, was the Board's termination of Feti's employment at the end of the 2012-2013 year otherwise compliant with applicable law? If not, what should be the remedy?

3. Is Feti entitled to additional compensation for unused vacation and sick days?

## FACTUAL DISCUSSION AND FINDINGS OF FACT

The following background facts are uncontroverted, and I **FIND**:

Feti had been employed by the Board as a custodian since on or about April 1, 2001, when his employment was not renewed at the close of the 2012-2013 school year. He was given thirty days' notice, making his termination effective July 26, 2013. Feti never requested a formal written statement of reasons for his non-renewal, nor did he request an informal appearance before the Board.

For each year prior to 2012-2013, Feti had been appointed via a one-year fixed-term contract. Initially appointed as a custodian, Feti's October 2, 2002, contract promoted him to head custodian, a position he retained via annual reappointment through the 2011-2012 year. Effective July 1, 2012, Feti was demoted to custodian at a salary of $46,000 per annum. Neither Feti nor the Board could produce a written contract specifying the terms of his appointment for 2012-2013.

Feti's Appointment for the 2012-2013 School Year

Minutes of the Board's Education Committee meeting on June 12, 2012, reveal concerns about the quality of District custodial services. Interim Superintendent Dwight Pfennig recommended that no head custodian be appointed for the 2012-2013 school year, and that Feti and Stephen Peterson be appointed as custodians. (R-6.) This reflected a change in heart by Pfennig, as Feti previously had received a May 11, 2012, letter in which Pfennig had non-renewed his employment, effective July 1, 2012. (R-4.)

The Board acted on Feti's employment on June 26, 2012, via a resolution appointing him at a salary of $45,000. Discussion ensued, with one Board member questioning the decision not to appoint a head custodian, and likewise questioning the amount of salary. It was agreed that Feti's salary should be $46,000, and an amended resolution unanimously carried, as follows:

> **BE IT RESOLVED** that the Netcong Board of Education, upon the recommendation of the Interim Superintendent, approve the employment of Mr. Ali Feti as a Full-Time Custodian, effective July 1, 2012 with an annual salary of $46,000.

The resolution language for other appointments made that night, to include custodial and secretarial staff, was similar. Conversely, resolutions appointing an assistant principal and an interim business administrator explicitly stated that these individuals had been hired for a one-year term.

The events leading up to Feti's reappointment for 2012-2013 were described by Board President Bernadette Dalesandro (Dalesandro). Dalesandro is an experienced Board member, having served the public for nearly twenty years. From 1995-2004 she simultaneously served on the Netcong Board and on the Lenape Valley Regional Board of Education. She has served as a member of the negotiating committee continuously since 2004, with the exception of the 2009-2010 year, when she took a leave from service for health reasons. Dalesandro testified that Pfennig did not wish to renew either Feti's or Richardson's employment, and she indicated that the letter of May 11, 2012, was sent to Feti because Pfennig was dissatisfied with Feti's performance. But Pfennig was leaving the District. It was decided to give Feti an additional chance; allow him to work for the 2012-2013 school year; and let Pfennig's successor, Kevin Carroll, determine the future of Feti's employment.

Dalesandro was adamant, notwithstanding her inability to produce a written contract, that it was never the intention of the Board to appoint Feti for anything more than a one-year term. Dalesandro pointed to the history of contracts awarded to Feti previously each year. She pointed to the language in the Collective Bargaining Agreement (CBA) between the Board and the Netcong Teacher's Association, which provides at Article XV, paragraph E that, "[c]ustodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure." (R-5.) Likewise, Board Policy Number 4360 provides that "[p]ersons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions." (R-9.)

As for why there was no contract, Dalesandro described a business office that was in complete disarray. Her description was confirmed by Business Administrator Nicole Sylvester, who had attempted to locate Feti's contract in District files, but to no

avail. Since 2011, the District had employed so many different business administrators that Sylvester could not recall their names or dates of employment without the assistance of a previously prepared certification. That document confirmed that there have been five different individuals holding the position since 2011. (R-1.) Both Sylvester and Dalesandro shared that Christine Werner, who held the position for the 2011-2012 school year, kept important school documents in her car; only with the intervention of Board counsel were some of these documents later returned. Sylvester provided a photograph of the office "filing system," which consisted of piles of boxes containing personnel files and other critical business office files stacked against a wall. This photograph depicted the files after some effort had been undertaken to organize them, but nonetheless continued to reflect an appalling way to maintain important public records. Additionally, there was a constant turnover of school superintendents. Many were appointed as interims as the Board explored the cost savings that could result from a shared arrangement with neighboring districts. This background was offered to further explain both why Feti's 2012-2013 contract could not be located, and why the resolution appointing him did not expressly state that his appointment was for a one-year term.

Feti likewise could not produce a fully executed copy of a contract for the 2012-2013 year, although he contended that he signed a contract, and unsuccessfully requested a finalized copy several times. But Feti urged that he anticipated that he would not be given a contract that year, because Dalesandro was the president of the Board and she disliked him. He pointed to events that transpired in or about 2009. Then Interim Superintendent of Schools Arthur DeBenedetto also served as Superintendent for the Stanhope Schools in a shared-services arrangement. According to Feti, DeBenedetto insisted that the husband of the Stanhope Board of Education president, John Thomas, be hired as a custodian in Netcong. Thomas was ultimately fired in the aftermath of an incident in which he threw his keys at DeBenedetto. Feti perceived that shortly thereafter, DeBenedetto was fired as well. In Feti's view, DeBenedetto and Dalesandro were close friends; she blamed him for DeBenedetto's discharge; and for this reason, his contract went unsigned.

Feti's theory is nonsensical for multiple reasons. Dalesandro explained that DeBenedetto was a retired superintendent who was retained in an interim capacity. DeBenedetto was not fired, as Feti contended, but rather, had simply reached the end of his term. It moreover strains credibility that Dalesandro would harbor a grudge and non-renew Feti's employment in 2013 to retaliate for an affront years earlier. Nor is it credible that Dalesandro, a highly experienced Board member, would fail to provide a contract to Feti when doing so might create an issue relative to his acquisition of tenure. According to Feti, she did not return his contract because she disliked him; but query then, why would Dalesandro appoint someone she so disliked for an indeterminate term?

In summary, I **FIND** that on June 26, 2012, Feti was appointed at an annual salary of $46,000 to serve as custodian effective July 1, 2012. The resolution so appointing him does not expressly state that his appointment was for a one-year term. But I also **FIND** that the Board does not grant tenure to custodial staff, and routinely appoints custodians for a one-year term. I **FIND** that Feti himself was always appointed via a one-year contract until July 2012. I **FIND** that for the last year of Feti's employment, neither party was able to produce a fully executed contract, either because the contract could not be located, or does not exist. But I **FIND** that any failure to fully execute such a contract was in no way intended to confer tenure upon Feti. To the contrary, a contract could not be produced only due to the dysfunction of the Board's business office, and the misfeasance of its prior administrators. Finally, I **FIND** that the CBA expressly stipulates that District custodians will not earn tenure.

## Vacation and Sick Pay

### *Sick Pay*

Feti has made a claim for payment for unused sick pay, and has made the bald statement that the Board owes him compensation for forty days. Accompanying his motion for summary decision was no evidence that this number of days remains in his sick leave bank. Feti cites Article IV, paragraph A(1) of the CBA to support his request for sick leave, which provides that "[a] teacher having been in the employ of the Board

for (10) or more years shall be entitled to severance allowance for unused sick leave . . . ." The agreement makes no reference to such benefits for custodians, however. [1]

*Vacation Pay*

I **FIND** that Feti was already paid for the twenty days of unused vacation pay that he seeks via this petition. Business records produced by the Board confirm that he received payment both for working in July 2013, and for unused vacation days.[2]

Sylvester shared a copy of a handwritten check dated July 24, 2013, in the amount of $2677.05, reflecting net pay on a gross amount of $3750. That amount of payment was later formalized in a non-negotiable check issued officially through payroll. Feti urged that this check does not say "vacation pay," and insisted that it was actually payment for his work in July 2013. His argument is unavailing. Dalesandro related that among the issues surrounding the revolving door of business administrators in Netcong was a former administrator who wrote what Dalesandro described as "hand checks," and defrauded the District in the process. Thereafter, Dalesandro kept a closer eye on the business office, and expressly prohibited the issuance of handwritten checks. The check issued to Feti was a notable exception; Dalesandro expressly recalled being asked to permit the check to be issued, and being expressly informed that it was for Feti's vacation pay. Her testimony was credible.

Moreover, the Board produced documentary evidence that payment was made both for the vacation days and for the period of notice in July 2013. Dalesandro produced a payroll register for the period ending July 31, 2013. It reflects a gross payment for the period from January 1, 2013, through July 31, 2013, of $26,250. This is the equivalent of seven months' pay at the rate of $3750 per month; twelve months of payment at $3750 per month would equal $45,000. Thus, Feti was paid through July

[1] A copy of the CBA accompanies the certification of counsel filed in support of the Board's motion for summary decision.

[2] Feti was paid at the rate of $45,000 per annum during the 2012-2013 year, and the additional pay was calculated at this erroneous rate. The Board conceded at hearing that Feti should have been paid at the rate of $46,000 per annum and that it should compensate Feti in the amount of $1,000.

31, 2013; since his termination date was July 26, 2013, Dalesandro correctly testified that he was actually overpaid by a few days. (See R-10.)

The payroll register also reveals a separate payment in the gross amount of $3750; this was the payment made for Feti's unused vacation days. It is thus clear, and I **FIND**, that no further vacation pay is due or owing to Feti.

## CONCLUSIONS OF LAW

### Burden of Proof

Feti unsuccessfully asserts that the Board bears the burden of proving that it has appointed him for a fixed term. He urges that in the absence of such proof, his employment status must be deemed to be protected by tenure. The following language in Schaffer v. Weast, 546 U.S. 49, 56,126 S. Ct. 528, 534, 163 L. Ed. 2d 387, 396 (2005), is instructive:

> . . . the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims. McCormick § 337, at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion"); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

Feti points to no statutory authority that would support a departure from the default rule. Accordingly, Feti must prove his claims by a preponderance of the credible evidence. See also N.J.S.A. 52:14B-10(c).

### Feti's Entitlement to Tenure

Tenure is a legislative status. It is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90

N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962). Feti's claims spring from N.J.S.A. 18A:17-3, which provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.
>
> [Emphasis supplied.]

Thus, local public school districts retain the discretion to deny tenure to custodial staff, or alternatively, to confer that status upon them. Wright v. Bd. of Educ. of the City of Orange, 99 N.J. 112 (1985). Our Supreme Court has held that, "[b]oards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians." Id. at 119.

In Strincoski v Board of Education of East Brunswick, 94 N.J.A.R.2d (EDU) 37, the State Board of Education relied on Wright to award tenure to a custodian where the CBA provided that tenure would be earned after three years of service. The State Board so determined notwithstanding evidence proffered by the board that it awarded its custodians fixed term contracts. Although these individual contracts evinced an intent to deny tenure, the CBA was held to govern the rights of the parties. When the reasoning in Strincoski and Wright is applied here, it is plain that Feti's claim to tenure must fail.

In Netcong, the CBA clearly and unequivocally denies tenure to custodians. Thus, the inability of the Board to produce an executed fixed term contract for the 2012-2013 school year does not dictate a result in favor of Feti. Moreover, unlike Strincoski, the course of conduct between the parties here is consistent with the CBA, and lends further support to the Board's contention that it has consistently exercised its discretion

under N.J.S.A. 18A:17-3 to deny its custodians tenure. Each year the Board awarded Feti a fixed-term one-year contract, and but for the malfeasance of its administrative staff, would have done so again in 2012-2013. Our courts have considered the course of conduct between the parties when determining if tenure should be granted to school district custodians. See Hunterdon Central High Sch. Educ. Ass'n. v Hunterdon Central Reg'l High Sch. Bd. of Educ., 1988 S.L.D. 2468, 2473, aff'd, A-5036-87T2 (App. Div. June 28, 1989).

I **CONCLUDE** that at the time of his discharge, Feti was not tenured. In his post-hearing memorandum Feti urges that his demotion to custodian from head custodian violated his tenure rights because he suffered a reduction in compensation. He moreover urges that the CBA's terms are inapplicable to his employment as a head custodian. But until 2012-2013, Feti was unequivocally appointed for repeated fixed terms; was not tenured; and was subject to demotion at the discretion of the Board. At the time of his termination, and throughout the 2012-2013 year, Feti was serving in a position that fell within the CBA's recognition clause. Accordingly, I **CONCLUDE** that these additional claims are without merit.

The Termination of Feti's Employment

In the alternative, Feti argues that the Board violated his due process rights when it non-renewed his non-tenured employment. Feti asserts that the Board improperly failed to alert him of his right to a formal statement of reasons and an opportunity for a hearing. But the statutes that afford Feti due process place the clear burden on him to request a statement of reasons and a hearing, and place no concomitant burden on the Board to invite him to do so. N.J.S.A. 18A:27-4.1(b); see also N.J.S.A. 18A:27-3.2.[3] As the court stated in Hubbard v. Springfield Board of Education, 2003 U.S. App. LEXIS 23118 (November 12, 2003), the statute affords no automatic right to reasons or to a hearing, and "[t]he information and opportunity need only be provided upon written

[3] The latter statute references "teaching staff members," which is defined to include only professional staff. But the language of N.J.S.A. 18:27-4.1 clearly appears to extend the right to a statement of reasons to non-professional personnel such as Feti.

request . . . ." Id. at *8. Likewise, in Leang v. Jersey City Board of Education, 198 N.J. 557, 578-79 (2009), the court held:

> Upon plaintiff's receipt of the notification from the Board that her contract would not be renewed, she had a statutory right to request and to receive a written statement of reasons for the Board's decision not to renew her contract. N.J.S.A. 18A:27-3.2. In addition, she had a statutory right to demand an "informal appearance" before the Board during which she would be permitted "to convince the members of the board to offer reemployment." N.J.S.A. 18A:27-4.1.
>
> Those statutory rights are the embodiment of the process created by the Legislature through which plaintiff could seek to challenge and to be heard about the Board's non-renewal decision. Plaintiff did not avail herself of those statutory rights and therefore failed to take advantage of the avenues of relief that would have afforded her the due process she now complains was denied to her. We will not permit her to expand upon her statutorily protected right to be heard by authorizing her to pursue a claim that she was in some way deprived of due process in the Board's non-renewal decision.

Accordingly, it was incumbent upon Feti avail himself of the applicable statutory due process procedures, and there is no basis for his claim that his rights were violated by the Board's failure to affirmatively invite him to do so.

The remaining due process contentions of the petition demand little analysis or discussion. The claimed violations of N.J.S.A. 11A:2-13 and N.J.S.A. 11A:2-24 are brought in the incorrect forum. The Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that where a controversy does not arise under the school laws, it is outside the jurisdiction of the Commissioner, even if the dispute pertains to school personnel. Bd. of Educ. of E. Brunswick Twp. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). Feti's demand for arbitration under the CBA likewise must be dismissed for lack of jurisdiction.

I **CONCLUDE** that Feti's claims to reinstatement and back pay due to a violation of his due process rights are meritless.

Sick and Vacation Days

Feti has no entitlement to payment for either sick or vacation days. Relative to vacation days, there is no factual basis for his claim to additional compensation and I **CONCLUDE** that he was paid for his vacation days. The Board readily conceded, and I **CONCLUDE** however, that the amount paid to him should be adjusted to reflect pro rata payment at the rate of $46,000 per annum.

Feti's demand for payment for unused sick days is meritless. He cites no provision of Title 18A of the New Jersey School Laws, and accordingly, I **CONCLUDE** that Feti's claims are outside the Commissioner's jurisdiction. See: Bd. of Educ. of E. Brunswick Twp., supra, 48 N.J. at 102. But it bears reiteration that even the collective bargaining language upon which Feti relies lends no support to his claim.

## ORDER

Based on the foregoing, the Board is **ORDERED** to compensate Feti in the amount of $1000, reflecting the difference between the $45,000 it paid him and the $46,000 it owed him for his last year of employment. His payment for vacation pay should likewise be adjusted to reflect pro rata payment at the rate of $46,000 per annum. The remaining claims of the petition are **DISMISSED** in their entirety and with prejudice.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

October 14, 2015

DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: October 14, 2015

Date Mailed to Parties: OCT 15 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## APPENDIX

### Witnesses

For Petitioner:

Ali Feti

For Respondent:

Nicole Sylvester
Bernadette Dalesandro

### Exhibits

For Petitioner:

P-1 Letter dated June 26, 2013
P-2 March 25, 2013, Evaluation excerpt
P-3 Letter dated April 15, 2013
P-4 Letter dated May 24, 2013
P-5 Memorandum dated May 27, 2013
P-6 Admitted as R-6
P-7 Employment contract
P-8 Admitted as R-8
P-9 Admitted as R-3
P-10 Admitted as R-7
P-11 Letter dated December 19, 2013
P-12 Letter of reference
P-13 Letter of reference
P-14 Letter of reference
P-15 Letter of reference
P-16 Job posting
P-17 Admitted as R-3

P-18 Page 2 of Collective Bargaining Agreement

For Respondent:

R-1 Certification
R-2 Photograph
R-3 Employment history documents, including checks
R-4 Letter dated May 11, 2012
R-5 Excerpt from Collective Bargaining Agreement
R-6 Board committee minutes
R-7 Minutes of Board meeting, June 26, 2012
R-8 Minutes of Board meeting, July 23, 2012
R-9 Board Policy Number 4360
R-10 Payroll register
R-11 Record of absences

12-16LM

12-16

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

January 15, 2016

Diane Potorski, *pro se*
[redacted]
Pennington, NJ 08534

Neha Patel, Esq.
Apruzzese, McDermott, Mastro & Murphy
P.O. Box 112
Liberty Corner, NJ 07938

Re: *Diane Potorski v. Board of Trustees of the Princeton Charter School, Agency Dkt. No. 307-9/15*

Dear Parties:

Upon review of the petition of appeal filed in connection with this matter as well as the Board's motion to dismiss, I have determined to dismiss the above-captioned matter without prejudice for failure to provide the information required by *N.J.A.C.* 6A:3-1.3(c). However, petitioner is advised that she may refile her petition with the Bureau of Controversies and Disputes (Bureau) once she obtains an eligibility determination for work-related disability benefits by the Division of Workers' Compensation (Division).[1]

In brief, the instant petition contends that the Board deducted certain sick and vacation days from petitioner "for a work related injury" in violation of *N.J.S.A.* 18A:30-2.1(a). *N.J.A.C.* 6A:3-1.3(c) provides, in relevant part:

> A petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 shall include a copy of the ruling or settlement agreement issued by the Division of Workers' Compensation with respect to the injury underlying the claim or provide reasons why the matter constitutes an exception to the requirement that the Commissioner refrain from exercising jurisdiction until the Division makes a determination of work-related injury.

[1] The 90-day limitation period for petitions seeking benefits under *N.J.S.A.* 18A:30-2.1 now runs from the date of the Division's determination that either finds the employee to have been injured in the performance of duty or settles the compensation claim without a determination of work-related causation.





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Upon receipt and review of the Board's motion, it became apparent that the petition lacks any indication that a decision on petitioner's eligibility for work-related disability benefits has been rendered by the Division, or that petitioner's claim falls within an exception contemplated by *N.J.A.C.* 6A:3-1.3(c).

Via letter dated November 6, 2015, petitioner was given an opportunity to remedy the deficiency by submitting, on or before November 23, 2015, *either* 1) a copy of her Division ruling *or* 2) reasons why this matter is properly before the Commissioner, notwithstanding that no Division determination has been made. To date, the Bureau has not received a response from petitioner.

Absent the information required by *N.J.A.C.* 6A:3-1.3(c), the petition remains deficient and, therefore, I find that it must be dismissed as premature. *See, e.g., Naomi Weiss v. Board of Education of the City of New Brunswick, Middlesex County,* EDU 3576-14, Initial Decision (July 24, 2014), adopted, Commissioner Decision No. 360-14 (September 4, 2014).

Accordingly, the Board's motion to dismiss the petition is granted. The petition is hereby dismissed without prejudice.

IT IS SO ORDERED.[2]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/DCS

[2] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

13-16

**ADAMS GUTIERREZ & LATTIBOUDERE**
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorney for the State-operated School
District of the City of Newark

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF JUANA JAVIER | **AGENCY REF. NO. 280-9/15** |
| and | |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | **STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Juana Javier, residing at 12 Gallagher Court Street, Bergenfield, New Jersey 07621 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of inefficiency to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Juana Javier, State-operated School*

*District of the City of Newark, Essex County* ("Tenure Charges"), upon allegations, including, but not limited to, that Respondent received ineffective annual evaluations during the 2013-14 and 2014-15 school years, and such charges were assigned Docket No. 280-9/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Randi E. Lowitt, Esq. ("Arbitrator") for a hearing; and

**WHEREAS**, Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, the District is a State-operated school district with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from her employment without litigation and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for her resignation from the District effective February 1, 2016 ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Respondent also agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. Upon final approval of the signed Stipulation by the Arbitrator, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same.

4. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be placed on administrative leave with pay and will receive salary for the time commencing on September 1, 2015 until her date of resignation on January 31, 2016. All salary paid for said period shall be subject to all applicable salary withholdings and deductions. Other than the salary that Respondent receives from being placed on administrative leave with pay for the time period identified above, Respondent will

not receive any other monies from the District in exchange for this Stipulation of Settlement.

5. Respondent represents that since on or about September 1, 2015, she has been covered by her spouse's health and prescription insurance policy.

   a. In light of her other health and prescription coverage, Respondent agrees to waive District provided health and prescription coverage for all periods covered by any retroactive salary checks received by Respondent.

   b. Although Respondent agrees to waive District provided health and prescription coverage as set forth in subsection 5a, Respondent will not seek and/or accept any health and prescription waiver payment from the District.

   c. Notwithstanding Paragraph 4, as a result of Respondent's waiver of health and prescription coverage as set forth in subsection 5a, the District shall not deduct Chapter 78 premium contributions from any retroactive salary checks received by Respondent.

   d. However, to the extent that Respondent receives any regular payroll checks in January 2016 and February 2016 (not retroactive payments as set forth in Paragraph 5), all applicable salary withholdings and deductions shall be made by the District, including Respondent's Chapter 78 premium contributions, as there will be no waiver by Respondent of District provided health and prescription coverage for the time period covered by the regular payroll check(s).

6. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for any portion of the 2015-16 school year.

7. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective February 1, 2016, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation.

8. The District will not oppose any application by Respondent for unemployment benefits.

9. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Respondent acknowledges that the District is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral and that said participation will not be considered to be a violation of this Stipulation of Settlement. Aside from such requirements, pursuant to the above-referenced regulation, the District agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

10. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

11. Respondent will not apply for reemployment with the District at any time. Specifically, Respondent will be considered to have permanently resigned from her tenured position as a result of this Stipulation of Settlement. If Respondent does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

12. In exchange for the consideration set forth in paragraph 4 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with

Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law; personal injury, or public policy, having any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent also agrees to withdraw any and all pending complaints or actions that have been filed against the District or any of its employees or representatives.

13. Notwithstanding Paragraphs 2, 11 and 14 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 11, Respondent agrees not to seek or accept any resulting relief whatsoever.

14. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

15. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et

al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the District receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the District is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

16. This agreement shall not constitute a precedent in any matters involving other District employees.

17. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without

duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

18. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

19. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

20. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

21. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

22. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

23. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

24. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 1/5/16

JUANA JAVIER

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 1/12/16

By: CHRISTOPHER CERF
State District Superintendent

## CERTIFICATION

I, Juana Javier, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/5/16

Juana Javier
JUANA JAVIER

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 1/12/2016

Derlys Maria Gutierrez, Esq.

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the State-operated School
District of the City of Newark

**APPROVED:**
Dated: 1/17/16

Randi E. Lowitt, Esq., Arbitrator

# EXHIBIT A

JUANA I. JAVIER
27 Briggs Court
Bergenfield, New Jersey 07621

January 12, 2016

Christopher Cerf, State District Superintendent
The Newark Public Schools
Office of the State District Superintendent
2 Cedar Street
Newark, New Jersey 07102

**Re: Irrevocable Letter of Resignation**

Dear Superintendent Cerf:

Kindly accept this letter as my irrevocable resignation from my employment with the Newark Public Schools, effective at the close of business on January 31, 2016.

Thank you for your kind attention to this matter.

Sincerely,

Juana I. Javier

cc: Bernard Mercado, Esq., Newark Public Schools
Adam S. Herman, Esq.
Paul W. Tyshchenko, Esq.

14-16

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| BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE, H.L., H.L.(2), H.L.(3), BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

The petitioner, Board of Education of Highland Park (Highland Park), contended that it is not financially responsible for H.L's educational program during the 2013-2014 and 2014-2015 school years, claiming that Highland Park is not H.L.'s "district of residence" pursuant to *N.J.S.A.* 18A:7B-12(b). In 2011, H.L. – a multiply disabled classified student – was placed by the Department of Children and Families in a group home affiliated with Willowglen Academy. H.L. turned 21 years of age at the close of the 2014-2015 school year. Petitioner argued, *inter alia*, that either the Board of Education of Sparta (Sparta) – where Willowglen Academy's business offices are located – or the Board of Education of West Orange (West Orange) – where H.L.'s adoptive parents (parents) formerly lived – is financially responsible for H.L.'s tuition. The petitioner filed a motion for summary decision; respondents West Orange and Sparta filed cross motions for summary decision. West Orange additionally filed a counterclaim for tuition reimbursement from either Highland Park or H.L.'s parents.

The ALJ found, *inter alia,* that: there are no material facts in dispute, and the matter is ripe for summary decision; when children are placed residentially by state agencies such as DCF, local school districts remain financially responsible for their educational services; pursuant to *N.J.S.A.* 18A:7B-12(b), the district of residence for children who have been placed by State agencies in group homes is the present district of residence of the parent or guardian with whom the child lived prior to the most recent placement by a State agency; pursuant to *N.J.A.C.* 6A:23A-19.2(a)(1), the district where H.L.'s parents resided as of October 16 in any given academic year is responsible for the tuition costs for a child placed by a state agency, which during 2013-2014 was Highland Park; there is no factual or legal basis for assigning responsibility to Sparta for H.L's tuition; financial responsibility cannot be assigned to West Orange under the theory that H.L. or her family were homeless; and H.L.'s parents cannot be held liable for their daughter's educational costs. The ALJ concluded that Highland Park is responsible for tuition costs attached to H.L.'s placement at Willowglen for the 2013-2014 and 2014-2015 school years. Summary decision was granted to Sparta and Highland Park was ordered to reimburse West Orange for monies expended for H.L.'s education for the 2013-2014 school year.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein.

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

Issued 1/14/16

OAL DKT. NO. EDU 13316-14
AGENCY DKT. NO. 247-9/14

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|---|---|---|
| BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE, H.L., H.L.(2), H.L.(3), BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

In this matter, petitioner challenges the Department's determination that the Borough of Highland Park is H.L.'s district of residence pursuant to *N.J.S.A.* 18A:7B-12b[1] and, therefore, that petitioner is responsible for the cost of her educational program at Willowglen Academy.[2] The record and the November 30, 2015 Initial Decision of the Office of Administrative Law (OAL) have

[1] When the Department of Children and Families (DCF) places a child in a group home, that child's local school district – or district of residence – is financially responsible for his or her educational program. (Initial Decision at 7) Pursuant to *N.J.S.A.* 18A:7B-12b, "The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency."

[2] In June 2011, the Department of Children and Families placed H.L. – who is classified as "multiply disabled" – at a group home affiliated with Willowglen Academy, a private residential facility approved by the New Jersey State Department of Education for the provision of education and post-secondary services to both school-aged students and adults with disabilities. From that point forward, H.L. attended school at the Willowglen Academy. (Initial Decision at 4)

been reviewed, as have petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the Department's reply thereto.[3]

In its exceptions, petitioner argues that the Administrative Law Judge (ALJ) erred when determining H.L.'s district of residence to be Highland Park for the 2013-2014 and 2014-2015 school years[4] by failing to address the "impact" of: 1) certifications submitted by H.L.'s parents[5] and 2) H.L.'s exercise of her rights as an adult student under the Individuals with Disabilities Education Act (IDEA). In reply, the Department asserts that the ALJ considered those issues and rightfully dismissed them as irrelevant. Upon review of the parties' submissions, the Commissioner finds that both of petitioner's contentions – which were adequately addressed by the ALJ in her comprehensive Initial Decision – are without merit.

As to petitioner's first point, the documentation submitted by H.L.'s parents, in which they "callously disavowed any involvement in her life", does not warrant a legal determination that their daughter – "who has never in her life lived independently" – is emancipated. (Initial Decision at 11) As noted by the ALJ, "There is no fixed age when emancipation occurs." *Dolce v. Dolce*, 383 *N.J. Super.* 11, 17 (App. Div. 2006). (Initial Decision at 11) H.L. does not become emancipated under the law simply by reaching the age of 18. Furthermore, H.L.'s parents' claim that she will not ever live with them again lends no support whatsoever to petitioner's contention that H.L. is emancipated, or petitioner's contention that its district should not be held responsible for H.L.'s

[3] Respondents Board of Education of the Township of West Orange, Board of Education of the Township of Sparta, H.L., H.L.(2), and H.L.(3) did not submit exceptions or replies. Since H.L. and her parents share the same first and last initials, the ALJ utilized H.L.(2) and H.L.(3) in the Initial Decision to identify H.L.'s parents. To ensure consistency, the same nomenclature is used herein.

[4] H.L.'s parents have resided in Highland Park since November 2012. Between 1999 and November 2012, they resided in West Orange. Prior to H.L.'s various residential placements (and hospitalization) in supervised settings due to her special needs, she lived with her parents. (Initial Decision at 4)

[5] Although H.L.(2) and H.L.(3) refer to themselves as H.L.'s "adoptive" parents, they will be referred to herein as her parents.

tuition at Willowglen.[6] Similarly, as to petitioner's second point, H.L.'s exercise of her rights under IDEA through participation in her individualized education program (IEP) meetings has absolutely no bearing upon the determination of her district of residence pursuant to *N.J.S.A.* 18A:7B-12b. Moreover, as emphasized by the ALJ, students with disabilities are entitled to a free, appropriate public education between the ages of three and 21 under both state and federal law. (Initial Decision at 12) Neither H.L. nor her parents are responsible for the tuition costs incurred at Willowglen; petitioner's attempt to avoid its financial obligation in this regard is without merit.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent Sparta's motion for summary decision is granted, and the claims against Sparta are hereby dismissed. Petitioner's motion for summary decision is hereby denied. Respondent West Orange's motion for summary decision is granted, in part. Petitioner is hereby ordered to reimburse West Orange for all monies it expended for H.L.'s educational program during the 2013-2014 school year. Petitioner is further declared responsible for tuition costs attached to H.L.'s educational program at Willowglen for the 2014-2015 school year. West Orange's cross-claim against H.L.'s parents is hereby dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/16

Date of Mailing: 1/15/16

[6] Contrary to petitioner's assertions, *N.J.A.C.* 6A:23A-19.3(a)(7) is inapplicable here since – although she is over 18 years old – H.L. has never lived independently, nor is she legally emancipated. (Initial Decision at 9-11) Indeed, the record contains admissions by H.L.(2) and H.L.(3) that "H.L. did not live on her own before her initial placement at Willowglen Academy on June 9, 2011."

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 13316-14
AGENCY DKT. NO. 247-9/14

**BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE, H.L., H.L.(2), H.L.(3), BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,**

Respondents.

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**Nathanya Simon**, Esq., and **Marc Mucciolo**, Esq., for petitioner (Schwartz, Simon, Edelstein, and Celso, attorneys)

**Laura Console**, Deputy Attorney General, for respondent, new Jersey Department of Education (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

**Stephen Cristiano**, Esq., for respondent, West Orange Board of Education

**Rodney T. Hara**, Esq., for respondent, Sparta Board of Education (Fogarty and Hara, attorneys)

**H.L., H.L.(2), and H.L.(3)**, pro se, no appearance

Record Closed: November 2, 2015 Decided: November 30, 2015

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

## STATEMENT OF THE CASE

Petitioner, the Highland Park Board of Education (Highland Park), contends that it is not financially responsible for H.L.'s educational program, asserting that it is not her "district of residence" under N.J.S.A. 18A:7B-12.

## PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Highland Park on September 6, 2014. The Department of Education, Division of Administration and Finance, (the Department) filed an answer on September 29, 2014. The West Orange Board of Education (West Orange) filed an answer on September 30, 2014. The Sparta Board of Education (Sparta) filed an answer on October 2, 2014. Respondents H.L., H.L.(2), and H.L.(3) have not filed a formal responsive pleading, although H.L.(2) and H.L.(3) did respond via a letter to Highland Park dated October 21, 2014, and likewise responded to the Department's request for discovery.[1]

West Orange's motion to amend its answer to include a counterclaim and crossclaim for tuition reimbursement from either Highland Park or H.L.(2) or H.L.(3) was granted by order dated January 21, 2015. Highland Park filed its answer with its opposition to the motion, on January 7, 2015.

[1] H.L.(2) and H.L.(3) are the parents of H.L.

A stipulation of fact with accompanying exhibits was filed by the parties on June 1, 2015. A motion for summary decision was filed by Highland Park on June 29, 2015; cross-motions were filed by the responding parties on July 29, 2015; and Highland Park replied on August 10, 2015. Upon reviewing the submissions of the parties, it appeared unclear whether H.L. attended a school program located in Sparta and/or resided there via a residential placement. Via letter dated September 17, 2015, counsel for Sparta supplied a certification from Patricia Kane, Director of Willowglen Academy (Willowglen), which confirmed that although H.L. remains enrolled at Willowglen it has never been at a facility physically located in Sparta. Highland Park asked for an opportunity to reply in writing to the Sparta submission, which I granted. Highland Park filed a supplemental reply on November 2, 2015, at which time the record closed.

## FINDINGS OF FACT

The parties' stipulations, together with the supplementary certifications filed in support of the cross-motions, reveal that there are no facts in dispute. I **FIND**:

H.L. is a classified student whose birthday is June 27, 1994, and accordingly, turned twenty-one years of age at the close of the 2014-2015 school year. H.L.(2) and H.L.(3) are H.L.'s adoptive parents. They currently reside in Highland Park and have done so since November 2012. From 1999 until their move to Highland Park, H.L.(2) and H.L.(3) lived in West Orange. H.L. was enrolled as a student in West Orange in 1999. West Orange Director of Special Services Constance Salimbeno emphasized via certification that H.L.(2) and H.L.(3) never notified her that they had relocated from West Orange to Highland Park in November 2012. West Orange continued to keep H.L. on its rolls and fund the educational component of her residential placements until February 2014. West Orange stopped paying tuition to Willowglen for H.L.'s placement as of February 14, 2014, after a residency investigation confirmed that the family had relocated.

Sparta Director of Special Services Danielle Hamblin obtained the history of H.L.'s placements from a review of records. From in or about September 1999 until and including part of the 2003-2004 school year, H.L. was placed by West Orange at the

Calais School. During that last year, her classification was changed from "emotionally disturbed" to "multiply disabled," and she was placed at the Bergen Center for Child Development. Her placement there continued through the 2006-2007 year. Commencing with the 2007-2008 school year, H.L. was placed residentially at the CPC High Point Adolescent School via an IEP developed by West Orange. In or about January 2010, H.L. was admitted to Trinitas Hospital, and West Orange provided bedside instruction. On or about March 19, 2010, H.L. was placed residentially in the Estelle Manor residential facility under the auspices of a State agency, the Division of Children and Families (DCF). While she lived at Estelle Manor, West Orange funded H.L.'s educational program at the DCF Regional School in Cumberland County.

H.L. remained at Estelle Manor until June 9, 2011, when DCF advised West Orange that she was being discharged to a group home affiliated with Willowglen, a private residential facility approved by the State of New Jersey Department of Education for the provision of educational and post-secondary services to both school-aged students and adults with disabilities. Hamblin emphasizes that at no time was H.L. living independently; her various residential placements, to include Willowglen, were all supervised settings. Moreover, none of these placements were physically in Sparta. Indeed, the Kane certification confirms that Willowglen maintains corporate offices in Sparta; an educational facility in Newton; and group homes in various locations throughout Sussex and Warren counties. But Kane confirmed that while H.L. has been enrolled at Willowglen since June 2011, she "has never attended an educational facility at Willowglen's Sparta Campus, nor has she resided in a group home or any other similar facility within the Township of Sparta." Moreover, H.L. has never been enrolled in the Sparta school system; was not placed at Willowglen by Sparta; her parents never resided in Sparta; and indeed, Hamblin's office had no knowledge of H.L. whatsoever until this petition of appeal was filed.

On April 10, 2014, a "district of residence" determination was requested by Hope Farber, Child Study Team Regional Manager and State Responsible Student Coordinator for DCF. On April 30, 2014 the Department found that, in accordance with N.J.S.A. 18A:7B-12, N.J.A.C. 6A:23A-19.2, and N.J.A.C. 6A:23A-19.3, Highland Park

was H.L.'s district of residence for the 2013-2014 school year and therefore was responsible for the educational costs of H.L.'s placement at Willowglen.

On May 19, 2014, Highland Park appealed the Department's decision to David Corso, Assistant Commissioner for Administration and Finance, as permitted by N.J.A.C. 6A:23A-19.2(d). On June 19, 2014, Corso held that the "[d]istrict of residence responsibility continues to be based upon a parent or guardian's address even after age 18 if the child has never lived on his or her own before the child's initial placement." He determined that "[H.L.] has never lived on her own before her initial placement with Willowglen Academy on June 9, 2011," noting that a residential treatment facility such as Willowglen cannot be considered a residence for assigning district responsibility. Accordingly, Corso upheld the Department's decision that Highland Park was responsible for the educational costs of H.L.'s placement at Willowglen for the 2013-2014 school year. To date, Highland Park has paid Willowglen a prorated portion of tuition for the 2013-2014 school year, and the entire tuition for the 2014-2015 school year, including the Extended School Year (ESY). From July 1, 2013, until February 2014, West Orange paid $39,883.38 in tuition to Willowglen.

Via letter dated October 21, 2014, H.L.(2) advised as follows:

> Please be advised that [H.L.] became emancipated on June 27, 2012. My husband . . . and I elected not to be her legal guardians. At that time we resided at 4 Rosemont Court, West Orange, N.J.
>
> My husband and I moved to Highland Park, N.J. at the end of November 2012. [H.L.] has never resided in Highland Park, has never visited or stayed in Highland Park. And, she will not ever be living with or visiting us.
>
> [J-13.]

H.L.(2) responded to requests for admissions served by the Department, in which she stated that H.L. did not reside with them prior to her placement at Willowglen, but rather, resided in a different residential setting, or was hospitalized.

## ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that the respondent school districts and Department of Education are entitled to judgment as a matter of law.

The Department's determination regarding "district of residence" is entitled to a presumption of correctness. Bd. of Educ. of S. River v. Dep't of Educ., EDU 10117-98, Initial Decision (November 1, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>. When a local school board contests a district-of-residence determination made by the Department, the local board bears the burden of proving that the determination was in error. Bd. of Educ. of Bradley Beach v. Dep't of Educ., EDU 4975-99, Comm'r (July 3, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>.

When children are placed residentially by state agencies such as DCF, local school districts remain financially responsible for their educational services. The State Facilities Education Act of 1979, N.J.S.A. 18A:7B-2(a), provides as follows:

> For each State-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the prebudget year, . . . the Commissioner of Education shall deduct from the State aid payable to that district an amount equal to the approved per pupil cost established pursuant to the provisions of section 24 of P.L. 1996, c. 138 (C.18A:7F-24) . . . .

The phrase "resident in a district" is defined by N.J.S.A. 18A:7B-12(b) as follows:

> The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

Regulations promulgated by the Commissioner clarify which district retains fiscal responsibility for students such as H.L. These regulations recognize that a parent's residence may change, and, accordingly, N.J.A.C. 6A:23A-19.2 provides as follows:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> 1. The "present district of residence" of a child in a residential state facility defined in N.J.S.A. 18A:7F-45 and referred to in the first paragraph of N.J.S.A. 18A:7B-12(b)

> means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
>
> 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, approved private school for students with disabilities or out-of-State facility also referred to in the first paragraph of N.J.S.A. 18A:7B-12(b) means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's most recent placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)(1) above.

The regulatory reference to the "last school day prior to October 16" is purposeful. Pursuant to N.J.S.A. 18A:7F-33, local school districts are required annually, "on or before October 20," to "file with the commissioner a report . . . containing all data necessary to effectuate the aid provisions of P.L. 2007, c. 260 (C. 18A:7F-43 et al.), which shall include . . . the number of pupils enrolled by grade . . . on the last school day prior to October 16." State aid is based, in part, on these student enrollment figures. Hence, the regulations that implement the State Facilities Education Act seek to correlate the "district of residence" assignment of financial responsibility with an accurate determination of where a student is included, each academic year, for State-aid reporting purposes. See also N.J.A.C. 6A:23A-19.3.

The Contention that Sparta is Financially Responsible for H.L.'s Tuition

Plainly, Sparta was not responsible for H.L.'s tuition for the 2013-2014 school year. The Kane certification reveals that the theory upon which Highland Park's claim against Sparta is based is simply unsupported by the factual record. Highland Park asserts that Sparta was H.L.'s domicile when she never resided there, either independently or via a residential placement under the auspices of Willowglen. Indeed, Sparta's only nexus to H.L. is that Willowglen maintains corporate offices within its boundaries. Accordingly, I **CONCLUDE** that Highland Park's claims against Sparta are

without merit, as there is no factual or legal basis whatsoever for assigning responsibility to Sparta for H.L.'s tuition.

Highland Park has suggested that it would be appropriate to inquire further of Willowglen, and determine in which community it actually has placed H.L. The expense to the parties, and the delay in adjudicating this matter that would result from reopening the record for this purpose, is unwarranted. I **CONCLUDE** that, per the requirements of N.J.A.C. 6A:23A-19.2(a)(1), Highland Park was indisputably "the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16, [2013]."

Highland Park relies upon several arguments to evade its responsibility in this regard; all are unavailing. It cites N.J.A.C. 6A:23A-19.3(a)(7), which provides, relative to students who have reached the age of majority, as follows:

> 7. If the child is age 18 or older, or has been legally emancipated and has lived on his or her own before the initial placement, the present address of the child as of the date required by N.J.A.C. 6A:23A-19.2(a)(1) or (2) is submitted.

It thus asserts that having reached age 18, the district where H.L. resides is financially responsible for her educational costs. But Highland Park ignores the fact that under the regulation H.L. needed to have "lived on . . . her own" before her initial placement by DCF in order for her "present address" to govern financial responsibility. H.L. was under 18, and had been residentially placed by West Orange at the time of her initial placement in March 2010 at Estelle Manor.[2] Thereafter, she has remained residentially placed by DCF to date. Accordingly, it is clear that H.L. has never "lived on . . . her own."

Concededly, the regulation is inartfully punctuated. The placement of a comma after the words "age 18 or older . . . " could give the impression that only a legally emancipated child would also have to "live on . . . her own," in order for the child's

[2] A hospitalization preceded H.L.'s move to Estelle Manor. But again, she was not living independently.

address to dictate educational responsibility. The regulation could be read to mean that an eighteen year old's address governs responsibility in all instances. Indeed, a regulation with the meaning ascribed to it by the Department should look like this, grammatically:

> 7. If the child is age 18 or older or has been legally emancipated, and has lived on his or her own before the initial placement, the present address of the child as of the date required by N.J.A.C. 6A:23A-19.2(a)(1) or (2) is submitted.

But the Department persuasively argues that the regulatory intent is that a child's address dictate responsibility for tuition only if the child has lived independently, both as to students who are legally emancipated, and as to students who have reached the age of majority. An agency's interpretation of its own regulations is entitled to deference. Matturi v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002). Moreover, the intent of a statute or regulation should be gleaned from a view of the whole and of every part of the regulation, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). For this reason, our courts have recognized that "[p]unctuation, though important, is not necessarily controlling in the search for legislative intent." Perez v. Zagami, 218 N.J. 202, 210 (2014) (citing Casriel v. King, 2 N.J. 45, 50 (1949)).

The history of the statute reveals that it was enacted, in part, to "avoid placing an undue burden on the municipality in which the state facility is located." Governor's Statement to A-86, "The State Facilities Education Act of 1979", L. 1979 c. 207. Severely handicapped students, like H.L., are entitled to educational services past the age of majority; indeed, until they are twenty-one. See N.J.A.C. 6A:14-1.1(c)(1); N.J.A.C. 6A:14-1.3. If the district where a residential placement is located was responsible for the educational costs for all students ages eighteen to twenty-one, as Highland Park essentially urges here, this would create an untenable financial burden for that district, and one that is entirely inconsistent with the clear intent of the drafters of the State Facilities Education Act.

Nor can Highland Park successfully argue that H.L. was emancipated simply because she has reached the age of 18. It is indisputable that parents are responsible for the "care, custody, education and maintenance of [their] children," and equally so when those children are adopted. N.J.S.A. 2A:34-23; N.J.S.A. 9:3-50. Our case law recognizes that emancipation is "the conclusion of the fundamental dependent relationship between parent and child." Dolce v. Dolce, 383 N.J. Super. 11, 17 (App. Div. 2006). There is no fixed age when emancipation occurs. Schumm v. Schumm, 122 N.J. Super. 146, 150 (App. Div. 1973). Highland Park would have this tribunal determine that this young lady, who has never in her life lived independently, is emancipated. This record does not permit me to do so. The fact that H.L.'s parents have callously disavowed any involvement in her life via their statements in letters and in answers to requests for admissions does not detract from this conclusion. Moreover, N.J.S.A. 18A:7B-12 concerns itself not at all with formal guardianship, or with whether a child is welcome to return to her parents' home. The district where H.L.'s parents resided as of October 16 in any given academic year is responsible for the educational costs for a child placed by a state agency; during 2013-2014, that district was Highland Park.[3]

The Contention that West Orange is Financially Responsible for H.L.'s Tuition

In the alternative, Highland Park asserts that West Orange remains financially responsible for H.L.'s educational expenses under the theory that H.L. is homeless. This argument is without merit. A "homeless child" is one "who lacks a fixed, regular, and adequate residence . . . ." N.J.A.C. 6A:17-1.2. The regulations offer examples of homelessness, to include children who reside in shelters, hotels, motels, or any place "not designated for or ordinarily used as a regular sleeping accommodation." N.J.A.C. 6A:17-2.2(a). In accordance with N.J.S.A. 18A:7B-12.1, "[t]he district of residence for a homeless child determined pursuant to . . . [N.J.S.A. 18A:7B-12] shall be responsible for the education of the homeless child . . . when the homeless child attends school in a

[3] The argument that since H.L. never lived in Highland Park, it cannot be held responsible for her education likewise thus is without merit. The statutory scheme clearly affixes financial responsibility based upon a parents' residence, not the child's.

district other than the district of residence, the district of residence shall pay the costs of tuition for the child to attend school . . . ."

Clearly, H.L. is not homeless as that term is defined by law. Neither are her parents. H.L. has resided full-time in State residential facilities since in or about the 2007-2008 school year. Her parents likewise have maintained a fixed residence at all times pertinent to this controversy, first in West Orange, thereafter and to date, in Highland Park. Highland Park urges that upon reaching the age of majority H.L. "became . . . essentially homeless, as she has never returned to her adoptive parents' residence, and presumably would not be allowed to do so." But the Department correctly points out that the regulations nowhere contemplate "essential homelessness" as a basis for any educational determinations, financial or otherwise.[4] Accordingly, I **CONCLUDE** that financial responsibility cannot properly be assigned to West Orange under the theory that H.L. or her family were homeless.

H.L.(2) and H.L.(3) Cannot Be Held Liable for their Daughter's Educational Costs

As a resident of the State of New Jersey, who was classified as eligible for special education and related services, H.L. was entitled to a free and appropriate public education until she reached the age of twenty-one. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1487, requires that all children with educational disabilities have access to a free appropriate education and related services designed to meet their unique needs. New Jersey regulations are in accord, and provide that "[e]ach district board of education shall have policies, procedures and programs . . . in effect to ensure . . .[a] free, appropriate public education . . . is available to all students with disabilities between the ages of three and 21 . . . ." N.J.A.C. 6A:14-1.2(b).

There is thus no basis for either Highland Park's or West Orange's claim that H.L.'s parents are liable for her tuition. This is a dispute exclusively between the party

[4] Indeed, the Department in its brief correctly notes that homelessness status would require a formal determination by a district board of education, N.J.A.C. 6A:17-2.3. If that status was disputed, a determination by the Executive County Superintendent is required by regulation. N.J.A.C. 6A:17-2.8. No formal homelessness determinations took place here.

school districts, because it is one of them, and not the parents, that is responsible financially by law to educate H.L. Accordingly, notwithstanding their failure to appear in this matter, I **CONCLUDE** that the claims against H.L.(2) and H.L.(3) must be dismissed.

## ORDER

Based on the foregoing, it is hereby **ORDERED** as follows:

1. The motion for summary decision filed by Sparta is **GRANTED**, and the claims against Sparta are hereby **DISMISSED**.

2. The motion for summary decision filed by Highland Park is **DENIED**.

3. The motion for summary decision filed by West Orange is **GRANTED**, in part. Highland Park is **ORDERED** to reimburse West Orange for all moneys it expended for H.L.'s educational program during the 2013-2014 school year. Although H.L.'s parents moved in November 2012 to Highland Park, they resided in West Orange on October 16, 2012, thus making West Orange responsible for their daughter's educational tuition for the 2012-2013 school year. West Orange's cross-claim against H.L.(2) and H.L.(3) is **DISMISSED**.

4. Highland Park is responsible for tuition costs attached to H.L.'s placement at Willowglen for the 2013-2014 and 2014-2015 school years, at which time its obligation ended because H.L. turned twenty-one years of age.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

November 30, 2015

DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: November 30, 2015

Date Mailed to Parties: DEC - 2 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## APPENDIX

Joint Exhibits

J-1 Information about Willow Glen

J-2 Email

J-3 Email

J-4 Letter dated January 31, 2014

J-5 Excel spreadsheet

J-6 Excel spreadsheet

J-7 Letter dated April 10, 2014, with attachments

J-8 Letter dated April 30, 2014

J-9 Letter dated May 19, 2014, with attachments

J-10 Letter dated June 19, 2014

J-12 Voucher and contact

J-13 Letter dated October 21, 2014

J-14 Answers to request for admissions

16-16

OAL DKT. NO. EDU 19228-15
AGENCY DKT. NO. 361-12/15

| | | |
|---|---|---|
| D.J., on behalf of minor child, D.B.J. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, the Commissioner observes that the Superintendent of the Florence Township Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendant to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Further, it is noted that the agreement indicates that it resolves all issues pertaining to emergent relief, but does not indicate whether it resolves all requests for relief alleged in the petition or whether issues remain to be adjudicated at a hearing on the merits. It is

also noted that the settlement makes reference to actions intended to be taken on December 15, 2015. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/19/16
Date of Mailing: 1/19/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 19228-15
AGENCY DKT. NO. 361-12/15

**D.J. ON BEHALF OF MINOR CHILD, D.B.J.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,**
Respondent.

---

**D.J.,** petitioner, pro se

**Sanmathi Dev** Esq., for respondent (Capehart Scatchard, LLC, attorneys)

Record closed: December 14, 2015 Decided: December 14, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted on an emergent basis to the Office of Administrative Law on December 3, 2015, and scheduled for Oral Argument on December 14, 2015

At the scheduled proceeding, the parties entered into successful settlement negotiations. The parties have prepared a Settlement Agreement (J-1) indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 14, 2015
DATE

**ROBERT BINGHAM, II**, ALJ

Date Received at Agency: 12/15/15

Date Mailed to Parties: 12/15/15

/lam

## APPENDIX

## LIST OF EXHIBITS

**Joint:**

J-1 Settlement Agreement

J-1

Sanmathi Dev, Esq.
CAPEHART & SCATCHARD, P.A.
Laurel Corporate Center, Suite 300S
8000 Midlantic Drive
Mount Laurel, New Jersey 08054
(856) 380-6709
Attorneys for Respondent, Florence Township Board of Education

| | | |
|---|---|---|
| D.J. o/b/o D.B.J.,<br><br>Petitioner,<br><br>vs.<br><br>FLORENCE TOWNSHIP BOARD OF EDUCATION,<br><br>Respondent. | : | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>OAL DOCKET NO. EDU 19228-2015<br>AGENCY REF. NO. 361-12\15<br><br>**SETTLEMENT AGREEMENT REGARDING EMERGENT RELIEF** |

The parties hereby agree to the following in order to resolve all issues pertaining to Petitioner D.J. o/b/o D.B.J.'s Request for Emergent Relief bearing OAL Docket No. 19228-2015 and Agency Ref. No. 361-12\15:

1. ~~Parent D.J. shall return~~ Student D.B.J. will return to school immediately on December 15, 2015 without signing the "last chance agreement."
2. Parent D.J. disagrees with the Board's recommendation of and the need for in-school counseling for student D.B.J.
3. The parties agree that this Agreement shall be kept confidential consistent with state and federal regulations.
4. The parties reserves all other rights.

David L. Johnson, father of student D.B.J. — 12-14-2015 Date

Donna Ambrosius, Superintendent
Florence Township Board of Education — 12/14/2015 Date

Honorable Robert W. Bingham, II, A.L.J. — Date

17-16

17-16LM

State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

January 14, 2016

Aileen M. O'Driscoll, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, New Jersey 08608

Louis R. Lessig, Esq.
Brown & Connery, LLP
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108

Re: *Camden Education Association, on behalf of its members v. State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 219-8/15*

Dear Counsel,

I have reviewed the materials filed in connection with the respondent State-Operated School District of the City of Camden's motion for reconsideration of the Commissioner's December 11, 2015 decision and request to vacate the default in the above-captioned matter. Upon review of the submissions, I find that the December 2015 default decision should be vacated and the petition of appeal should be reopened. The basis for the December 2015 decision was the District's failure to file an Answer to the petition of appeal. Although the District was served with the petition, it does not appear as though the petition was forwarded to the District's labor counsel.

Accordingly, the District's motion to vacate the default decision and reopen the petition of appeal in this matter is hereby granted. The District is directed to file an Answer within twenty (20) days of receipt of this decision. Under the circumstances, no further extensions will be granted.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

AGENCY DKT. NO. 248-9/15

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF LAURA HOWSON, | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT | : | DECISION |
| OF THE CITY OF PATERSON, | : | |
| PASSAIC COUNTY. | : | |

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

To the extent that Paragraph 14 of the Agreement provides for strict confidentiality, the parties are reminded that the Settlement Agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Accordingly, the parties' settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/16

Date of Mailing: 1/15/16

18-16

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of:

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF CAMDEN

**Case No. 310-10/15**

and

EVA LEWIS

Before:
Edmund Gerber, Arbitrator

Appearances:
For the School District of the City of Camden
Benjamin S. Teris, Esq.
Tara L. Humma, Esq.
Brown & Connery, LLP

For the Respondent:
Cristal Holmes-Bowie, Esq.
Law Office of Michael A. Armstrong

On October 6, 2015, the Camden City School District filed tenure charges against Eva Lewis ("Respondent"). After reviewing the charges, pursuant to N.J.S.A. 18A:6-17.3c, the Commissioner of Education referred the tenure charges to me, Edmund Gerber, as Arbitrator.

I conducted hearings on November 30, 2015 and December 1, 2015. Both parties examined and cross-examined witnesses and introduced evidence. The parties submitted briefs which were received by December 31, 2015.

## FACTS

Respondent was first employed in the District as a substitute teacher in 1993. She subsequently received a B.A. degree Rowan University and a Master's Degree in Special Education and in Curriculum. She acquired certification to teach Special Education, and was

employed by the District as a full time teacher and beginning in school year 2010-11 was employed as a full time special education co-teacher in an inclusion class in Woodrow Wilson High School. She continued there through 2013-14 school year. She was then assigned to the Coopers Poynt Family School as a general education teacher in a second (2nd) grade inclusion class for the 2014-15 school years.

At the conclusion of the 2014-15 school year the District brought tenure charge for inefficiency against Respondent pursuant to N.J.S.A. 18-A:6-17.3 based upon her two consecutive "partially effective" summative evaluations.

The evaluations were made using the Charlotte Danielson Framework ("Danielson") as its instrument for performing evaluations. Under Danielson, teachers are scored on a scale of 1 to 4:1-1.84 – ineffective; 1.85-2-.64 – partially ineffective; 2.65-3.49 – effective; 3-.5-4 – highly effective. The Teacher Practice Instrument is one part of the two-part evaluation process under TEACHNJ.

Daniel encompasses four (4) domains: (1) Planning and Preparation, (2) Classroom Environment, (3) Instruction, and (4) Professional Responsibilities. Teacher scores are based, in part, on classroom observations as required by TEACHNJ. Each domain contains "subdomains," which are scored to then produce a score in the four domains based on percentage of the total teacher practice score attributed to each specific domain. The scoring under this framework is as follows: 1-ineffective, 2-partially effective, 3-effective and 4-high effective.

The District also implements Teachscape, a software program used to access and store the records of the Danielson system.

Under TEACHNJ, the second element to the evaluation process, is the calculation of a teacher's Student Growth Objective ("SGO"). A teacher's total evaluation score for any particular year is based partially upon an SGO score.

## TESTIMONY

Nicole Harrigan, is currently Principal of the Hatch Family School. She testified that during the 2013-14 school year, Harrigan was a Teacher Coach Evaluator. As such, she went to several different schools to perform training of teachers in the Danielson system. Teams that were trained in Danielson went to every school in the District to teach Danielson so that all the teachers in the District had received training in the Danielson; that training lasted six (6) hours and included practice videos, and scoring those videos and, moreover, in the 2013-14 school year, teachers are also trained in Teachscape.

Harrigan also performed evaluations of teachers and did coaching of teachers, as well. During the 2013-14 school year, the Principal of the Woodrow Wilson High School took a leave of absence and Harrigan was assigned to the High School to do evaluations.

According to Harrigan, the first observation of the Respondent in school year 2013-14 was performed on December 10, 2013 by Deborah Olusa who assumed the role of Co-Principal that year (Ms. Olusa is no longer an employee of the District). Prior to the observation, Olusa had a conference with Respondent and, also conducted a post-observation conference. Olusa's evaluation was partially effective and Respondent filed a rebuttal to that evaluation.

The second evaluation of Respondent that year was by Jill Trainor who was a Trainer and Evaluator during the 2013-14 school year. Trainor testified that she attempted an unannounced evaluation of Respondent but, on three separate occasions Respondent was not in her classroom. On the third attempt, neither Trainer nor the school Vice Principal was able to locate Respondent. Trainor finally observed Respondent on April 2, 2014; the observation lasted a minimum of 20 minutes, and Trainer found that entire observation was concerning. Respondent never submitted lesson plans for the class and the questions she asked to the students were of a lower level. Trainer scored Respondent with mostly ineffective and a few partially effective scores in the sub-domains. Trainer completed a post-observation conference with Respondent and, during the conference, spoke with Respondent about her "guided reading lesson," which, according to Trainor, Respondent taught incorrectly.

Trainor also completed an informal walk-through of Respondent's class on May 8, 2014. Respondent was late to the classroom on that date and claimed that she had a meeting with administrative staff. When Trainor inquired of the named staff members, both denied they had met with Respondent.

Respondent's third evaluation in 2013-14 was performed by Kristen Reid who, at the time, was a Teacher Trainer and Evaluator. Reid conducted a formal observation on May 2, 2014 which lasted at least 20 minutes. Reid specifically recalls there was minimal observable instruction during the period because Respondent spent a significant amount of time with one

student who could not remember a computer password. Respondent also took a personal phone call in the middle of her class.

Reid had a post-observation conference with Respondent on May 5, 2014 and made recommendations for Respondent during the meeting. She also afforded Respondent the opportunity to have a fourth observation and coaching to help her improve, but Respondent never contacted Reid to schedule another observation or coaching. Also during the conference, Respondent mentioned that a student had broken her wrist during the school year. Reid indicated that it did not affect her observation because if Respondent was fit to return to work, she was fit to be evaluated.

In completing the evaluation, Harrigan reviewed all three of Respondent's observations for the year to prepare for the summative evaluation. She specifically recalled Olusa's observation and believed it was accurate and consistent with her own observations. The concerns and issues mentioned in the other two observations were similar to those mentioned by Olusa.

Harrigan had a summative conference with Respondent on June 3, 2014. Respondent's summative evaluation for the year was partially effective. Although she received a highly effective score of 4 on her SGO portion of her evaluation, overall,, after weighing each component, the Respondent's overall summative rating of 2.15, which is only "partially efficient.." In the Danielson system a score must by at least 2.62 to be considered efficient.

Harrigan discussed the summative evaluation with Respondent and gave her an opportunity to voice any concerns.

In the following year, 2014-15, Respondent was assigned to the Coopers Poynt School. Stephen Bournes is the Principal of the school. He testified that the District notified him that Respondent needed to be placed on a Corrective Action Plan ("CAP") due to her partially effective summative evaluation score for the 2013-14 school year.

Bournes created a CAP for Respondent at the beginning of the school year and met with her twice as part of the process. During their first meeting on September 22, 2014, they reviewed the CAP and Respondent suggested a change with regard to an attendance issue. Based upon her concerns, Bournes removed the attendance issue from the CAP. Bournes did not consider the fact that Respondent taught at the high school level the prior year significant in the creation of the CAP. According to Bournes, the areas Respondent needed to improve upon would have been the same whether she was teaching in the high school or second grade, and whether she was teaching general education students or special education students. Every teacher is evaluated upon the same rubic.

Bournes detailed three major areas in which Respondent needed improvement: (1) the quality of her lesson plan, (2) increased higher order thinking questions during discussion, and (3) improved classroom routines and procedures to avoid loss of instructional time.

Pursuant to the CAP created for Respondent, Bournes noted that all teachers at the school were provided with training on Danielson and, during the school year, there were professional development meetings every Monday which also focused on Danielson. Bournes specifically recalled Respondent attending the mandatory Danielson training and taking at least two optional

refresher courses. Bournes noted that if a teacher had any problems with Teachscape, she could approach Nick Pillsbury an expert in the program; teachers were able to contact Pillsbury directly.

Bourne provided Respondent with common planning time as well as lesson plan review and feedback specifically as to both the substance and implementation of her lesson plans. He also provided her with a questioning tool in order to assist her in promoting higher order questioning of her students during lessons.

Respondent was also provided with weekly "PinPoynt" coaching sessions to provide feedback and suggestions regarding her lessons. Reid was also provided support to Respondent. Reid conducted coaching sessions and completed a walk-through of Respondent's classroom.

Respondent was provided a Children's Literacy Initiative consultant who would model and demonstrate effective literacy practices, although the consultant complained to Bournes that Respondent avoided her and would not get back to her.

Respondent was provided with a Peer Mentor, Nicole Almanzar, a highly effective teacher of a primary class whose classroom was nearby. Almanzar was basically Respondent's grade level mentor.

Almanzar testified that she met with Respondent to discuss multiple topics including instructional practices, lesson plans, setting up the classroom, curriculum and teaching practices. Respondent would approach Almanzar outside of more formal meetings and ask questions about

grade keeping, report cards, lesson plans and setting up things on the computer. Almanzar was assigned as Respondent's mentor at the beginning of the school but first thought that she was assigned as mentor because Respondent was new in the building; she did not learn that she was Respondent's CAP mentor until October or November of that year.

Respondent's first observation for the year was on September 24, 2014 by Bournes who has completed approximately 150 teacher observations since starting work with the District. Bournes' observation report shows that the observation lasted at least 20 minutes. He noted that Respondent was inconsistent in addressing all of the students; she used some harsh tones with the students, there was a lack of structure to her lessons and the classroom was chaotic. Bournes conducted a post-observation conference with Respondent on October 1, 2014.

Kristen Reid, a Lead Educator, conducted a 40-minute evaluation of Respondent on October 20, 2014. Reid and Respondent had a pre-observation on October 17, 2014 and a post-observation conference October 27, 2014. In that post-observation conference, Respondent produced evidence of student work and Reid raised at least one of Respondent's scores from a 2 to a 3

Reid testified that all Teacher Trainer Evaluator/Coaches received training in Danielson in August of 2013 and throughout the year in 2013-2014.

Bournes conducted a third observation of Respondent on November 24, 2014. The observation lasted at least 20 minutes and Bournes had the same concerns during this observation

as he did in his prior observation of her. He also conducted a post-observation conference with Respondent on December 10, 2014.

Respondent's fourth observation of the school year was conducted on February 19, 2015 by Reid. The observation lasted at least 20 minutes. Reid recalled the students bickering and antagonizing one another during this observation and some of these behaviors were addressed by Respondent harshly while some were ignored. Reid held her post-observation conference with Respondent on February 27, 2015. Reid also prepared Respondent's summative evaluation for the 20014-15 school year.

As part of the evaluation in Domain 4, Respondent produced a binder of materials that Reid believed needed some work and Reid permitted Respondent to provide supplemental materials.

Reid completed the end-of-the-year summative evaluation for the Respondent in 2014-15. Although Respondent again received a score of 4 on here SGO, her final summative rating was 2.49, which was again "partially effective." (To receive an "effective score," one needs a rating of 2.65 or higher.)

Reid noted that the Respondent's high SGO scores for both years were based on the test Respondent that were created by Respondent and were at such a low grade level they may have artificially inflated the SGO scores. Reid also explained this issue was not addressed at the time the tests were scored because the apparent ease of the final tests was not discovered until later.

Reid conducted a summative conference with Respondent on June 3, 2015. Reid described Respondent's classroom as being tough due to kids fighting and crying. Respondent's interactions with students was intimidating, especially in the way she spoke to them.

Reid reviewed Respondent's CAP in connection with the summative evaluations and found Respondent on the low end of "partially effective." She testified, "I don't think she's an effective teacher. I would not want my child in that classroom." Reid further testified that if Respondent were to return to work, that students would not receive well-designed and implemented instruction, nor would they be in an environment that is conducive to academic growth and/or well-being.

Bournes described some of Respondent's struggles as those he would expect from a novice teacher, not an experienced one. Respondent often had grammatical errors on her black board and in student work handouts. He suggested to Respondent that she have another person review these materials to ensure they were correct, but the problem persisted throughout the year.

A number of parents of students in Respondent's class expressed serious concerns over errors on report cards and grades, as well as issues with Respondent yelling at students. Some parents requested to transfer their children out of her classroom and related that Respondent had embittered conversations with some parents. Bournes had to remove four (4) students from Respondent's classroom and place them in a different second grade class.

Bournes testified that based upon his twenty-two (22) years as an educator, he believes that Respondent is an ineffective teacher, "She is not able to sustain and maintain the quality of instruction that is expected of a teacher to be highly effective both in terms of knowledge of pedagogy and in terms of classroom routines and procedures and overall instruction."

Respondent testified that in the 2013-14 school year, in addition to her assigned classroom, she was often assigned to cover other classes as well as English as a Second Language and bilingual classes. Whenever there was a need for substitute in the high school, she would be assigned even though she was a special education teacher.

Respondent attended a class given by the District about how to do SGOs for special education students. Respondent had students in the ninth and tenth grade students reading at third grade levels and she would have to make up her own tests for SGOs. The tests she made were signed off by the school Principal.

Respondent initially denied that she received training in Teachscape and Danielson. However, later in her testimony she acknowledged that her colleagues showed her how to use Teachscape and acknowledged that she did, in fact, receive training in Danielson.

She believes that the quality of her teaching was affected by an incident in the Spring of 2014. A student had broken her wrist apparently in class and she had to take leave after the injury. Subsequently, she suffered from Post-Traumatic Stress Disorder ("PTSD") because of the injury.

Respondent claims that her first evaluation of the 2013-14 year by Olusa lasted only nine (9) minutes and in the midst of the observation, Olusa got a telephone call on her cell phone and took the call. Olusa said that she would resume the observation at another time but she never did. Respondent prepared a rebuttal to Olusa's evaluation but there is no mention in the rebuttal that: Olusa never completed the observation, that the observation only lasted nine minutes or that Olusa took a telephone call during the observation.

As to Respondent's second observation in 2013-14 by Trainor, Respondent claimed that the first time Trainor found Respondent unavailable, Respondent was covering another class. As to Trainor's claim that Respondent was not in her class when Trainor went to do a "walk through", Respondent claimed that she was speaking with two administrators.

As to her third observation in 2013-24 by Reid which was critical of Respondent for spending too much time trying to get one student online, Respondent claims the students were in the computer lab and she was not there to teach but to "get kids their Google accounts."

Although Respondent does not dispute that she received a rating of only "partial effective" in her summative evaluation at the end of 20130-14, she was unaware she was going to be placed on a CAP until her meeting with Bournes on September 22, 2014. Respondent acknowledged that Bournes told her to ask Almanzar for assistance if needed, but denied she was part of any professional development class or program with Bournes or anyone else in the school.

## RESPONDENT'S ARGUMENT

Respondent makes a number of arguments in her defense. Specifically:

The District failed to comply with the TEACHNJ statutory and regulatory requirements in the first evaluation of 2013-14. There is no evidence that the first observer, Deborah Olusa, was appropriately trained using the evaluation instrument pursuant to N.J.A.C. 6A:10-2-2(b). Other evaluators have testified of the lengthy training process they underwent to implement the Danielson evaluation instrument but there was no proof at all that Olusa received appropriate training in the evaluation instrument or demonstrated competence in using that evaluation instrument as required by N.J.A.C. 6A:10-2-2 (4)(i.) (1-3).

Respondent was entitled to at least one announced observation and the observation by Olusa was the only announced observation in 2013-14. Respondent testified that the evaluator took a cell phone call and left the classroom after approximately nine minutes, not the required minimum of twenty minutes. Respondent testified that Olusa promised to continue the evaluation at a later time, but there is no evidence that it ever took place. There is nothing indicated in the text of Olusa's observation report to provide the time the observation took place.

While Trainor testified that Respondent was uncooperative with scheduling evaluations, there was no such finding in her summative evaluation nor was there a problem with Respondent's SGO in 2013-14. There were no disciplinary issues with Respondent In 2013-14.

In 2014-15, Respondent was assigned as a regular education teacher for an inclusion class, but in the prior year, her assignment was as a Special Education co-teacher in Woodrow Wilson High School. Respondent expressed concern about this change in assignment; however, Bournes did not take into consideration the differences in the students' ages, grades or abilities when evaluating Respondent. The District failed to have an established process of transferring the areas of concern in her CAP from one teaching position to another.

There were also issues about the level of assistance from a Special Education teacher who was assigned since she was splitting her time with other classes. The lack of support from the Special Education teacher affected Respondent's ability to comply with the recommendations of the evaluator.

N.J.A.C. 6A:2.5 requires that teaching staff members rated "partially effective" in a summative evaluation meet to discuss a CAP prior to the September 15th of the following school year. Respondent was unaware she would be placed on a CAP until September 22, 2014.

TEACHNJ requires the District implement a research-based mentoring program as per N.J.S.A. 18A:6-128. No evidence was presented that this program was in place in the District to assist Respondent to improve her teaching skills. There is no evidence that Respondent's meetings with Almanzar were developed in consultation with a CAP. Respondent testified that she saw Almanzar as a helpful colleague, not as a formal mentor. Almanzar testified that she did not know she was assigned as a mentor for any reason other than to assist Respondent as a new person in the building.

Respondent objects to the testimony of Reid as to any discrepancy of SGO testing in the 2014-15 school year. Similarly, Reid's testimony regarding classroom management alleged intimidation and student behaviors should be disregarded because this was never disclosed in support of the charges in discovery.

Prior to the filing of the tenure charges, the District was on notice of Respondent's treatment for PTSD due to the incident that occurred at Woodrow Wilson High School in May, 2014. Respondent testified she was treated by the District's psychologist. Bournes testified he was aware of Respondent's illness during the school year. The District had knowledge and information of the violent attack on Respondent well before the tenure charges were filed. There is no evidence that there was any consideration of Respondent's circumstances.

The District produced no proof of the certification or training of the evaluators nor was any evidence produced of the certification by Danielson of training of any of the evaluators. Based upon the District's failure to comply with the evaluation process, the District has acted in an arbitrary and capricious manner. Therefore, Respondent's evaluations should be set aside and Respondent should be returned to work.

## DISCUSSION

Given the tenure charges brought against the Respondent were for being rated "partially effective" for two (2) consecutive years my authority as Arbitrator is limited by N.J.S.A. 18A:6-17.2. Specifically:

> In rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to, providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) The district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall determine if that fact materially impacted the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the [district] and the employee shall be dismissed.

Respondent's arguments must be evaluated in light of the statute and, accordingly, the scores issued by the observers and evaluators cannot be challenged *per se*.

Respondent challenged the observations of Olusa on two grounds. Respondent testified that Olusa's evaluation, which was the first of three evaluations performed during the 2013-14 school year, failed to adhere substantially to the evaluation process. Specifically, Respondent

testified that the observation only lasted nine (9) minutes, not twenty (20) minutes as required by regulation and there is no evidence that Olusa received the required training to be an evaluator.

I do not find Respondent's testimony credible that Olusa's observation only lasted nine minutes. The Respondent submitted to a post observation conference with Olusa even even though Olusa supposedly told Respondent that they would continue that observation at another time but never did. Although Respondent was dissatisfied with the grading of the observation and filed a rebuttal to Olusa's overall evaluation, the rebuttal does not mention that the observation was too short, was interrupted by a cell phone call to Olusa or that Olusa failed to come back to finish the observation as promised.

However, there is no clear evidence that Olusa, who did not testify, had training in the evaluation process (Danielson) as required by regulation N.J.A.C. 6A:10-2-2(b). Both Trainor and Reid testified that every teacher was trained in Danielson before the start of the school year in August 2013 and Reid testified that all Evaluator/Coaches received training in Danielson in August of 2013 and throughout 2013-2014. But neither witness could testify that Olusa received such training. Given that evaluator training is a clear requirement of the regulation, and the District failed to establish Olusa received training, Olusa's evaluation failed to adhere substantially to the evaluation process.

After such a finding the statute requires a determination as to whether the finding materially impacted the outcome of the evaluation. As Reid so testified, Olusa's scoring of Respondent's observation is consistent with all six subsequent evaluations received by

Respondent, both as to issues which the Respondent was either ineffective or partially effective and as to overall scoring (See also, Exhibit P-3). I do not find that Olusa's lack of observation training materially impacted upon her overall evaluation of Respondent.

As to Respondent's other arguments, specifically:

The district did not provide any documentary evidence that the Respondent's r evaluator, apart from Olusa, received training in Danielson. Aside from Olusa, all of the Respondent's evaluators testified that they received training. Absent some issue as to the witnesses lack of credibility, and there was none, their testimony was sufficient to establish that they were trained in Danielson.

Trainor's testimony that the Respondent was uncooperative with scheduling her evaluations should not be considered. The tenure charges filed by the district are based upon partial ineffectiveness, not specific misconduct. Accordingly, Respondent's alleged failure to cooperate with the evaluation process is not relevant to my decision.

Respondent had difficulty transitioning from teaching Special Education at the high school level to teaching a second grade inclusion class. The transition should have been taken into account in her evaluations. This argument is one of an educational nature and is outside my authority under N.J.S.A. 18A:6-17.2. Similarly, Respondent's contention that she did not receive sufficient support from her co-teacher is an educational issue outside of my authority.

The District failed to meet and discuss Respondent's CAP prior to September 15, 2015 as required by regulation. However, Respondent was absent from school from September 9, 2015 l until September 15, 2015. Accordingly, Respondent was not informed of her CAP until September 22, 2015. Given Respondent's absence, such a minor deviation from the regulation did not substantially interfere with the Respondent's right to a CAP under TEACHNJ.

The District failed to implement a research based monitoring program pursuant to N.J.S.A. 18A:6-128. However, the statutory reference to Research based mentoring appears in N.J.S.A.18A:6-127 and is addresses mentoring of first year teachers. N.J.S.A. 18A:6-128b, provides for :

> additional professional development for any teaching staff member who fails or is struggling to meet the performance standards established the board, as documented in the teaching staff member's annual summative evaluation. The additional professional development shall be designed to correct the needs identified in the annual summative evaluation.

Bournes testimony is clear that he prepared a multi-phased Corrective Action Plan. The statute does not require that the district establish that the plan is "research based" The plan is education based and not subject to my substantive review.

Testimony regarding discrepancies in her SGO rating should not be considered in my consideration. The Board of Education has not challenged the results of those SGO ratings and

used the final score of 4 or "highly effective" in computing Respondent's overall evaluation score; that score was still only partially effective. The District has never taken the position that the SGO scores should not be counted in Respondent's overall evaluation score The argument is without merit.

The District should have taken into consideration the fact that she suffered PTSD after she was attacked by a student and suffered a broken wrist at Woodrow Wilson High School in May of 2014. However, it is noted that Respondent did not introduce any medical evidence in support of her claim that she suffered from PTSD. Reid was aware of the attack when she prepared Respondent's summative evaluation for 2013-14 and Bournes was aware of Respondent's condition during the 2014-15 school year. Given Bournes' evaluations were performed in light of Respondent's condition, and I cannot reasonably evaluate the severity of the symptoms due to the lack of medical evidence, the district's responses to Respondent's medical condition were educational based and beyond my authority to review.

Respondent argues that the District's actions were arbitrary and capricious, but offers no specifics and facts in support of her argument beyond those previously mentioned herein the argument is without merit.

Based upon the entire record, I make the following:

AWARD

The tenure charges for inefficiency brought against Respondent, Eva Lewis, by the State Operated School District of the City of Camden, are sustained. Eva Smith is dismissed from her tenured teaching position in the State Operated School District of the City of Camden.

Edmund Gerber, Arbitrator

January, 12. 2016

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges

**ELIZABETH BOARD OF EDUCATION, UNION COUNTY,**

Petitioner,

-and-

**NIKITA CLARKE-HUFF,**

Respondent.

AGENCY DOCKET NO.: 290-9/15

**OPINION AND AWARD**

**BEFORE: RUTH MOSCOVITCH, Arbitrator**

**Appearances:**

**For the Petitioner:**

John G. Geppert
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**For the Respondent:**

Sheldon H. Pincus
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Bloomfield, NJ 07003

This matter comes before me on tenure charges brought under N.J.S.A. 18A:17-2 and 18A:6-10 et seq. by Petitioner Elizabeth Board of Education, Union County, against Respondent Nikita Clarke-Huff. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 22, 2015. I was appointed the arbitrator to adjudicate this matter on October 16, 2015. The Respondent made a

motion to dismiss all of the charges, which I granted in part and denied in Part in a Decision and Award dated November 16, 2015.

I conducted hearings to take evidence in the City of Elizabeth, Union County, on December 4, 7 and 10, 2015 on the remaining charges, set forth below. The parties submitted written post hearing briefs to me on January 4, 2016 at which time the record was closed.

## ISSUES PRESENTED

1. Did the Respondent engage in any or all of the charged misconduct related to falsifying her child's residency and chronic absenteeism?
2. If so, does the proven conduct constitute unbecoming conduct warranting dismissal from her employment with the Board or some lesser penalty?

## TENURE CHARGES

## CHARGE II

## NEGLECT, MISBEHAVIOR OR OTHER OFFENSE, INCLUDING BUT NOT LIMITED TO UNBECOMING CONDUCT OR OTHER JUST CAUSE, RELATED TO RESPONDENT FALSIFYING HER CHILD'S RESIDENCY

The foregoing background information, charge, counts, and the facts alleged therein are incorporated by reference as if fully set forth herein. Nikita Clarke-Huff has violated by unbecoming conduct the public trust placed upon Respondent as an employee of this District, failed to exhibit the good behavior necessary to continued employment, and failed to comply with all requirements of the law, including, without limitation and over an extended period of time: by falsely certifying to the District that

her daughter resided in the District during the 2014-2015 school year, thereby depriving the District of tuition Respondent otherwise would owe the District for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey. These acts and omissions, more specifically set forth below, constitute conduct unbecoming a school employee, or other just cause, warranting the immediate dismissal of Respondent.

**Count 1**

On or about June 26, 2014, Respondent signed and submitted to the District a form entitled Temporary Guardianship Authorization for Care of Minor ("TGA"), in which Respondent falsely declared that during the period from July 1, 2014 to July 30, 2015, she had placed her child, N.H., a 12th grade student at all times relevant, in the care of a temporary guardian residing within the City of Elizabeth, for purposes of obtaining a free education for N.H. at the Upper Academy High School in Elizabeth, New Jersey, at a tuition cost to the District and its taxpayers of not less than $17,283.00, when in fact both Respondent and her daughter resided during this period at a home located at 22 Colton Road in Edison, New Jersey, and notwithstanding that the TGA form signed by Respondent clearly indicated that execution of same by the declarant was "under penalty of perjury under the laws of the State of New Jersey."

**Count 2**

The facts alleged in Charge II, Count 1, above, are incorporated by reference as if fully set forth herein. The foregoing facts also constitute conduct unbecoming, including theft by deception, of tuition costs in an approximate amount of $17,283.00 that

Respondent properly owed the District, for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey, during the 2014-2015 school year, had she not improperly falsified the foregoing forms.

The foregoing acts and omissions by Nikita Clarke-Huff, individually and cumulatively, constitute just cause for dismissal based upon conduct unbecoming or other just cause related to her acts of false declaration and theft by deception of tuition, by which Respondent has demonstrated that she is unworthy of the public trust placed upon Respondent as an employee of this District. The Board, a public employer charged with providing a thorough and efficient education to children who legitimately reside within the District, cannot have the proper allocation of tuition jeopardized by the reprehensible conduct of Respondent, an untrustworthy employee who occupies a confidential position, and the Board should no longer have to be burdened by such misfeasance. Immediate dismissal is fully warranted.

**CHARGE III, Counts 15 through 18**

**CHRONIC ABSENTEEISM**

The foregoing background information, charges, specific counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. Nikita Clarke-Huff has displayed chronically poor attendance during the last nineteen (19) years of her employment with the Elizabeth School District, during which she has been absent from her post on not less than **379.37** occasions, which has adversely affected the proper

operation of the school, despite repeated warnings.[1] Ms. Clarke-Huff has been chronically absent for sick days and personal days. These acts and omissions, more specifically set forth below, constitute *neglect, misbehavior or other offense,* including but not limited to *chronic absenteeism, unbecoming conduct, or other just cause,* warranting her immediate dismissal.

**Count 15**

During the 2011/2012 school year, Respondent was absent from her post on no less than eighteen and one-fourth (18.25) occasions, including one (1) family illness, one (1) personal, and sixteen and one-quarter (16.25) sick.

**Count 16**

During the 2012/2013 school year, Respondent was absent from her post on no less than eighteen and one-fourth (18.25) occasions, including one (1) family illness, fifteen and one-quarter (15.25) sick and two (2) "accident on duty."

**Count 17**

During the 2013/2014 school year, Respondent was absent from her post on no less than ten and one-half (10.5) occasions, including one-half (.5) family illness, one (1) personal, and nine (9) sick.

**Count 18**

During the 2014/2015 school year, Respondent was absent from her post on no less than forty-eight and one-half (48.5) occasions, including one (1) family illness, one

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[1] I include the introductory and concluding paragraphs, although they include a reference to Counts 1 through 14, which have been dismissed. The total number of alleged days absent for Counts 15 through 18 is 95.5.

(1) personal, ten (10) sick, thirty-four and one-half (34.5) paid administrative leave, two "Mitchell Building," and was one-tenth day (.1) tardy.

The foregoing acts and omissions by Nikita Clarke-Huff, individually and cumulatively, constitute *neglect, misbehavior or other offense,* including but not limited to *chronic absenteeism, unbecoming conduct, or other just cause;* during the last nineteen (19) years of her employment with the Elizabeth School District, Respondent has been absent from her post on not less than **379.37** occasions, which has adversely affected the proper operation of the school, warranting her immediate dismissal.

**CHARGE IV**

**INSUBORDINATION, NEGLECT, MISBEHAVIOR AND/OR OTHER JUST CAUSE FOR DISMISSAL, RELATED TO A PATTERN OF CONDUCT**

All of the foregoing charges and the facts set forth therein are incorporated by reference as if fully set forth herein. The course of misconduct set forth in the above charges and counts, jointly and severally, manifests a pattern of numerous infractions over an extended period of time, and constitute *neglect, misbehavior or other offense, including but not limited to unbecoming conduct, chronic absenteeism, or other just cause.* This pattern and course of conduct during an extended period of time demonstrates Ms. Clarke-Huffs unfitness to serve in a position of trust as an Administrative secretary, warranting her immediate dismissal.

**FACTUAL BACKGROUND**

Respondent Nikita Clarke-Huff has been employed by the Petitioner, Elizabeth Board of Education, (Board) as a school secretary since 1996, that is, for the past 19 years. Her title at the time these charges were served upon her was Administrative

Secretary II at the Jerome Dunn Academy. She is assigned to a 12-month position. Prior to working for the Board, Respondent held a number of other jobs, including serving in the U.S. Army for twenty years as a soldier. In the army, she rose to the rank of Staff Sergeant. She was stationed in a number of locations, including overseas.

Respondent is currently married to Eddie Huff. The couple has been together for 25 years, and they have been married for the past 15 of those years. They have two children together: Dante, aged 24 and N., aged 18, who has now graduated from the Elizabeth public schools. This is the second marriage for both Respondent and Mr. Huff. Respondent was previously married to a man named Pittman, with whom she had two children: Veronica, now aged 34 and Christina aged 30. Veronica resides in Sicklerville, New Jersey, near Camden. Christina resides in Baltimore, Maryland. Christina is a graduate of Morgan State University in Baltimore, which N. now attends, having graduated from Elizabeth High School Upper Academy in June 2015. Mr. Huff has three children from his prior marriage, ages, 43, 42 and 39. One of those, Shakira, resides in Virginia.

Respondent is part of large, extended family. She has six siblings, one of whom, Robert Jones, resides at 1116 Anna Street in Elizabeth, New Jersey. A sister resides in Virginia. She also has a step-mother, Willie Mae Banks. who resides on Anna Street, in Elizabeth, at Number 1057. Respondent identified eight family members who reside with Ms. Banks on Anna Street: a disabled uncle, two sisters, one of whom has two children aged 13 and 11, an adult niece who has a 2 year old son, and a step-brother.

The Charges in this case involve two separate issues: Respondent's attendance for the school years: 2011-2015, and whether she lied regarding her residency and that

of her daughter N. during the spring of 2015, when N. was a senior in the Elizabeth school system.

**Attendance Issues.**

The collective bargaining agreement covering Respondent provides for 14[2] sick days per year, 2 personal days per year and other leaves of absence, including days for funerals. Unused sick and personal days roll over and accumulate. (R. 7, 8) Respondent and other similarly situated employees were entitled to 20 vacation days per year. At the start of the 2011-2012 school year, Respondent had accumulated 55.63 days in her sick day bank.

During the 2011-12 school year, Respondent was diagnosed with ovarian cancer. She was operated upon and received treatment. Respondent used all but ¼ day of her vacation days for her operation and used 16.25 sick and one of her two personal days for treatment and doctors' visits. At the end of that year, Respondent still had a balance of 39.38 sick days in her bank. (P. 13)

During the 2012-13 school year, Respondent continued to use sick days for her cancer treatment. She also suffered an accident at work on May 2, 2013 that resulted in two days absence. In that year, Respondent used all of her 20 vacation days, one day for family illness, one and one-half day for a funeral, two days for her accident on duty and 15.25 for sickness. At the end of that school year, she still had a balance of 39.13 days in her sick bank, only fractionally different from the number of days in her bank at the end of the previous year. (P. 14)

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[2] The record is somewhat unclear about the precise number of sick days Respondent was receiving in 2015; it may have been 15 or even 16. See Respondent's Brief, p. 43, n. 20.

During the 2013-14 school year, Respondent used 9 of her allotted sick days. She completed the year with 46.13 days in her sick bank, an increase of 7 days over the prior year. Respondent again took all of her vacation days. The only category of days she exceeded was for family funerals – she took a total of 7.5 days for this purpose – 2.5 days in August of 2013, and another 5 days in June of 2014. (P. 15)

During the final year at issue in this case, 2014-15, Respondent took 10 sick days. She took all of her vacation days. The remaining 37.50 days with which she is charged were due to her being involuntarily reassigned while these charges were under investigation. (P. 16)

**Residency Issue.**

In March 2015, the Board Superintendent received an anonymous tip that Respondent and her daughter did not reside in Elizabeth. The Superintendent handed the matter over to Marvin Lehman, Board General Counsel, who in turn assigned Donald Pulidore to investigate the matter.

As far as the Board knew, in the spring of 2015, Respondent resided in the City of Elizabeth with her daughter N. at 1022 Emma Street, 2nd Floor. This was the address listed for N. in Power School, the student information system (P. 11), as well as the address on file for Respondent in the employee information system, known as Edumet. (P. 24) After Mr. Pulidore was unable to verify that Respondent and her daughter resided at that address, he took further steps to locate a residence. Those steps are detailed in his Investigation Report dated March 25, 2015. (P. 1) Mr. Pulidore consulted several sources in the course of investigation, including a database called "Accurint" that identifies addresses associated with a given name from such sources as

property records, utilities, car registrations, cell phones, etc. Ultimately, Mr. Pulidore located Respondent leaving to go to work on three days – March 25, 26, 27 – from a house at 22 Colton Road, Edison, New Jersey, an address associated in Accurint with Eddie Huff. On those mornings, Respondent drove a car registered to Mr. Huff. On two of those mornings – March 25 and 26 – her daughter, N., left the home with her. Mr. Pulidore took photographs showing someone, allegedly Respondent, leaving the house. Those photographs are of poor quality, but are in evidence as exhibits to his report. (P. 1) On those days, Mr. Pulidore observed Respondent as she drove N. to her high school in Elizabeth. (P. 1)

Based upon Mr. Pulidore's report, Mr. Lehman made a preliminary determination that N. was ineligible to attend high school in Elizabeth. He sent Respondent a "Notice of Initial Determination of Ineligibility" (P. 5) and scheduled a meeting with Respondent for March 30, 2015. Respondent brought an attorney with her to the meeting.

Respondent admits that neither she nor N. was residing at the Emma Street address in 2015. When asked by Mr. Lehman where she lived, Respondent replied that at the moment she "had no domicile." Respondent told Mr. Lehman, however, that N. resided with her brother, Robert A. Jones, at 1116 Anna, Apt. 4F in Elizabeth. She presented some documents to support that statement. Of particular significance were two purported leases for the premises for the periods 2/1/14-1/31/15 and 2/1/15 – 1/31/16 (P. 4, R. 4) and a handwritten "Temporary Guardianship Authorization for Care of Minor" signed by both Respondent and Robert A. Jones, both signatures dated June 26, 2014 (P. 3).

**Respondent's residence.**

Respondent testified that she first reported the address on file for her with the Board – 1022 Emma – in approximately 2011. She and N. lived at that address during the 2011-12 and 2012-13 school years, along with a friend, Janet Moore. Her husband, Eddie Huff, N.'s father, did not live at the Emma Street address with them that year; they were having marital problems.

Respondent admits she never reported a change in address after she left Emma Street. When asked why she had not done so, she testified that all mail from the Board, including paychecks, was delivered to her at her school, and "she didn't think anything of it."

In the following two years, Respondent and her daughter moved around, staying with various friends and family. This roaming, about which she testified for several hours through direct and cross-examination, was due to her marital problems, which continued through the spring of 2015. Her brother, Robert Jones, confirmed that Respondent was going through hard times with Mr. Huff. Respondent did not go into detail about the nature of the problems between her and her husband, other than to say:

- Huff had a history of substance abuse with drugs and alcohol and in recent years, "he fell off the wagon;"
- Although Huff never hit Respondent, he was volatile at times, raising his voice, belittling and disrespecting her;
- N. was affected by the tension in the household; she got embarrassed when her father came home drunk; Respondent felt hurt to have her daughter see all of this;

- There were financial problems as well in the marriage, as a result of which Respondent was short of money; Robert Jones confirmed his sister had no money during this time.

Respondent testified to the following other residences during the period from 2012-2015:

- In 2012 and/or in 2013-2014 while she was recuperating from surgery for ovarian cancer, she stayed with a friend named Vanessa at 2125 Fay Avenue, Linden New Jersey. That address was one identified with Respondent's name in the Accurint database consulted by Board investigator Pulidore.
- During 2014 and 2015 Respondent lived "off and on" with her step-mother, Willie Mae Banks, at 1057 Anna Street. Respondent testified that she still receives mail at that address. Residing in the house on Anna Street were the nine family members listed above, in addition to Respondent. N. stayed at Ms. Banks' house "less than five times," because it was crowded, and N. did not get along with Respondent's niece.
- For approximately 4 months Respondent lived with her aunt and uncle at 917 Kensington in Plainfield, New Jersey. She moved out after the house was severely damaged in a fire.
- After the fire, Respondent stayed for a bit – probably less than 10 days – with her daughter Veronica, in Sicklerville, New Jersey after a blow-up with Mr. Huff.

- Finally, Respondent resided at 22 Colton, in Edison, New Jersey with her sister-in-law, Vickie Larry. That was where Investigator Pulidore observed her in March 2015.
- Eddie Huff resided with different friends during this period of time, ultimately landing at 22 Colton with his sister, Vickie.

**N.'s residency.**

According to Respondent and her brother, Robert Jones, Respondent arranged to have N. move in with Mr. Jones at his apartment, #4F, 1116 Anna Street in the spring of 2014 – Mr. Jones placed this event at the end of April or beginning of May 2014. Mr. Jones testified that he offered to have both Respondent and her daughter move in with him, but Respondent stayed to work on her marriage. Mr. Jones, like Respondent, felt that N. should not have to stay with her parents while they were having "troubles."

Mr. Jones lived in a large one-bedroom apartment. He gave N. his own bedroom and allowed her to put her clothes in his closet. While she resided with him, which was until she graduated form high school in June of 2015, he used the pull out couch in the living room as his bed. He purchased a partition that gave him more privacy and allowed N. to go to the bathroom or kitchen without disturbing him or seeing "her uncle sleeping with his shirt off."

For the most part, N. stayed with her uncle during the week while school was in session. On weekends, she would frequently stay with other family members or with her girlfriends, C. and M.; over vacations, she would travel to visit family in Maryland and Virginia. Because 1116 Anna was over a mile from the high school she attended, N. would often gets rides to school from her boyfriend, or her mother, who would pick her

up and drop her off at the school and then proceed to her own place of work. At times, N. would walk to or from school.

During the time N. lived with him, Mr. Jones was mostly unemployed, having been laid off from his job at a photography studio in August 2014. Thereafter, he collected unemployment compensation, and had at least one temp job. Mostly, however, he worked with the VA on finding new employment: since he was a veteran, the VA had him "moving around every day" for his job search, for example, attending classes on resume building. He started a new job in October of 2015, and the parties agreed to allow him to testify via telephone during his lunch break, so as not to jeopardize the job.

During her years in high school, N. was an A student. She was also a tutor and participated in girl scouts. But she was particularly active in band, chorus and drama. Band practice began in August with a one-week band camp in Elizabeth. After that the band played at football games every Friday, and would participate in competitions which involved practice on Saturday and travel to competitions. The big competition was an all-day event in Delaware on a Sunday around Thanksgiving. Respondent was active as a band parent, chaperoning the students on the bus, arranging for food and selling tickets at games. On occasions, when the band returned late, Respondent would have N. stay over with her wherever she was staying at the time.

Once band season was over, rehearsals picked up for drama at the Thomas Jefferson Arts Academy in Elizabeth. As with school band, Respondent was an active parent supporter: the drama production program identified her as one of several "Drama Mamas" who helped throughout the production process, helping find costumes,

feed the kids, drive them, and do other chores. In the 2012-13 school year, N. was in the cast as a soldier for the school production of Pippin in March. (R. 10, p. 00173); Respondent was thanked in the program (Id. p. 00177) In the 2014-15 school year, the drama group performed "Bring It On". (Program, R. 9) N. played part of "Danielle" (Id. p. 00153); Respondent was one of the "Drama Moms" thanked by the Director "for always offering your time and talents and for supporting your daughters' passion!" (Id. p. 00158)

The performances of "Bring It On" were on March 26, 27 and 28, 2015. Robert Jones testified that he was out of town that month, but returned to see his niece in the play. Respondent testified that some nights, when her brother was away, or when rehearsals went late, she brought N. to stay with her, rather than leave her alone in the Anna apartment in Elizabeth. At that time, as observed by Mr. Pulidore, Respondent was staying in Edison. Respondent does not dispute that Mr. Pulidore observed N. staying with her the two nights he identified: March 25 and 26. She testified these stays were a result of Mr. Jones' travels and the drama production schedule.

As further proof that N. resided with Mr. Jones in the spring of 2015, Respondent produced photographs of N. in front of 1116 Anna Street, dressed up for the prom, standing with her boyfriend. (R. 31., pp. 281-3) She also produced a receipt for the limousine paid for by Eddie Huff and Robert Jones, showing that the limo was to pick and drop off its charges at 1116 Anna Street in Elizabeth on June 3, 2015. (Id. p. 00280)

**Certificate of Guardianship.** Respondent testified that when she and her brother decided that N. would reside with him, in the spring of 2014, she downloaded a guardianship form from the internet, filled it out, signed it, and had her brother sign it.

The form, signed by her "under penalty of perjury" authorizes the temporary guardianship from July 1, 2014 to July 30, 2015. (P. 3, p. 0077) She testified:

- She thought her brother needed "something extra because he was taking care of" her daughter;
- She had used this procedure before when she was in the army: knowing her unit could be activated, she always had a contingency plan for the care of her children.

Mr. Jones confirmed in his testimony that he and his sister had executed the Guardianship form in June of 2014. He also signed an affidavit on April 4, 2015 to the same effect that was presented to the Board on Respondent's behalf. (R. 4, p. 00073) He testified that it was when his sister asked him to sign the paper, that he realized "how serious the situation was at home with Eddie." Mr. Jones testified that he provided most of the financial support for N. because his sister "was dealing with stuff on her own; Nikkie didn't really have the money to pay me. I wasn't asking her to, either."

**Leases for 1116 Anna Street.**

Purported residential leases for Apartment #4F at 1116 Anna Street in the name of Robert A. Jones were placed in evidence for two years, 02/01/14 to 1/31/15 and 02/01/15 to 01/31/16. Pages of the leases were placed in evidence by both sides. (P 4, R. 4) Several features of these leases are of note:

- Although Mr. Jones signed the 2015-16 lease and his initials appear on each page throughout the lease, no signature from the leaser – FDG Management Corp – appears anywhere on the document.

- One copy of the 14-15 lease has Mr. Jones's signature on the first page (P. 4, pp. 0079); the other does not (R. 4, pp. 00059)
- N.'s name is typed onto 14-15 lease, even though the parties testified she did not move into the apartment until April or May of that year;
- N.'s name is also typed onto the 15-16 lease.
- Two different social security numbers appear on the two leases: for 14-15 the number ends in -9776; for 15-16 the number ends in -1596. Neither number is Mr. Jones' social security number.

A representative of the landlord, Alan Rosenbaum, testified in this proceeding. Mr. Rosenbaum only started at FDG Management on March 31, 2015, when Mr. Jones was already a tenant in apartment 4-F. Regarding the purported leases, Mr. Rosenbaum testified:

- Neither copy of the lease appears in the management company's file, but the form of the leases is one that FDG uses; the rental amount shown on the lease for 15-16 is incorrect: it shows $725, whereas the actual rent is $730;
- It is not the company's practice to include social security numbers on any lease;
- While the company requires a signed lease for a new tenant, thereafter, the company sends out a renewal. If tenants do not agree to the renewal, they are continued on a month-to-month tenancy. FDG did send Mr. Jones a lease for 2015-16, but he did not return it signed.

Mr. Jones testified that he would not have put N.'s name on any lease: he was afraid that if he told the landlord about the situation the landlord might raise the rent. Respondent confirms that Mr. Jones told her he was apprehensive because he hadn't told the landlord about N.; he thought it might be an issue so had not put her formally on the lease. Mr. Jones said he did have a lease in 2011 when he first moved in, and that he turned in a lease last December. He didn't know how "that idiot Alan" couldn't find a lease. Respondent testified that she obtained the two lease documents from her brother's apartment along with utility bills for the apartment. (R. 4) It is not clear if Mr. Jones was present in the apartment when Respondent retrieved the documents; he had "no clue" when he was asked about having a lease in his apartment or giving it to his sister. Respondent was adamant that she did not alter the lease documents in any way.

**POSITIONS OF THE PARTIES**

The Board argues that it has proven the charges by a preponderance of the credible evidence; further, that the charges establish the Respondent is guilty of making false statements to the Board, knowingly committing theft of the Board's services, has exhibited chronic absenteeism; and has exhibited a pattern of conduct over a period of years constituting just cause and warranting dismissal from her tenure position. In particular: (1) the Board's full and fair investigation, including surveillance of the Respondent at an Edison address, established that Respondent was residing with her child in Edison, rather than Elizabeth, in the spring of 2015; indeed, she was observed leaving the Edison home with her daughter on "several" mornings to drive her daughter to school; (2) the Respondent blatantly lied to the Board in order to obtain free educational services from the City of Elizabeth for her daughter, specifically,

Respondent knowingly submitted false and fraudulent documentation in the form of a Temporary Guardianship Authorization form, prepared under penalty of perjury as well as fraudulent leases to establish that her daughter lived with her brother, Robert A. Jones, at 1116 Anna Street, Elizabeth; (3) the Temporary Guardianship Authorization must be rejected as legally inadequate to establish an actual guardianship by Robert Jones of the minor daughter in that (a) it was never presented to a court of law, as required by NJ AC 6A:22-1.2 (b) it was never submitted to the Board until Respondent was summoned to an investigative meeting in March 2015; (c) on its face the form states that support will be provided, presumably by Respondent to Mr. Jones, yet the parties testified that no such support was in fact provided; (d) the asserted residential arrangement – namely that a teenage girl would share a one-bedroom apartment with her uncle – is inherently unbelievable; further, Mr. Jones' testimony is that the daughter did not reside at the apartment on weekends, and often not during the week, including "two nights per week" spent elsewhere; (4) the leases must be disregarded because (a) the landlord's representative testified that no such leases are on file with the landlord; (b) Mr. Jones testified that he never gave any leases to Respondent, nor had he executed a lease for the year in question; (c) on its face, the leases are unsigned; further, they contain social security numbers which the landlord says are never included, and for the two years submitted, those social security numbers differ from one another and from Mr. Jones' social security number; (5) All Board employees have an obligation to follow the Board's rules and regulations with regard to residency; the obligation of Respondent, a school secretary, is particularly critical, and her failure to follow these rules must be deemed conduct unbecoming; (6) the Board has further proven excessive

absenteeism on the part of Respondent since 2011 that has deprived the Board of her services and warrants termination; (7) given that the Respondent was subject to an increment withholding in 2011 for unbecoming conduct and excessive absenteeism, which must be regarded as progressive discipline, the current charges must be considered as proving a pattern of misconduct over time that merits discharge.

The Respondent, on the other hand, argues that the Board has not proven the charges against Respondent involving falsification of her child's residency; nor can the Board claim theft of services or excessive absenteeism based upon the record in this case. In particular, (1) the Board is required to prove the allegations charged by at least a preponderance of the evidence; indeed, a stricter standard of proof – clear and convincing evidence – has been applied in some New Jersey tenure cases; (2) under either standard, the Board has failed to meet its burden of proof: the facts established through the credible testimony of Respondent and her brother, and not contradicted by any contrary facts presented by the Board, prove that Respondent's daughter, N., did in fact reside in the City of Elizabeth with her brother at all relevant times; (3) the credible and uncontroverted evidence shows that Respondent and her brother did execute, in good faith, a temporary guardianship form; the fact that this was somewhat less than the court order required by N.J.A.C. 6A:22-1.2 is irrelevant since (1) the temporary guardianship shows substantial compliance with Board policies and thus suffices as a matter of equity; (2) under the state's and the Board's own rules and regulations, N. was entitled to attend school in Elizabeth either because she in fact resided in Elizabeth with a relative who provided her with support without remuneration; or because her family was in crisis and under New Jersey law she was entitled to continue her education in the

district while the family worked on resolving the crisis; or because the Board had discretion – which it in fact exercised – to allow her to continue her education once the question of residency arose; (4) the Board failed to present any salient facts beyond the ones gathered by its investigator and reported on March 25, 3015; those facts are amply rebutted by the uncontroverted evidence from the Respondent and her brother who both testified credibly; indeed, their testimony had the "ring of truth"; there is no question that Mr. Jones did in fact reside in Elizabeth at the address noted in the leases; other record evidence, including the prom photograph and limousine receipt corroborate that N. resided with him; further, if the leases are flawed as legal documents, nevertheless, Respondent has not been charged with presented false leases, only with a false statement on the Guardianship form; (5) there is simply no evidence that the Respondent created the Temporary Guardianship form out of a motive to steal tuition dollars or mislead the Board; instead the evidence shows that the Respondent did what she felt was reasonably necessary despite difficult circumstances to provide a stable residence for her daughter with her brother, in the district, while she worked on her marriage; the essential statements in the Guardianship – namely that N. resided with her uncle while attending school – are true; (6) the Board cannot claim theft of services for tuition since Respondent's daughter did qualify for free educational services; further, the Board did not at any time attempt to go through appropriate processes to determine a theft of service; finally the Board could and did exercise its discretion to allow the child to finish her education; it cannot now claim that it was deprived of funds to which it might have been entitled; (7) with respect to the charges that Respondent was excessively absent or tardy, the evidence shows that she was only tardy – and that

by a small amount – on one occasion; with respect to absences, Respondent underwent treatment for cancer during two of the years at issue and suffered an on-the-job injury and even then did not come close to depleted her accumulated sick bank; the final year at issue contained very few absences other than the days on which she was involuntarily reassigned, for which the Board alone retains responsibility; further the Board presented absolutely no evidence that her absences caused any harm to the Board; (8) finally, the Board has not demonstrated any pattern of conduct warranting dismissal; instead it continues to try to make this claim by relying on matters that were the subject of a settled increment withholding action and that have been dismissed from this proceeding. Consequently all charges against Respondent should be dismissed; she should be reinstated to her tenured secretarial position with full back pay, benefits and seniority.

## DISCUSSION

Both parties were represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. All witnesses were sworn. Two of the witnesses testified via telephone, with the consent of all parties. The parties submitted written closing statements with supporting legal authorities to me by January 4, 2016. Neither side has objected to the fairness of this proceeding.

In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. I find that the Board has failed to prove the charges against the Respondent for the reasons set forth below.

## Charge II. Falsifying Child's Residence.

By far the most serious of the charges against Respondent, and they are very serious indeed, are the charges in Charge II, Counts 1 and 2, that Respondent falsely certified to the District "that her daughter resided in the District during the 2014-2015 school year, thereby depriving the District of tuition Respondent otherwise would owe the District for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey." Count I recites the particulars of the false certification narrowly and specifically as the execution of a fraudulent Temporary Guardianship Authorization:

> On or about June 26, 2014, Respondent signed and submitted to the District a form entitled Temporary Guardianship Authorization for Care of Minor ("TGA"), in which Respondent falsely declared that during the period from July 1, 2014 to July 30, 2015, she had placed her child, N.H., a 12th grade student at all times relevant, in the care of a temporary guardian residing within the City of Elizabeth, for purposes of obtaining a free education for N.H. at the Upper Academy High School in Elizabeth, New Jersey, at a tuition cost to the District and its taxpayers of not less than $17,283.00, when in fact both Respondent and her daughter resided during this period at a home located at 22 Colton Road in Edison, New Jersey, and notwithstanding that the TGA form signed by Respondent clearly indicated that execution of same by the declarant was "under penalty of perjury under the laws of the State of New Jersey."

The overwhelming evidence adduced through three days of hearings establishes that Respondent did, indeed, place her daughter in the temporary care of her brother, Robert Jones, a resident of Elizabeth. I found the Respondent and her brother to be credible witnesses. Respondent testified at great length, through direct and a detailed cross-examination, about her personal situation. She was neither defensive nor hostile under the questioning. Instead, she responded calmly and in a forthcoming manner about what had to be a painful subject: the disruption to her life and that of her

youngest child because of her husband's instability after a return to drug use. Respondent was not asked, and did not volunteer, details about the relationship or the couple's financial problems. But what was very clear was that she was in a tumultuous relationship and reached out to friends and family to help her through. She testified to an extended family – her own children from her own first marriage, children from her husband's first marriage, stepmother, and brothers, sisters, aunts, uncles and cousins. She related how she stayed with one or another of those, or placed her daughter in their care, as she went back and forth with her husband to try to save her marriage over at least a two-year period.

Often Respondent stayed with her stepmother. But she also turned to her brother, Robert Jones, for help. Both lived close by one another on Anna Street, in Elizabeth. There is absolutely no doubt that Mr. Jones lived in an apartment at 1116 Anna Street: in addition to the testimony to that effect of Respondent and Mr. Jones, the landlord's agent called as a witness by the Board confirmed that fact.[3]
As to whether the daughter resided with Mr. Jones, we have the uncontroverted testimony of Respondent and Jones. But, in addition, we have the photograph and limousine receipt from the prom, neither of which was fabricated for this hearing. The key photograph (R. 31, pp. 281-3) shows the daughter dressed up for the prom and standing proudly in front of 1116 Anna; the receipt (R. 31, p. 280) shows that she was to be picked up and delivered back to that address.

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[3] The leases introduced as evidence that Mr. Jones rented the apartment are problematic in many ways, including the unexplained appearance of N.'s name on the lease, two different and both incorrect social security numbers, a discrepancy in the rental amount. Yet, Respondent is not charged with presenting fraudulent leases, only a fraudulent guardianship form. The underlying fact of Mr. Jones' residence in the apartment at Anna Street is beyond question.

Against this evidence, the Board had very little to offer. The Board argues that it is improbable that a teenage girl resided with her uncle in a one-bedroom apartment, with him sleeping on a sofa bed and using a screen for privacy. Yet, many families do share apartments, as Respondent's testimony about her stepmother and daughters makes clear. The Board could have, but did not assign its investigator to visit the Anna Street apartment or to put it under surveillance. Instead it relied entirely upon Mr. Pulidore's observation of an address in Edison, New Jersey, where N. was observed on two occasions – not "several" as claimed by the Board in its brief – exiting the home with her mother.

Respondent does not challenge Mr. Pullidore's observations on those two days; she merely explained that they are not determinative of N.'s residence in March 2015. The two days are particularly significant: they are March 25 and 26, the evening before and the first night of her show, "Bring it On" at the Thomas Jefferson Arts Academy in Elizabeth. The program from the show (R. 9) provides independent corroboration of N.'s participation in the show, the dates of the show, and Respondent's active support as a "drama mama." These pieces of evidence support Respondent's testimony that on a few occasions, including March 25 and 26, she had her daughter stay with her in Edison when there were late rehearsals and when Mr. Jones was out of town. The Board countered none of this information: not the prom, nor the drama performance, nor Mr. Jones' claims about his travels out of town in March.

The Board rests its case upon the assumption that the Temporary Guardianship form was fraudulent. But, as shown above, I find that the underlying facts of the

guardianship, namely that Respondent had her daughter living with Mr. Jones in Elizabeth, are true.

Further, I find that that brother and sister, in June of 2014, filled out the Temporary Guardianship Authorization form for the purpose - not of obtaining a free education for the daughter that she was not entitled to – but rather to give Mr. Jones some documentation in case he would need to establish his relationship to the daughter while she was staying with him. The Respondent's testimony about her experience as a member of the military with small children from her first marriage, when she used such forms because she anticipated being deployed overseas and left her children with family members, was entirely credible. The Board offered no evidence to rebut that testimony, so I conclude that Respondent's prior military experience is as she asserted.

It is perhaps understandable that the Board would be suspicious of the guardianship document produced only when Respondent was questioned about her daughter's residence. Further, the document is a casual document, certainly not a formal court order.[4] Yet after a full hearing, with lengthy testimony and the opportunity for cross examination and further investigation, the Board has offered no reason why the Respondent and her brother would have manufactured such a document and backdated it specifically to June of the prior year. The document, like the testimony of Respondent and her brother, had the ring of truth about it. I find that there was no falsification of guardianship.

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[4] I find no particular significance to the "discrepancies" pointed to by the Board between the form's statement that costs of the guardianship shall be paid "monthly" and the testimony that Respondent did not pay Mr. Jones for her daughter's rent and food. The form does not say who will pay such expenses and it is clear that Mr. Jones covered basic expenses for his niece.

The Board refers me to requirements of local and state law regarding establishing domicile for a child: generally the child must be the child of a parent or guardian domiciled in the district. Guardianship, for such purposes is defined in to N.J.A.C. 6A:22-1.2:

> A person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district unless it can be proven that the children does not actually live with the custodian.

Respondent counters by pointing out that both state and local laws and regulations give latitude to a school district to allow a student to attend without payment of tuition, even when the child in fact resides outside the district. The district may look at the totality of circumstances, including family crises, to determine whether a tuition waiver should be granted. (See Board's policy, R. 30, and N.J.A.C. 6A:22-3.4) The Board in this case did exercise its discretion to allow N. to complete the school year and graduate.

In any case, I need not address the issue of whether the Guardianship form is sufficient to establish that Robert Jones was the legal guardian of his niece in March 2015. The only issue before me is whether Respondent falsely declared, under penalty of perjury, that she had placed N. into her brother's guardianship for the purpose of obtaining a free education to which her daughter was not entitled. I find that she made no false declaration. I find that the Guardianship form was executed in good faith in June 2014 for the purpose stated above: namely, giving her brother some authority to act in the child's best interests should a need arise.

It is certainly true that the Respondent failed to report changes in her own and her child's address as required by Board policies and procedures. As a school secretary, she

certainly knew or should have known that she was supposed to report such changes. It is perhaps understandable why an employee, whose personal life is in such turmoil, would not want to share all of the ups and downs of her own and her daughter's residency with the Board. Certainly many employees do fail to report address changes. In any case, Respondent is not charged with failing to report address changes for herself or her child to the Board, only with falsely claiming guardianship in order to receive a free education for her daughter. That I find she did not do. Hence, I dismiss Charge II, Count 1.

As to Charge II, Count 2, the Board charges Respondent with theft by deception by falsely claiming residency for her daughter. For the reasons set forth above, I find no false claim of residence and hence, no theft by deception. Charge II, Count 2 is also dismissed.

**Charge III, Chronic Absenteeism**

In four counts, Counts 15 through 18, covering school years 2011/2012, 2012/2013, 2013/2014, 2014/2015, the Board charges Respondent with excessive absenteeism and tardiness. Respondent does not contest any of the dates at issue, arguing only that none of the evidence shows chronic absenteeism.

Respondent points out that she had only .1 day of tardiness, which is hardly "excessive." As to the absences, they, too, were not excessive, and Respondent never exceeded her allotment of days for sickness, family illness, personal leave, bereavement and the like. In the first two years charged, when she was under treatment for cancer, Respondent did dip into her accumulated sick bank, but even under those circumstances, she did not exceed days to which she was entitled. And, in the final two years that are charged, she actually increased, rather than decreased her bank of unused sick days,

using only 9 and 10 days respectively for sick leave. I agree with Respondent: this is not a record of excessive absenteeism.

In the final school year (Count 18), she is charged with absences when she was assigned involuntarily to sit in a "rubber" room, while these matters were investigated. I find no basis for the Board to charge Respondent with absenteeism for the days when it assigned her to desk duty rather than to her usual place of work. That assignment was done at the Board's discretion and at it's bidding: Respondent cannot be faulted for complying with that assignment.

Finally, the Board had no basis whatever to charge excessive tardiness for one tenth of one day over a four-year period.

All parts of Charge III, Counts 15 through 18, are dismissed.

**Charge IV, Pattern of Conduct of Misbehavior**

In this Charge, the Board incorporates all of Charges II and III. Insofar as Charge IV relies upon the matters pled in Charges II and III, which I have dismissed, this charge too must be dismissed. In addition, the Board refers in its brief to matters that were the subject of a settled increment withholding. In my Order dismissing charges based upon events prior to June 2011, I made clear that no claim could be prosecuted against Respondent now for those same issues. I stand by that decision. There is nothing new in Charge IV. I have found the Board failed to prove any of the charged misbehavior, let alone a pattern of misbehavior over a period of years.
Charge IV is consequently dismissed.

## AWARD

For all of the reasons set forth herein, all of the charges herein are dismissed. Respondent is ordered reinstated, with full back pay, seniority and benefits.

Ruth Moscovitch

Ruth Moscovitch, Arbitrator

Dated: January 15, 2016

## ACKNOWLEDGMENT

STATE OF NEW YORK )
) ss.:
COUNTY OF ~~NEW YORK~~ ORANGE )

On January 15 2016, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

John I. Gaffney

Notary Public
My Commission expires:

JOHN I. GAFFNEY
Notary Public State of New York
No. 4695982
Qualified in Orange County
My Commission Expires May 26, 2019

20-16

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**In the Matter of the Tenure Hearing of Carrie Osborne, State Operated School District of the City of Paterson, Passaic County, Agency Dkt. No. 288-9/15**

**In the Matter of the Tenure Hearing of Thomas Schaefer, State Operated School District of the City of Paterson, Passaic County, Agency Dkt. No. 247-9/15**

**In the Matter of the Tenure Hearing of Ardeena Long, State Operated School District of the City of Paterson, Passaic County, Agency Dkt. No. 262-9/15**

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# INTERIM DECISION ADDRESSING DISTRICT'S IMPLEMENTATION OF STATE DEPARTMENT OF EDUCATION-APPROVED TEACHER PERFORMANCE EVALUATION SYSTEM AND PROCEDURES

**Before**
**Robert C. Gifford, Esq.**
**Arbitrator**

**Appearances:**

**For the School District:**
Brenda C. Liss, Esq.
Teresa L. Moore, Esq.
Amanda L. Lukof, Esq. (Brief only)
Riker Danzig Scherer Hyland & Perretti

**For Respondents Osborne and Schaefer:**
Sanford R. Oxfeld, Esq.
Samuel Wenocur, Esq.
Oxfeld Cohen

**For Respondent Long**
Theodore Kyles, Esq.

The State-Operated School District of the City of Paterson ["District" or "Petitioner"], certified tenure charges of inefficiency separately against Respondents Carrie Osborne, Thomas Schaefer and Ardeena Long pursuant to *N.J.S.A. 18A:6-11* and *N.J.S.A. 18A:6-17.3*. Respondents filed Answers opposing the charges filed against them.

On October 26, 2015, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that the matter pertaining to Respondent Osborne was referred to me pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26* and *P.L. 2015, c. 109*:

> Please be advised that, following receipt of respondent's answer on October 16, 2015, the above-captioned tenure charges have been reviewed pursuant to *N.J.S.A. 18A:6-17.3c*. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to *N.J.S.A. 18A:6-17.2*, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator, including, but not limited to, whether *N.J.S.A. 18A:6-17.2* and *6-17.3* now provide the exclusive mechanism for bringing inefficiency charges. The arbitrator shall review those charges brought pursuant to *N.J.S.A. 18A:6-16* – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

With respect to Respondent Osborne, a settlement conference was conducted on November 5, 2015, at the Law Offices of Oxfeld Cohen in Newark, New Jersey. At that time, the parties brought to my attention that there were global issues common to all of the Respondents' cases that needed to be addressed. The Respondents contend that "the manner in which Paterson Public Schools ("PPS") implemented its teacher evaluation system during the 2014-2015 school year violated New Jersey State evaluation statutes and regulations." [Respondent Brief, p. 1]. More specifically:

> Respondents assert that PPS' actions in implementing Student Growth Objectives ("SGO"), PPS' non-disclosure of key evaluation grading rubric information for its teachers' observations and evaluations, and PPS failure to implement and enforce uniform and objective observation scoring rules all violated State statutes and regulations, thus bringing the integrity of all of PPS's 2014-2015 school year teacher evaluations into doubt. [Id. at 2, footnote omitted].

The parties mutually requested that I conduct a single hearing on the global issues in accordance with the following tentative schedule:

- Respondent will serve witness certification(s) in support of argument of defects in the District-wide implementation of its performance evaluation system and procedures by Monday, November 16th;
- Petitioner will serve witness certification(s) in support of the Paterson Public Schools' District-wide implementation of its performance evaluation system and procedures by Monday, November 23rd;

- A hearing in the Osborne case will occur before Arbitrator Gifford on Wednesday, December 2nd. This hearing will be limited to cross-examination (and rebuttal testimony) of the witnesses;

- The parties will file briefs regarding this issue only, due one week after receipt of expedited transcripts;

- Arbitrator Gifford will issue a decision regarding District-wide implementation of its performance evaluation system and procedures by January 13, 2016.[1] [Ex. J-1, p. 1].

The parties and the Arbitrators who are addressing the charges against Respondents Schaefer and Long agreed to rely upon my interim decision "as to the District-wide implementation of its performance evaluation system and procedures, and for each case to then separately address the remaining issues." [Ex. J-1, p. 2].[2]

The Respondents submitted certifications from Mary Chowhan – Treasurer of Paterson Education Association ["PEA], Executive of PEA Evaluation Committee, and Math Teacher; and Sasha Wolf – NJEA Field Representative. The District submitted a certification from Sandra Diodonet – Acting Associate Chief Academic Officer. The parties timely exchanged their witness certifications. [Exs. R-1 (Chowhan), R-2 (Wolf), SD-1 & SD-2 (Diodonet)]. Then, two (2) days of hearing took place on December 2 and 8, 2015 in Paterson, New

[1] The parties did not object to my request for an additional day to render this decision.
[2] The parties notified Director Duncan of the agreed upon tentative schedule. Director Duncan granted an extension of time for each Arbitrator to issue an Award.

Jersey. A stenographic recording of the proceedings was taken in accordance with the tentative schedule above.[3] Sworn testimony was received Chowhan, Wolf and Diodonet. The parties submitted post-hearing briefs on December 21, 2015. The record was closed upon receipt of the parties' briefs.

## RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or

[3] The transcript for December 2nd and 8th shall be referred to as T1 and T2 respectively. The pages in T1 and numbered 1-101 and 102-374 for T2.

employments under the conditions and with the effect provided by law.

N.J.S.A. 18A:6-17.2. **Considerations for arbitrator in rendering decision.**

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious,

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case.

The arbitrator shall render a written decision within 45 days of the start of the hearing.

N.J.S.A. 18A:6-17.3. **Evaluation process, determination of charges.**

25. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provision of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to

hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board an approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

## FINDINGS

The parties presented proposed findings of fact in their post-hearing briefs. Having reviewed the entire record, I have adopted the proposed findings as modified below.

1. Sandra Diodonet has been employed in the District either as a teacher or an administrator since 2003. (*Diodonet Certification*, Ex. SD-1, ¶2). Diodonet has been the Acting Associate Chief Academic Officer since May 2015. (*Id.* at ¶1). Prior to that, Diodonet serves as a Principal at Public School No. 5 from August 2013 to April 2015, an Interim Principal at Public School No. 5 from December 2012 to July 2013, and a Supervisor/Department Head at International High School from January 2011 to November 2012. (*Id.* at ¶2). Diodonet was the District's sole witness in this proceeding.

2. To comply with the mandates of *TEACHNJ, N.J.S.A. 18A:6-123(c)*, the School District developed, and the State District Superintendent adopted,

a teacher evaluation rubric to be followed beginning in the 2013-2014 school year. (*Id.* at ¶4). The New Jersey Department of Education ("NJDOE") approved the School District's teacher evaluation rubric by letters dated September 7, 2012 and October 4, 2012. (Ex. SD-1(A)). NJDOE notified the District that "[i]f you release a new version [of the Teaching Practice Evaluation Instrument], or if a district employing your instrument makes substantial modifications to the approved version, this information must be submitted through the next review cycle for potential inclusion on the approved list." (*Id.*).

3. In 2013, the District held staff development programming regarding *TEACHNJ* and *AchieveNJ*. (Ex. SD-2, PPS-SD-103). The staff was provided with an opportunity to submit questions to the District. On June 24, 2013, Deputy Superintendent Eileen Shafer provided staff members with a copy of the questions and answers. (Ex. SD-2, PPS-SD-104-152). The District later provided another opportunity for questions. The answers were provided in a September update. ((Ex. SD-2, PPS-SD-104-153-157).

4. Pursuant to the District's teacher evaluation system, teachers are evaluated on either two or three components: Teacher Practice, Student Growth Objectives ("SGO" or "SGOs"), and Student Growth Percentage ("SGP"). (*Wolf Certification*, Ex. R-2, ¶ 13). For most teachers, the Teacher Practice Score ("TPS") and the SGO are the two components used to determine the summative rating. (T2:305; Ex. SD-2, 2014-2015 Guidebook,

PPS-SD-256). Teachers assigned to teach in non-tested areas (subjects other than grades 4-8 math and English Language Arts) receive annual summative evaluation ratings comprised of two parts: (i) a teacher practice score based on their performance on the evaluation instrument; and (ii) an SGO score based on the academic growth shown by their students over the course of the school year. (Ex. SD-1, ¶10).

5. Teacher Practice Scores are calculated by measuring teaching performance according to seven standards: (1) Preparation for Instruction, (2) Use of Data to Inform Instruction, (3) Delivers Quality Instruction, (4) Interventions to Meet Diverse Needs, (5) Classroom Environment, (6) Leadership and (7) Professionalism. (Ex. SD-1, ¶11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-11; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-257.) Each standard is comprised of several indicators:

Standard 1: Preparation for Instruction

- Indicator 1a. Establish a culture of high expectations for learning and achievement.
- Indicator 1b. Use district-adopted curriculum and content knowledge to design coherent lessons.
- Indicator 1c. Post aligned lesson objectives and plan for demonstrations of learning.

Standard 2: Use of Data to Inform Instruction

- Indicator 2a. Focus on improving instruction using data.
- Indicator 2b. Use a variety of assessment methods when designing classroom assessments.
- Indicator 2c. Involve students in assessing their own learning.

Standard 3: Delivers Quality Instruction

- Indicator 3a. Instruct bell to bell.
- Indicator 3b. Use a variety of instructional strategies to focus instruction.
- Indicator 3c. Engages students in learning.
- Indicator 3d. Continually checks for understanding.
- Indicator 3e. Deliver rigorous and relevant content.
- Indicator 3f. Integrate 21st Century Skills in instruction.
- Indicator 3g. Provides feedback about student proficiency.

Standard 4: Interventions to Meet Diverse Needs

- Indicator 4a. Differentiate instruction based on student needs and background.
- Indicator 4b. Implements interventions with fidelity and adjusts interventions based on results.
- Indicator 4c. Adapt and modify instruction for the unique needs of learners.

Standard 5: Classroom Environment

- Indicator 5a. Contribute to a safe and orderly learning environment.
- Indicator 5b. Use effective classroom management procedures.
- Indicator 5c. Effectively manage student behavior.
- Indicator 5d. Foster collaboration and self-regulation in students.
- Indicator 5e. Promote positive and respectful rapport.

Standard 6: Leadership

- Indicator 6a. Understand their role and responsibility in implementing the District and/or Building Action Plan.
- Indicator 6b. Promote the concept of Professional Learning Communities/ Professional Forums through collaboration and purposeful involvement.
- Indicator 6c. Continue professional growth.

Standard 7: Professionalism

- Indicator 7a. Adhere to federal laws, state statutes and regulations pertaining to education, Board of Education (BOE) policies, and school rules.
- Indicator 7b. Demonstrate professionalism.

- Indicator 7c. Effectively communicates and solves problems.

(Ex. SD-1, ¶11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-10 through 38; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-168, 257).

6. For each sub-indicator, there are three (3) sub-indicators. (Ex. SD-2, 2013-2014 Guidebook, PPS-SD-10 through 38; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-196 through 222).

7. In order to evaluate teacher performance observed in classroom observations, the administrators (*i.e.* principal) assigned ratings for each of the indicators being measured in that observation. (Ex. SD-1, ¶12; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-64). The ratings ranged from "exemplary" (or highly effective) to "unsatisfactory" (or ineffective). Evaluation categories were as follows:

Unsatisfactory (Ineffective, 1 point)
Progressing I (Partially Effective, 2 points)
Progressing II (Partially Effective, 3 points)
Proficient I (Effective, 4 points)
Proficient II (Effective, 5 points)
Proficient III (Highly Effective, 6 points)
Exemplary (Highly Effective, 7 points)

(Ex. SD-1, ¶12; Ex. SD-1(H), p. 11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-64 & 66).

8. The numerical ratings for the seven performance standards (based on the rating of each component indicator) were then weighted with one to three, based on the following weights:

Standard 1: Preparation for Instruction (2)
Standard 2: Use of Data to Inform Instruction (2)
Standard 3: Delivers Quality Instruction (3)
Standard 4: Interventions to Meet Diverse Needs (3)
Standard 5: Classroom Environment (2)
Standard 6: Leadership (1)
Standard 7: Professionalism (1)

(Ex. SD-1, ¶13; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-51 & 52; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-167.) Performance Standard 6 (Leadership) was initially weighted once, but later changed to a weight of two (2) in the Spring of 2014:

Standard 1: Preparation for Instruction (2)
Standard 2: Use of Data to Inform Instruction (2)
Standard 3: Delivers Quality Instruction (3)
Standard 4: Interventions to Meet Diverse Needs (3)
Standard 5: Classroom Environment (2)
Standard 6: Leadership (2)
Standard 7: Professionalism (1)

(Ex. SD-1 ¶13; T2:321; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-255 through 257).

9. Diodonet testified that in order to calculate the annual Teacher Practice Score, the teacher's ratings in each observation were averaged, and the total point values in each of the seven standards were weighted as outlined above. (Ex. SD-1, ¶14; Ex. SD-1(H)). That final sum was then applied to the following chart:

| PPS Weighted Sum Intervals | Score |
|---|---|
| 14-27 | 1 |
| 28-55 | 2 |
| 56-83 | 3 |
| 84-105 | 4 |

(Ex. SD-1, ¶¶ 14 & 23.)

The same point values and weights were applied to calculate the summative ratings in the 2013-2014 and 2014-2015 school years. (*Id.* at ¶¶ 26 & 27). As more fully discussed below, the Respondents claim that they were not fully informed that the point values and weights would not change for 2014-2015.

10. In the Spring of 2014, teachers were given a PowerPoint presentation concerning the implementation of the teacher observation and evaluation system, specifically with respect to the weighting of the teacher practice standards. (Ex. SD-1(H)). The presentation explained how each of the seven (7) standards were weighed, the scoring of the summative rating, and when a particular standard was rated in more than one observation that the scores for the standard were added and averaged. (Ex. SD-1(H), p. 11).

11. In addition to evaluating their practice, teachers are evaluated on the extent to which they meet their SGOs each school year. *N.J.A.C.* 6A:10-1.2 defines "Student growth objective" as "an academic goal that teachers and evaluators set for groups of students." "SGOs are long-term academic goals for groups of students set by teachers in consultation with their supervisors." (*See* http://www.nj.gov/education/AchieveNJ/teacher/objectives.shtml). SGOs are required to be set by each teacher in collaboration with the

principal or supervisor, with the principal having the authority to make the final determination. (*N.J.A.C.* 6A:10-4(e)3; Ex. SD-1, ¶17; T2:219-220, 267-268.) The teacher determines annual academic goals for a class or group of students and tracks the academic progress of that class or group towards the assigned goals during the school year. (Ex. SD-1, ¶17.) These goals are aligned with Common Core Standards, Core Curriculum Content Standards and school goals, and are based on student learning data from pre-assessments and post-assessments. (*Id.*). Student progress on an identified SGO is determined by an assessment of the increase in learning between two points in time, as indicated by: (i) acquisition of knowledge or skill from a particular starting point or readiness level; or (ii) development of a portfolio indicating a change in skill or knowledge over a period of time; and (iii) difference in learning on pre-assessments and post-assessments. (*Id.* at ¶18). Additional information concerning SGOs can be found on the New Jersey Department of Education's website in the AchieveNJ Home section.

12. On October 1, 2013, Assistant Superintendents Maria Santa and Aubrey Johnson issued a memorandum to all principals regarding the SGO Professional Development scheduled for October 4, 2013. (Ex. SD-1(J)). The memorandum included an agenda for the October 4th meeting. Attached thereto were comprehensive materials related to the SGO PowerPoint presentation including, but not limited to, an SGO planning

calendar, information addressing SGO specific best practices, SGO samples, and other SGO information from the New Jersey Department of Education. (*Id.*) The memorandum indicated that the purpose of the half day of development was "for teachers to actually write SGOs". (*Id.*)

13. The Annual Summary Conference Form is the document that reports a teacher's annual summative evaluation rating. The form includes both the Teacher Practice Score and SGO score. In the 2013-2014 school year, teacher practice scores counted for 85% of a teacher's overall rating and SGO scores counted for the remaining 15%. In the 2014-2015 school year, teacher practice scores counted for 80% of a teacher's overall rating and SGO scores counted for the remaining 20%.

14. On the 2013-2014 Annual Summary Conference Form, the Teacher Practice Score and the SGO are listed in their raw data form, and the form indicates the weight given to each piece of data in the calculation of the final rating: 85% for the Teacher Practice Score, and 15% for the SGO. (Ex. SD-1, ¶21). Those scores were then weighted and the annual summative score determined. (*Id.*). The form also includes a summative rating scale in order to show teachers how this numerical summative rating ranks them as highly effective, effective, partially effective or ineffective. (*Id.*).

15. The data to establish the Teacher Practice Score is summarized in the Teacher Practice Summary Report that accompanies the Annual Summary Conference Form, which shows the teacher's average scores in

each of the seven performance standards from observations throughout the year. (Ex. SD-1, ¶22). This report also shows the weight given to each performance standard and includes a weighted sum interval chart. (*See* SD-2, PPS-SD-256).

16. In the 2014-2015 school year, the District continued to use the evaluation rubric that had been approved previously by the Commissioner of Education. (Ex. SD-1, ¶26). The framework for evaluation was outlined again for teachers in the 2014-2015 Guidebook. (*Id.*; Ex. SD-2, 2014-2015 Guidebook). Diodonet indicated that the point values assigned to each indicator were the same as those that had been used in the 2013-2014 school year, as the 2013-2014 Guidebook had set forth. (Ex. SD-1, ¶27). The same calculation method was used in both 2013-2014 and 2014-2015. (Ex. SD-1, ¶15; T2:321).

17. As in the 2013-2014 school year, the 2014-2015 Annual Summary Conference Form contained a Teacher Practice Score and SGO score. (Ex. SD-1, ¶29). Also as in the 2013-2014 school year, the Teacher Practice score was determined based on the ratings assigned for each performance indicator in classroom observations throughout the school year, and the weights assigned to each performance standard, while the SGO score was determined based on the calculations in the teacher's SGO goal-setting process. (*Id.*). On the 2014-2015 Annual Summary Conference Form, the Teacher Practice Score and SGO were listed as

*weighted* data, rather than in their raw data form as in 2013-2014. (*Id.* at ¶30). The form also indicated the 80% weight given to teaching performance and 20% to student growth in the calculation of the final rating. (*Id.*). The weighted Teacher Practice and the SGO scores were added together to determine the summative evaluation score. (*Id.*).

18. In addition to formal classroom observations that were rated, the rubric requires administrators to observe teacher performance informally by doing informal "walkthroughs". (*Id.* at ¶34). A walkthrough identifies and informs teacher practice in the areas of classroom environment, instruction and student engagement. (*Id.*). Trained administrators debrief with the teacher and provide feedback and recommendations to improve teaching and learning. (*Id.*; SD-2, 2013-2014 Guidebook, PPS-SD-44-47). A walkthrough is a non-evaluative classroom visit of no more than ten (10) minutes. (Ex. SD-1, ¶34; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-183).

19. Diodonet testified that toward the end of the 2013-2014 school year, principals, supervisors and teachers in the Paterson Public Schools were directed to begin drafting Corrective Action Plans ("CAPs") for those teachers who did not earn a summative rating of "effective" or "highly effective." (Ex. SD-1, ¶25). A CAP requires "[t]he teaching staff member to work with their supervisor to create a plan of professional development that is designed to correct the needs identified in their evaluation. The

CAP includes timelines for corrective action, and clearly delineates responsibilities of the teaching staff member versus the district in implementing the plan." http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuide.pdf. CAPs were to be drafted by principals in collaboration with teachers and supervisors, meaning that the teachers were to be provided with an opportunity to provide input into the content of their individual CAPs. (Ex. SD-1, ¶25).

20. Diodonet indicated that the 2014-2015 Guidebook originally required that eight walkthroughs be conducted each year for teachers on a CAP, an expectation which was reduced later in the 2014-2015 school year. (Ex. SD-1, ¶35; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-183).

21. Diodonet testified, as reflected by the guidebooks, training and guidance with respect to implementation of the new evaluation system was initially provided to teaching staff members, including school administrators and teachers, in the 2012-2013 school year and continued during the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶¶5, 8, 28). As a reference, the District produced manuals describing each aspect of the evaluation framework, which were distributed to all teaching staff in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶9; Ex. SD-2, 2013-2014 Guidebook and 2014-2015 Guidebook). The District also distributed "District Updates"

to further inform teachers on the new evaluation system. (Ex. SD-1, ¶7; Ex. SD-1(D); SD-2, 2013-2014 Guidebook, PPS-SD-87-100).

22. Teachers received training from the District's Office of Accountability during the 2012-2013 school year. (Ex. SD-1, ¶6; Ex. SD-1(B) & (C). In the training conducted in May and June 2013, teachers were informed that the new framework would be the basis on which their performance would be evaluated beginning in the 2013-2014 school year. (Ex. SD-1(B) & (C)). During these sessions, teachers were informed that at the end of the 2013-2014 school year, and in following years, each teacher would receive an annual summative rating of "highly effective," "effective," "partially effective," or "ineffective" based on a points rating system; and that if any teacher earned a summative rating of "ineffective" or "partially effective" in both the 2013-2014 and 2014-2015 school years, the District would be required to file a tenure charge of inefficiency after the 2014-2015 school year. (*Id.*).

23. Diodonet testified that additional training sessions were conducted over several days in preparation for rollout of the system in the 2013-2014 school year. (Ex. SD-1, ¶5). At multiple training sessions, principals were instructed on how to train teachers on the purpose and implementation of the new evaluation framework. (*Id.*; T2:243-245). Principals were directed to train their teachers on the evaluation system. (*Id.* at ¶6; T2:243-245). Training was also conducted throughout the 2013-2014

school year for teachers and school administrators. (Ex. SD-1, ¶8; Ex. SD-1 (E), (F), (G), (H) & (I)).

24. The point values and the weights given to the performance standards were communicated to teachers in the 2012-2013 school year, prior to implementation of the evaluation system, and again in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶¶15, 27; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-51-52 and 2014-2015 Guidebook, PPS-SD-167).

25. As to training on SGOs in particular, information about SGOs was delivered to all District principals on October 1, 2013. On October 4, 2013, a half day was devoted to district-wide professional development for the purpose of teachers drafting their SGOs with principals and supervisors. (Ex. SD-1, ¶19; Ex. SD-1(J)). The materials used on that training day are attached to Diodonet's Certification, Ex. SD-1(F). (T2:315-316). Additionally, information about SGOs was distributed to teachers in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶16; SD-2, 2013-2014 Guidebook, PPS-SD-70 through 85, 2014-2015 Guidebook, PPS-SD-171 through 175).

26. The calculation of the Teacher Practice Score was explained in a March 2014 training provided by the District, which included PowerPoint slides with an audio explanation. (Ex. SD-1(H), Slides 10, 11 and 12; T2:326-327). In the 2014-2015 school year, principals and central office administrators continued to train teachers on the evaluation framework. (Ex. SD-1, ¶28;

Ex. SD-1(K), (L) & (M)). Diodonet testified that the District had also provided training to principals and that principals trained their teachers in March 2014 on the evaluation framework. (T2:326).

27. With respect to the Teacher Practice Score, the Respondents contend that there were problems with how the District's observers (*i.e.* principals) differentiated between the different scores for the seven (7) standards and the sub-categories (indicators) within each standard for 2014-2015.

28. Mary Chowhan is a Math Teacher at the School of Business, Technology, Marketing & Finance at John F. Kennedy High School. She is also the Treasurer of Paterson Education Association ["PEA], and was the Executive of PEA Evaluation Committee in 2014-2015. Chowhan testified that teachers were unable to determine Standard scores either for a given observation or for the full year for purposes of calculating their TPS. (T1:78-79). During the 2013-2014 school year, when the District provided its teachers and the PEA with written explanations of how the District would calculate the TPS for annual summative evaluations. (Ex. R-2, ¶15). For instance, the 2013-2014 guide included a chart for calculating the raw scores for each of the seven Standards considered for the TPS. (Ex. SD-2, PPS-SD-64). Chowhan testified that for 2013-2014 she was able to calculate the total summative rating based upon the information contained in the Summary Report and the Annual Summary Conference Form. (T1:38-39; *See* Ex. SD-2, PPS-SD-256-257). In comparison, however,

Chowhan explained that during the 2014-2015 school year, teachers received scores for the sub-categories during observations, but not an overall score for the Standard. (T1:16). Chowhan testified that the teachers were never told how the scores were added together for an observation standard score or how the standard scores were added together to determine the TPS. (T1:97-98). Chowhan asked her department chair to explain the ratings process who informed her that the ratings were compiled on a software system called McREL. (T1:67-68; 94). Diodonet testified that as a principal she did not personally perform the calculations because that was done by McREL, a system that was later replaced by Media-X. (T2:297, 301).

29. The Respondents claim that during the 2014-2015 school year, the District also failed to provide any training or information for calculating an overall Standard score for an observation. As a result, teachers did not know how the District's observers differentiated between the different scores for sub-categories and Standards. Teachers were also unable to determine Standard scores either for a given observation or for the full year for purposes of calculating their TPS. (T1:78-79).

30. Chowhan testified that the lack of information regarding the Standard scores became problematic as teachers and the PEA were unable to check the accuracy of the observation reports, which varied significantly in their calculations. (T1:59-60). Although teachers received observation

reports, they could not know their standing for the school year. The observation reports did not include whether the teachers were on track for effective ratings in their eventual annual summative evaluation. (Ex. R-1, ¶6). Further, for the Standards that were observed more than once during the school year, the District failed to explain to the PEA or its members how multiple observation scores for a particular Standard were considered together in the District determining a final Standard score for the year. (T1:64-65).

31. Chowhan testified that PEA members reached out to her during the 2014-2015 school year to raise their concerns with the District's teacher evaluation system, including regarding the scoring rubric for the teachers' annual summative evaluations. (Ex. R-1, ¶ 5). Chowhan shared in the teachers' concerns. Chowhan testified that she asked her department chair for an explanation, but was told that the calculations were done by the computer associated with the McRel evaluation system, without elaboration. (T1:66-67).

32. Sasha Wolf is a Field Representative for the NJEA. Wolf testified that the PEA approached him with respect to its concerns with the scoring rubric and Standard scores. (Ex. R-2, ¶ 12). On November 11, 2014, Wolf emailed Superintendent Evans to address the scoring guide rubric. (Ex. R-2(C)). On November 24, 2014, Acting Chief Human Resources Officer Marnie McKoy responded to Wolf. McKoy wrote that there had been

training during the 2013-2014 school year and that the District's principals would provide additional training the following January. (Ex. R-2(D)). Wolf was not aware of any such training taking place in or after January 2015. (Ex. R-2, ¶ 17; T2:148:6-12).

33. Chowhan developed her own charts in an effort to help the members understand the significance of the observation reports. (Ex. R-1, ¶ 7). Chowhan testified that her calculations were only approximations and did not always match up with the averages established by the District. (T1:69). The PEA ran CAP training seminars, some of which were conducted by Wolf, in which the PEA addressed member concerns about their evaluations. (T1:24; T2:158-159). Wolf testified that during the seminars members described not knowing how their 2014-2015 observation scores would be tallied for the purposes of determining their TPS. (T2:158-159). Chowhan testified that teachers also independently asked their principals for information about their standing for the year, but were not provided the information to be able to calculate their Standard scores or TPS. (T1:25).

34. Wolf testified that there was no indication that the March 2014 teacher training (which occurred during the 2013-2014 school year) was applicable to the 2014-2015 evaluations. (T2:224). Wolf indicated that the materials provided at the training were apparently not even up to date as of the end of the 2013-2014 school year. (Ex. R-1(H); T2:329-330). Wolf

testified that other training materials previously provided to District teachers included significantly important errors, such as a supposedly false depiction of the evaluation instrument summary and inaccurate calculations of sample summative evaluation scores. (Ex. SD-2, PPS-SD-64; Ex. SD-2, PPS-SD-256; T2:278-279, 294).

35. The Respondents claim that the District never told its teachers that the scoring rubric and evaluation procedures would remain the same for the 2014-2015 school year. To the contrary, as Chowhan testified, the District during the 2013-2014 school year informed its teachers that they would be made aware of the changes when they returned to school in September 2014, but the District never made follow-up comments as to the changes taking effect for the 2014-2105 school year. (T1:85-86).

36. The Respondents point out that the Diodonet has only been the Acting Associate Chief Academic Officer since May 2015. Prior to that, she did not previously hold any District-wide position. She, therefore, was not responsible for disseminating information to other schools or ensuring that principals complied with State evaluation requirements. (T2:217-218; 238-239). The Respondents indicate that out of all of the documents attached to her certification, Diodonet's input was limited to one page of the 2014-2015 evaluation manual and the May 2015 presentation to District principals. (T2:231-232; 236-237). For these reasons the Respondents submit that Diodonet could not comment as to how other schools trained

their teachers on the evaluation framework for the 2014-2015 school year. (T2:243-244).

37. Chowhan testified that the District never gave the PEA information for distinguishing between a Proficient 1 or a Proficient 2 performance (both of which fall within Proficient) in a sub-category. (T1:16). Diodonet acknowledged that a decision between a Proficient 1 or Proficient 2 or other scores was left to the principal's discretion. (T2:277).

38. Chowhan testified that during the 2014-2015 school year she asked multiple District evaluators and administrators to explain how they determined teacher observation scores. These individuals included, but not limited to Pamela Powell (Principal at BTMF), Jorge Osoria (BTMF Vice Principal) and Judy Rhodes (Chowhan's supervisor). (T1:29-30). Chowhan testified that the administrators gave inconsistent answers. For instance, one person told Chowhan that a Standard was determined by taking an average of the relevant observation scores, while another based a Standard score on whichever rating had the most check marks. (T1:30-31).

39. Chowhan also testified that one (1) District official admitted to artificially lowering observation scores in multiple respects because he did not believe in giving out 7's (on a 1-7 scale) in observations because everyone always had room to grow. (Ex. R-1, ¶ 13). Chowhan also indicated that administrators at District schools #7 and #28 admitted to

their teachers that they gave lower scores during the first observation of the year because they felt the need to have an opportunity for a teacher to show growth during the course of the year. (*Id.* at ¶ 14).

40. With respect to the Student Growth Objectives, Wolf testified that during the Spring and Summer of 2014 he received complaints from leadership members of the Paterson Education Association that some of the District's supervisors and/or administrators were unilaterally dictating the content of SGOs on teachers for the 2014-2015 school year. (Ex. R-2, ¶17; T2:109, 114-115). The schools where each of the Respondents taught were not identified as participating in this alleged practice. (T2:132).

41. The District concedes that if, in fact, any administrator had unilaterally decided on a teacher's SGOs, doing so would have been contrary to the District's evaluation system that requires a collaborative SGO-setting process. (Ex. SD-1, ¶17; Ex. SD-1(F) & (J); T2:317). Diodonet testified that developing an SGO is a complicated process that depends on incorporating student academic achievement data that teachers have, not administrators. (T2:219-220; 270). Diodonet indicated that it would have been impractical for any principal to "impose" an SGO on a teacher, because the principal does not have the student achievement data necessary to develop an SGO. (T2:270, 314-315).

42. On August 21, 2014, Wolf emailed District Superintendent Donnie Evans regarding the PEA's concern that the District was unilaterally

implementing SGOs. (Ex. R-2(A)). Wolf requested a meeting with Evans for the purposes of discussing the SGOs. (Ex. R-2(A)).

43. On September 12, 2014, Wolf and other PEA representatives met with District representatives - Assistant Superintendent Susie Peron, District Director Lauren Kazmark, Deputy Superintendent Eileen Shafer, and District General Counsel Lisa Pollack. (T2:177-178). Wolf indicated that two members of the New Jersey State Department of Education were also in attendance. (Ex. R-2, ¶9). Wolf testified that during this meeting Peron and Kazmark both admitted to the District's unilateral development of the SGOs for the 2014-2015 school year. (T2:119). According to Wolf, Kazmark remarked that the District would try to work on a different method for developing SGOs and Peron indicated that there had not been solicitation of staff member input. (T2:120-121). Wolf testified that neither Shafer nor Pollack denied the accuracy of Kazmark and Peron's statements. (T2:178). Diodonet was not present at the meeting and has never talked to Peron or Kazmark about the statements they made during the meeting. (T2:255; 334-335).

44. Diodonet testified that Peron and Kazmark were central office administrators whose job responsibilities were to develop and provide assessments to teachers for use with their students; those assessments were approved for use in obtaining data to be used to set SGOs. (T2:310-311). According to Diodonet, those administrators likely provided the

assessments for teachers to use in order to obtain the data needed to develop SGOs, rather than determining the SGOs themselves. (T2:311).

45. On September 24, 2014, Wolf followed up on the meeting with an email to Peron. (Ex. R-2(B)). Wolf testified that despite this communication the District never informed him of any changes to its SGO implementation. (T2:179). Wolf testified that if such changes had been made that he would have heard about it from the PEA because the SGOs represented an existential threat to the PEA members. (T2:179-180).

46. The Respondents submit that the District's "neglect in its obligation to inform the PEA of the calculation methods for the scoring rubric not only violated Article 14 of the collectively negotiated agreement between PPS and PEA, it also violated PPS' Board policy and PEA's right to challenge increment withholdings." (Respondents' Brief, p. 9; T2:138-139). The Respondents note that "[t]he PEA filed a grievance against [the District] because of [its] failure to provide information for the scoring rubric." (Respondents' Brief, p. 10; Ex. R-1, ¶8). The PEA then filed a Petition of Appeal against PPS on the issue with the State Commissioner of Education. (Respondents' Brief, p. 10; Ex. R-2(E)).

The parties presented the following legal arguments and conclusions of law in support of their respective positions.

## The Respondents' Position[4]

The following legal arguments have been presented in the Respondents' post-hearing brief:

> **PATERSON PUBLIC SCHOOLS ACTIONS ON A SCHOOL DISTRICT WIDE SCALE VIOLATED STATUTORY AND REGULATORY REQUIREMENTS FOR NEW JERSEY TEACHER EVALUATIONS**
>
> A. Paterson Public Schools' Legal Obligations for Teacher Obligations
>
> Under the Teacher Effectiveness and Accountability for Children of New Jersey Act ("TEACHNJ"), an arbitrator rendering a decision for inefficiency based tenure charges can consider whether:
>
> 1) The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> 2) There is a mistake of fact in the evaluation;
>
> 3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> 4) The district's actions were arbitrary and capricious.

[4] Footnotes 5-7 herein are actually numbered 11-13 in the Respondents' Brief.

N.J.S.A. 18A:6-17.2(a). The issues identified in N.J.S.A. 18A:6-17.2(a)(1) are meant to ensure that a school district drafted and complied with a State-approved teacher evaluation system in the observations and evaluations of its teachers during a school year. An arbitrator may consider evidence that a teacher's annual summative evaluation score is an inaccurate depiction of his or her performance during a school year if the underlying reason for the divergence falls under one of the enumerated subsections.

TEACHNJ and State regulations identify numerous requirements for a school district to follow to ensure a reliable and fair system in that school district's evaluation of its teachers. For instance, school districts are required to annually submit to the Commissioner of Education the evaluation rubric it intends to use for teacher evaluations in the subsequent school year. N.J.S.A. 18A:6-122. The evaluation rubrics are due to the Commissioner by June 1st, with the State's approval by the following August 1st. N.J.A.C. 6A:10-2.1. The evaluation rubrics include a description of "scoring guide," which is defined by the state as:

> "Scoring guide" means a set of rules or criteria used to evaluate a performance, product or project. **The purpose of a scoring guide is to provide a transparent and reliable evaluation process.** Educator practice instruments include a scoring guide that an evaluator uses to structure his or her assessments and ratings of professional practice.

N.J.A.C. 6A:10-1.2 (Emphasis added). A school district is also obligated to ensure that the data it uses for the evaluations is collected and stored in an accessible and usable format. N.J.A.C. 6A:10-2.2(a)(6).[5]

School districts must comply with additional State statutes and regulations concerning administering teacher evaluations. Some of the statutes and regulations concern the creation, measuring and evaluating of SGOs. SGOs are expected to be specifically tailored to an individual teacher,

[5] Respondents acknowledge that as a State-Operated School District, PPS' Board of Education do not have the same authority or responsibility as other boards of education. However, the management of the Board of Education would not affect the ability or obligation to ensure that data is safely stored and accessible in a usable format.

rather than broad, generally applicable plans. N.J.A.C. 6A:10-4.2(a)(2). To ensure that the SGO's are properly developed to comply with State obligations:

> 3. Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each student growth objective. If the teacher does not agree with the student growth objectives, the principal shall make the final determination.

N.J.A.C. 6A:10-4.2(e). A School district must also provide its teachers with ongoing professional development, including additional professional development for any teacher who is struggling to meet performance standards. N.J.S.A. 18A:6-128.

TEACHNJ also addresses the relationship between a School District and any representative labor union. Under TEACHNJ school districts and labor unions can negotiate over teacher evaluations. In fact, unless a subject is superseded by State statute or regulation, all aspects of teacher evaluations are mandatorily negotiable. N.J.S.A. 18A:6-126.

B. Paterson Public Schools' Implementation of the 2014-2015 Student Growth Objectives violated State Requirements and the Purpose of Student Growth Objectives.

Prior to and during the 2014-2015 school year, PPS wholly ignored the State's laws addressing the formation of SGOs. Rather than pursuing a collaborative process which would have buttressed the reliability of this element of the annual summative evaluations, PPS opted to take short cuts in the creation of the SGOs, compromising the integrity of its teachers' SGOs and the regulatory scheme in the process.

Under N.J.A.C. 6A:10-4.2(e), PPS needed to first allow its teachers to develop their SGOs for the 2014-2015 school year. A teacher must be provided the first opportunity to draft his or her SGO. Only if a PPS teacher and his or her supervisor were in disagreement with the content of the SGO was a PPS administrator permitted to make a final determination as to the content of the SGO. Although PPS had latitude in what ultimately went into the SGO, the State still required PPS to

undertake a collaborative process with its teachers in creating the documents.

PPS' admissions during the September 12, 2014 meeting that it unilaterally imposed SGOs to its teachers at the majority of the PPS schools must be treated as a confession of PPS' violation of N.J.A.C. 6A:10-4.2(e). The uncontroverted testimony establishes that Peron and Kazmark, both high ranking PPS officials, admitted that PPS unilaterally developed SGOs for the 2014-2015 school year. Peron and Kazmark declared that PPS had failed to solicit staff members and that PPS would work on changing the method for SGOs. Neither PPS' deputy superintendent nor general counsel denied or otherwise tried to backtrack from Peron and Kazmark's remarks. Notwithstanding PPS' admission at the September 12, 2014 meeting, it did not rectify the problem during the 2014-2015 school year. The only reasonable conclusion is that the improper SGOs were largely or entirely left intact for the duration of 2014-2015 school year.

PPS' violation of N.J.A.C. 6A:10-4.2(e) undermined the SGOs' purpose of trying to correctly measure a teacher's impact on his or her students' improvement during the course of a school year. PPS' and Respondents' witnesses agreed at the hearings that a teacher is in the best position to draft an SGO. Only the teacher can best determine student placement and address other factors within the class which would affect an SGO.

Diodonet admitted that principals setting the requirements for an SGO (which PPS admitted to doing during the September 2014 meeting) would be unwise. Absent significant prior interaction with a class prior to drafting an SGO, it would be nearly impossible for a principal or other administrator to tailor SGOs as directed N.J.A.C. 6A:10-4.2(a)(2) to adequately reflect a classroom's teaching environment. Absent teachers' significant involvement from the beginning of an SGO's formation, SGOs would be imprecise and inaccurate depictions of teaching performance, thus losing all utility for teacher evaluations. Accordingly, it must be found that PPS' actions in the creation of the 2014-2015 SGOs violated State rules and regulations and otherwise compromised the purpose of the teacher evaluation system.

C. Paterson Public Schools' Failure to Disclosure Scoring Rubric Information Violated State Statutes and Regulations.

In addition to the problems with the SGOs during the 2014-2015 school year, PPS' handling of teacher observation scores also violated TEACHNJ. By failing to share the information needed to determine the teachers' Standard scores for the annual summative evaluations, PPS prevented its teachers from being able to determine during the school year whether they were meeting their goals and performing at an effective level. This impediment was exponentially more troublesome for teachers under a CAP in the 2014-2015 school year, as it left those teachers in doubt for the entire year as to whether they were at risk for the filing of tenure charges.

The evidence established that PPS, even after a grievance and the PEA's filing of a Petition of Appeal on the issue, failed to provide its teachers or the PEA the grading rubric information required under TEACHNJ. Chowhan and Wolf's certifications and testimony demonstrated that hundreds of PPS teachers across most if not all of PPS' schools had the same issues about calculating their teaching performance. Without fail, all of the teachers told Chowhan and Wolf that PPS had not given them enough information to determine their projected TPS and annual summative evaluation scores. Despite the PEA and its teachers' best efforts, they could not independently ascertain the missing information for the Standards and annual summative evaluation scores, it was unfeasible to make accurate calculations without PPS' cooperation. In fact, the PPS teachers and PEA's efforts served to highlight the PPS administrators' lack of knowledge about how the scores were tabulated and the administrators' inability to find the Standard scores used for the Standard Summary Report.

The PEA's communications with PPS confirms PPS' neglect in the sharing of scoring rubric information. Wolf's emails to Superintendent Evans put PPS on notice of the issue. McKoy's response that PPS would rectify the issue with additional training in January 2015 was an admission that PPS had not met its obligations as of November 2014. PPS' lack of

the promised training meant that it also failed thereafter to meet these obligations.

Although PPS provided some training to its teachers in September 2014, there is no evidence that PPS ever addressed the issue of calculating Standard scores either within an observation report or for the annual summative evaluation. The March 2014 training asserted by PPS could not and did not serve as training for the 2014-2015 evaluations. Diodonet testified that the March 2014 training session was intended for the 2013-2014 school year. It would have been impossible for PPS to have known its 2014-2015 evaluation procedures as of that date. Its evaluation plans were not due to the Commissioner of Education for nearly another three months, with approval likely occurring on or around August 1, 2015. N.J.S.A. 18A:6-122; N.J.A.C. 6A:10-2.1. It is obvious that neither prior to nor during the 2014-2015 school year did PPS provide its teachers or the PEA information on how to calculate Standard scores, a central component of the teachers' evaluation grading rubric.

The one documented instance of PPS training of teachers on the 2014-2015 scoring rubric generally also did not comply with N.J.S.A. 18A:6-128's requirement to provide ongoing professional development. One training seminar for teachers in September 2014 cannot qualify as ongoing professional development. Media-X did not cure any defects or provide additional training as Diodonet admitted that the only information Media-X provided relevant to the annual summative evaluations was the information provided in the observation reports.[6] As the observation reports did not include the missing Standard scores, Media-X[7] did not ameliorate this issue.

Because of the deficiencies in PPS' training and materials, its teachers faced insurmountable hurdles in their efforts to independently calculate their teaching performance during the 2014-2015 school year. First, the

[6] The other information allegedly provided on Media-X (classroom visitations, walk throughs and prior annual summative evaluations) did not go into the calculations for a TPS or annual summative evaluation. (T336:17-T337:6).

[7] Even assuming for the purposes of this brief that Media-X was running and operational for PPS teachers throughout the 2014-2015 school year, which Respondents deny

2013-2014 observation reports differed from the 2014-2015 reports because the 2014-2015 reports only included scores for a Standard's sub-categories, with no Standard scores included. The PEA and PPS teachers could not have relied upon training from the 2013-2014 school year as calculating an observation report's Standard score was not previously an issue. Moreover, the 2014-2015 training materials actually had less information regarding the Standard score than the materials from the prior school year, as PPS left out information previously found within the 2013-2014 manual regarding the calculations of the Standard scores. See Exhibit R-2A at SD-64.

Unable to determine the Standard scores from an observation, it already would have been an impossible for someone to calculate his or her Standard scores for the year with any degree of confidence. However, since PPS also refused to divulge how it added multiple observation Standard scores together in order to calculate the final Standard score for the year, teachers and the PEA were that much further in the dark as to how to calculate their TPS and annual summative evaluation scores. This was extremely important as accuracy was paramount in tracking teaching performance. Even a one point change in the average of some of the Standards would result in a three point swing in a teacher's weighted sum score. Considering that many PPS teachers were near the 56 weighted sum score which served as the cut-off for a 3 for the TPS (and for all intents and purposes as the cut-off between an overall partially effective and effective rating), certainty as to the precision of their Standard scores was a prerequisite for determining a teacher's performance. Instead, PPS teachers and the PEA could only wait until Standard Summary Report at the end of the school year to find out a teacher's TPS and Standard scores, unable to independently verify the accuracy of PPS' numbers.

Despite the PEA's best efforts, it was unable to crack the code to help PPS teachers find out the missing evaluation rubric information. The PEA, including Chowhan, tried to calculate observation scores for its membership, but was unable to determine the formula which matched up with the method used by PPS. This was unsurprising since much of the PPS' information previously provided to the PEA was flawed.

PPS admitted at the hearing to multiple mistakes in documents it had given to the PEA and PPS teachers, such as the unannounced changing of the evaluation instrument summary previously included in the evaluation materials and an inaccurate "Summative Rating" in the 2014-2015 evaluation training manual. See Exhibit P-2B at SD-256. If even PPS could not accurately express or understand key aspects of its grading rubric, there was no way the PEA or its members could have deciphered PPS' grading rubric with any conviction. Simply put, PPS' errors and omissions further robbed its teachers and the PEA of any meaningful opportunity to review their teaching performances during the course of the 2014-2015 school year.

As Diodonet explained in her testimony, PPS' is supposed to support its teachers rather than run an "I got you" system. (T247:18-T248:9). Diodonet's statement captures the requirements of N.J.S.A. 18A:6-128, especially PPS' obligation under subsection (b), to provide additional professional development for teachers who are failing or struggling to meet PPS' performance standards. Because of PPS' refusal to share observation Standard scores and other evaluation rubric information, PPS teachers (and supervisors) were left in the dark during the year as to whether they were struggling to keep up with or failing expectations. Denied this critical information, PPS teachers who were in need of help were not put on notice of their situations until the end of the year, thus depriving them of the opportunity for additional professional development as required under N.J.S.A. 18A:6-128. Instead, PPS set up these teachers for an "I got you" moment at the end of the 2014-2015 school year.

PPS' refusal to explain how it calculated Standard scores for observations and the Annual Summary Report also defied N.J.A.C. 6A:10-2.2(a)(6). This regulation required PPS to keep all of its evaluation data in an accessible and usable format. Neither the PPS teachers nor the PEA were able to access this vital data. For the entire 2014-2015 school year, PPS withheld from its teachers and the PEA key ingredients for how PPS determined Standard scores, and ultimately the TPS. When confronted, PPS responded by saying that McRel took care of it, that teachers would be trained later (supposedly in January 2015), ignoring pending grievances and cases, or by falsely asserting that no changes took place at all.

Throughout the 2014-2015 school year, the teachers and PEA were kept in the dark. As a result, they were denied the State recognized right to review PPS' records and determine if PPS' calculations were inaccurate, arbitrary or otherwise inappropriate.

PPS' incomplete description of the scoring rubric used for the TPS is contrary to TEACHNJ also because it does not meet the definition of a scoring guide. The State's definition of "scoring guide" under N.J.A.C. 6A:10-1.2 expressly declares that a scoring guide is supposed to provide a transparent and reliable evaluation process. PPS' system during the 2014-2015 school year was neither transparent nor reliable. Rather, the few parts divulged to the teachers and PEA gave false impressions of PPS' true system. Even now, PPS teachers and the PEA are uncertain as to how PPS calculated the teachers' annual summary report scores, unable to determine the reliability of the documented results. PPS has never shared the Standard scores earned by teachers during their 2014-2015 observations. PPS has never shared how it added up the observation Standard scores to determine the year-end Standard score. As far as the teachers and PEA are aware, there was no formula at all for calculating the average Standard scores for the 2014-2015 school year.

Objectivity, consistency, reliability and accuracy are the foundations of the evaluation system under TEACHNJ. If the PPS teachers (and its union) are unable are unable to confirm that PPS' evaluation has any of these features, the evaluation system ceases to be an effective tool of evaluating teacher performance. PPS' refusal to share its evaluation grading rubric undermined the credibility of the 2014-2015 teacher evaluation determination. Accordingly, PPS' failure to share evaluation rubric information with its teachers and the PEA must be found to have violated State statutes and regulations.

D. Paterson Public Schools' Failure to Implement and Enforce Objective Observation Scoring Rules violated State Statute.

Two of the grounds for which an arbitrator can dismiss inefficiency tenure charges under N.J.S.A. 18A:6-17.2 are if an evaluation failed to comply with a school district's evaluation

process, and if a school district's actions were arbitrary and capricious. If an arbitrator makes one of these findings, then the arbitrator must decide whether the school district's transgressions materially affected the outcome of the teacher's evaluation. The PPS, by failing to implement or divulge the scoring metrics for teacher observation or otherwise failing to train and require its teachers to comply with the supposed system, so significantly violated N.J.S.A. 18A:6-17.2 as to require a further determination as to whether they so significantly affected the integrity of the Respondents' 2014-2015 evaluations as to have materially affected the outcomes of Respondent's evaluations.

Differences of even one or two points in sub-category or Standard scores in an observation can significantly impact a teacher's TPS and annual summative evaluation scores. PPS, however, never explained how its observers picked between point values. PPS failed to clarify how observers distinguished between a Proficient I or II performance (the options within the Proficient classification) or a Progressing I or II performance (the options within the Progressing classification). The PPS Guidebooks did not clear up the confusion as they did not differentiate between the two performance ratings for the four classifications. Without this information, neither a PPS teacher nor the PEA could determine if the observation report supported a 2 vs. 3, a 4 vs. 5, or a 6 vs. 7 for a sub-category (such as Standard 3(a)), or for a full Standard in an observation. Without this tool, teachers and the PEA could not properly check PPS' observation reports for mistakes of fact or for the observers' compliance with evaluation procedures. When a single point in an observation can make the difference between a raw score of 55 (condemning a teacher to a CAP and tenure charges) or 56 (all but ensuring an effective rating at the annual summating evaluation), teachers must be presented an accurate and justifiable explanation for every score within an observation.

At the hearing, PPS, for the first time, tried to explain how it distinguished between different performance ratings within a classification. However, since there was no evidence to support the assertion, there is no basis to conclude that PPS actually used the asserted method during the 2014-2015 school year. Crucially, even in the hypothetical that PPS

actually wrote out a method to differentiate between the different performance ratings, PPS' nondisclosure of the system to its teachers and the observers' flouting of the alleged steps negated any legitimacy it could have provided to the evaluation process.

Diodonet, in alleging that PPS actually had a way on paper to differentiate between to performance ratings in calculating sub-category and Standard scores, admitted that she did not believe that this information was ever provided to PPS' teachers. Accordingly, the supposed method was as worthless as no method at all since a secret formula hidden from PPS teachers and the PEA does not protect the State's interests in ensuring fair teacher evaluations. A school district's evaluation system is supposed to promote clarity. Absent the sharing of information regarding the performance ratings, PPS teachers and the PEA could not ensure honesty or accuracy in the teacher observation reports.

PPS' supposed method to distinguish between performance ratings also fails to validate PPS' actions because if such a system existed, PPS' administrators either were unaware of it or ignored it with impunity. Chowhan's conversations with at least half a dozen administrators establish that there was no common understanding between PPS' administrators for how to calculate sub-category or Standard scores. Chowhan described how some administrators took an average of the scores below while others made their decisions based upon the mode of the scores (even if they differed from the average). There was no rhyme or consistency in determining a sub-category or Standard scores.

The actions of other PPS officials only further revealed the subjectivity and unreliability of the observation reports. Numerous teachers at multiple schools (all wholly separate from the schools represented in Chowhan's conversations) described administrator admitting to lowering observations scores for reasons wholly unrelated to teaching performance. This artificial suppression of sub-category and Standard scores negatively impacted all teacher evaluations. If the highest scores were now only a 5 or 6 rather than the listed seven, teaching performances that would have otherwise received a 4 or 5 were moved down a point or two to reflect the

difference between their performances and those of the highest performers.

When a single point in a single observation can make the difference between a 'partially effective' and 'effective' rating, administrators cannot be allowed to refuse to give out highest scores or to temper scores in order to demonstrate a supposed improvement in performance. Evaluation systems under TEACHNJ are reliable only if they can demonstrate consistency and objectivity. If observation scores are influenced by inconsistent or conflicting scoring methods and subject to an observer's personal opinion as to how PPS should administer or grade observations, the entire evaluation system implodes. Unfortunately, such an implosion occurred here.

The only reasonable determination is to find that there was no effective performance rating differential system in place at PPS for observation reports, resulting in the elimination of any semblance of objectivity during teacher observations. As a result, PPS' actions must be found to have substantially failed to adhere in evaluation process and to have been arbitrary and capricious, in violation of N.J.S.A. 18A:6-17.2.

## CONCLUSION

For all of the aforesaid reasons, Respondents Carrie Osborne, Thomas Schaefer and Ardeena Long respectfully requests that Paterson Public Schools be found to have violated New Jersey teacher evaluation statutes and regulations in its school district wide actions during the 2014-2015 school year.

**The District's Position**

The District provides the following conclusions of law in its post-hearing brief:

> Under TEACHNJ, the arbitrator's decision is final and binding, subject only to judicial review pursuant to the New Jersey Arbitration Act, N.J.S.A. 2A:24-7 *et seq.* *See* N.J.S.A. 18A:6-17.1. On the other hand, under TEACHNJ, the arbitrator is prohibited from second-guessing the evaluators' determinations regarding the quality of the teacher's classroom performance. N.J.S.A. 18A:6-17.1(c). Thus, while the arbitrator's authority is broad, the standard of arbitral review of teacher evaluations is quite deferential, and the factors to be considered in the arbitrator's review of a tenure charge of inefficiency are limited. In light of the required deference and the limited scope of review, the evidence to be considered in arbitration is similarly limited. In this case, review by the arbitrator is further limited, based on the agreement of the parties, to the implementation of the School District's teacher evaluation system and the procedural challenges brought by Respondent.
>
> The arbitrator's analysis at this stage in the proceeding must be conducted within the analytical framework of N.J.S.A. 18A:6-17.2. To that end, the arbitrator should consider not only whether any facts support Respondent's procedural claims, but also whether those facts "materially affected" the evaluation system. (In further proceedings, the arbitrator also will need to consider whether any facts presented in support of Respondent's defenses "materially affected" her own evaluation.) The evidence establishes that even if any facts in support of Respondent's claims could be proven, none can be found to have materially affected the validity of the School District's evaluation system or its compliance with applicable legal requirements.

## I. THE SCHOOL DISTRICT COMPLIED WITH ALL APPLICABLE LEGAL REQUIREMENTS FOR ITS TEACHER EVALUATION SYSTEM IN THE 2013-2014 AND 2014-2015 SCHOOL YEARS.

### A. The School District's Evaluation Rubric Satisfies All Applicable Requirements.

N.J.S.A. 18A:6-122(a) requires school districts to "annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members." The School District submitted its evaluation rubric for approval from the Commissioner for the first time in 2012 and received approval for its rubric at that time. (SD-1, ¶2 and Ex. A.) TEACHNJ sets forth specific guidelines for the minimum standards for Commissioner approval of district evaluation rubrics. Those standards include, at a minimum:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the

predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

N.J.S.A. 18:6-123(b)(1)-(14). *See also* N.J.A.C. 6A:10. In order to receive approval from the Commissioner, as the School District did here, the evaluation system was required to meet these minimum standards. Respondent has failed to show that the School District's approved evaluation system, including its evaluation rubric, does not meet any of these requirements. Therefore, the arbitrator should rule that Respondent's defense to the tenure charge (if any) based on any alleged failure of the School District's evaluation rubric to meet applicable requirements is rejected.

**B. The School District Satisfied All Applicable Legal Requirements Regarding Training and Professional Development on its Evaluation System.**

N.J.S.A. 18A:6-128 requires school districts to conduct ongoing professional development for teaching staff. More specifically, Section 128(a) requires districts to "provide its teaching staff members with ongoing professional development that supports student achievement and with an individual professional development plan." N.J.S.A. 18A:6-128(a). *See also* N.J.A.C. 6A:10-3.2(a)(4); N.J.A.C. 6A:10-2.4(e)(3). Respondent has failed to show that the School District has not met this requirement, either with respect to training and professional development provided to principals and supervisors or with respect to that provided to teachers. Extensive training, information, and professional development regarding the evaluation system and process were provided to administrators and teachers over the course of three school years. The evidence presented—specifically, Sandra Diodonet's testimony—demonstrates the School District's support of its teaching staff through professional development:

> Based on the observation trends from the building, [administrators] would develop professional development for your teachers. [For example], if you have a teacher who, let's say, did not do well on Standard 4 . . . the job of the principal and the observer would be to get [that teacher] the

> professional development or support that she needs to do well at the next time around. Because the system is supposed to be not an "I got you" system, but a support system . . . [If an administrator sees teachers] coming in proficient I or progressing II or unsatisfactory in an area, you, as the building leader, as the principal, are supposed to create professional development for that. So every month or so we have those professional development days that could be used for that; or you can send your teachers to a training; or your school-based supervisor, at grade level meetings, vertical articulation meetings, could address that standard that needs fixing.

(T247-248.)

Thus, the School District satisfied all applicable requirements regarding training and professional development for its teaching staff members with respect to its evaluation system, its rubric, and calculation of evaluation ratings. Therefore, the arbitrator should rule that Respondent's defense to the tenure charge based on the School District's alleged failure to provide sufficient training and professional development, failure to "disseminate information regarding the grading rubric for calculating annual summative ratings for the 2014-2015 school year," or failure to "teach its teachers about the formula for the grading rubric for calculating annual summative evaluating ratings for the 2014-2015 school year" is rejected.

### C. The School District Satisfied All Applicable Legal Requirements Regarding Development of Student Growth Objectives.

N.J.S.A. 18A:6-123(b) requires SGOs to be developed through a collaborative process between each teacher and his or her principal or the principal's designee. See also N.J.A.C. 6A:10-4.2(e). In other words, school districts and administrators are not permitted to "impose" SGOs on their teachers without receiving input from each teacher regarding his or her own SGOs. Respondent has failed to show that the School District violated this requirement. The evidence presented demonstrates that the School District has

satisfied its obligations regarding collaborative development of SGOs. Not only that, the evidence also demonstrates that it would be nearly impossible for principals to "impose" SGOs, as the data necessary for the development of SGOs is held by teachers. (T267-268; T314-315.) Indeed, as Diodonet testified, it "would be almost impossible" for an administrator to assign SGOs to teachers without any teacher involvement "because you cannot set an SGO without having data in front of you." (T270:4-13.) Furthermore,

> It's virtually impossible for [principals] to do this for all of their teachers. It's a lot of work, because there's a lot of math that goes into it and a lot of debating back and forth with the teacher and seeing what group the kid would fall in and the evidence that the teacher has to say the kid should stay here. And you have to look at data in the teacher's spreadsheets and her evidence to show that 20 percent increase. [It's] rigorous. So a principal would have to assess the students herself, get that data and do it. And I don't think that a principal would shoot themselves in the foot to blindly give a percentage of kids that are going to meet the SGO because, again, at the end of the school year, every teacher in the building, all those SGOs get averaged out [and] the principals get that rating.

(T314-T315.)

Therefore, the arbitrator should rule that Respondent's defense to the tenure charge based on the School District's alleged failure to provide for collaborative development of SGOs, or based on any alleged unilateral drafting or "imposition" of SGOs on teachers, is rejected.

### D. Respondent Cannot Have Been Affected by any Alleged Deflation of Observation Scores for Higher Performing Teachers.

As noted, the testimony presented on behalf of Respondent regarding alleged "deflation" of observation scores should be ruled inadmissible. Even if it were admitted into the record, Respondent – who indisputably was not a "higher performing teacher" – cannot have been affected

by any such action. Therefore, the arbitrator should rule that Respondent's defense to the tenure charge based on any alleged "deflated observation scores," or based on any alleged district-wide policy or practice permitting such deflation, should be rejected.

## CONCLUSION

For all the foregoing reasons, the State-operated School District of the City of Paterson respectfully submits that on the basis of the evidence presented the arbitrator should find in favor of the District on the procedural issues raised in this hearing.

## DISCUSSION

I have carefully reviewed the entire record of this proceeding. *N.J.S.A. 18A:6-17.2* sets forth the "[c]onsiderations for arbitrator in rendering decision":

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious,
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.
>
> d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

The New Jersey Department of Education has published on its website a document entitled "Summary of Legal Requirements for Teacher Evalation and Tenure Cases". This document can be found at www.nj.gov/education/AchieveNJ/implementation/legalrequirements.pdf. As indicated therein, "this guide outlines the actions required in law before bringing an inefficiency charge based on the new tenure revocation process, including the following elements:

A. Minimum Requirements to Ensure Compliance with Evaluation Procedures
   I. Observation Requirements
   II. Student Achievement Requirements
   III. Summative Evaluation Requirements
   IV. Corrective Action Plan (CAP) Requirements
   V. Additional Requirements

B. Requirements for Filing an Inefficiency Tenure Charge

C. Streamlined Tenure Revocation Process".

This guide must be read in conjunction with the applicable laws, rules and regulations. (*See N.J.A.C. 6A:10 et seq* ("Educator Effectiveness"), Title 18A of the New Jersey Statutes ("Education")).

I will initially address the Respondents' claim that the District unilaterally implemented Student Growth Objectives. *N.J.A.C.* 6A:10-4(e) provides:

(e) Student growth objectives for teachers shall be developed and measured according to the following procedures:

1. The chief school administrator shall determine the number of required student growth objective for teachers, including teachers with a student growth percentile. A teacher with a student growth percentile shall have a least one and not more than four student growth objectives. A teacher without a student growth percentile shall have at least two and maximum of four student growth objectives. By August 31 prior to the academic year in which the evaluation rubric applies, the Department shall provide on its website the minimum and maximum number of required student growth objectives within this range.

2. A teacher with a student growth percentile shall not use the standardized assessment used in determining the student growth percentile to measure progress toward a student growth objective.

3. Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each student growth objective. If the teacher does not agree with the student growth objectives, the principal shall make the final determination.

4. Student growth objectives and the criteria for assessing teacher performance based on the objectives shall be determined, recorded, and retained by the teacher and his or her supervisor by October 31 of each academic year, or within 20 work days of the teacher's start date if the teacher begins work after October 1.

5. Adjustments to student growth objectives may be made by the teacher in consultation with his or her supervisor only when approved by the chief school administrator or designee. Adjustments shall be recorded in the teacher's personnel file on or before February 15.

    i. If the SGO covers only the second semester of the school year, or if a teacher begins work after

October 1, adjustments shall be recorded before the mid-point of the second semester.

6. The teacher's designated supervisor shall calculate each teacher's student growth objective score. The teacher's student growth objective score, if available, shall be discussed at the teacher's annual summary conference and recorded in the teacher's personnel file.

Section 3 above requires collaboration between the teacher and his/her principal or supervisor before an SGO is set. Establishing an SGO without input from the individual teacher would be inconsistent with the requirements of this provision. Wolf testified that he received complaints that SGOs were being implemented without teacher input. Diodonet acknowledged that if such action took place that it would be contrary to the District's legal obligations. With this said, there is insufficient evidence to conclude at this point in the proceedings that SGOs are being unilaterally implemented by the principals and/or supervisors either globally or individually. Such a claim must be reviewed and considered by the appointed Arbitrator on a case-by-case basis after the parties have had an opportunity to fully develop their evidence and claims specific to each individual Respondent.

I now turn my attention to the Respondents' claims pertaining to the calculation of teacher observation and evaluation scores. To summarize, the Respondents claim that the District failed to disclose scoring rubric information, refused to explain the calculation of Standard scores for observations and the

Annual Summary Report, and failed to implement and enforce objective observation scoring rules. With respect to the scoring on the evaluation rubric, N.J.A.C. 6A:10-1.2 defines and expresses the purposes of a "scoring guide":

> "Scoring guide" means a set of rules or criteria used to evaluate a performance, product, or project. The purpose of a scoring guide is to provide a transparent and reliable evaluation process. Educator practice instruments include a scoring guide that an evaluator uses to structure his or her assessments and ratings of professional practice.

*N.J.S.A. 18A:6-17.2*, paragraph 23(a) provides that "the evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." However, the District must comply with fourteen (14) minimum standards set forth in *N.J.S.A. 18A:6-123*, paragraph 17.b including, but not limited to, "guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation"; "a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently"; and "a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources".

During the arbitration proceedings, the District provided extensive information concerning the training that was provided to teachers during the

2013-2014 and 2014-2015 school years. The District also indicated that the evaluators received training on how to evaluate the teachers, but this area of discussion was presented in a broader context. The evidence to date does not detail the measures that the District has in place to ensure that it is able to satisfy the minimum requirements of the statute. The District can avail itself of this opportunity during the case it will present against each individual Respondent.

As to the calculation of the scoring on the rubric, the District's explanation as to how the indices within each standard factored into the score of the standard and the overall Teacher Practice Score currently lacks specificity. For instance, Performance Standard #1: Preparation for Instruction Indicator, is comprised of three (3) indicators:

- 1a. Establish a culture of high expectations for learning and achievement.
- 1b. Use district-adopted curriculum and content knowledge to design coherent lessons.
- 1c. Post aligned lesson objectives and plan for demonstrations of learning.

Within each of these indicators are three (3) sub-indicators that the evaluator must rate the teacher as unsatisfactory, progressing, proficient and exemplary. Based upon these ratings, a teacher can receive a performance rating for each indicator of unsatisfactory, progressing I, progressing II, proficient I, proficient II, proficient III, and exemplary. Depending on the scores of the indicators, a

teacher will receive a performance rating for the overall Performance Standard of unsatisfactory, progressing I, progressing II, proficient I, proficient II, proficient III, and exemplary.

I am unable to determine from the record before me how the sub-indicators factored into the rating for the indicator. By way of example, if a teacher who has been evaluated on Indicator 1a received a rating of "unsatisfactory" for the first sub-indicator, "progressing" for the second, and "exemplary" in the third, I am unable to ascertain how those ratings, when combined, factor into the rating of Indicator 1a for Performance Standard #1. I have reviewed the PowerPoint presentation that the District presented to its teachers on March 19, 2014, with respect to the "Weighting of Components". Although this information shows how the seven (7) standards factor into the Teacher Practice Score, similar information is not provided for the indicators or the sub-indicators. Wolf and Chowhan testified that the issues about the District's calculation methods were brought to the District's attention after receiving numerous inquiries from teachers, but they did not receive a satisfactory response. As Chowhan testified, her department chair indicated that a software program took care of the calculations. Whether or not the individual Respondents were given additional guidance by their evaluators or other District representatives that went beyond the information provided during the professional development sessions has yet to be addressed.

My analysis only addresses the evidence that has been developed on the record to date. Notwithstanding my discussion above, there is insufficient evidence to conclude at this point in the proceedings that the District has failed to meet its legal requirements. Put simply, the issues raised by the Respondents pertaining the calculation of the teacher observation and evaluation scores must be reviewed and considered by the appointed Arbitrator on a case-by-case basis after the parties have had an opportunity to fully develop their evidence and claims specific to each individual Respondent.

Accordingly, based upon the foregoing and the entire record, the arbitration proceedings for each individual Respondent shall move forward.

## DECISION

There is insufficient evidence in the record at this time to conclude that the District has failed to satisfy the legal requirements of *TEACHNJ*. The arbitration proceedings for each individual Respondent shall move forward.

Dated: January 14, 2016
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 14th day of January, 2016, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford

24-16

| | | |
|---|---|---|
| C.G., ON BEHALF OF MINOR CHILD, Z.R., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son in February 2015, seeking a determination that Z.R. resided in the City of Woodbury. Respondent Board counterclaimed for tuition. The matter was transmitted to the Office of Administrative Law (OAL) to ascertain petitioner's residency and the amount of any tuition due. In November 2015, the Board moved to dismiss the petition based on petitioner's failure to provide discovery. Petitioner failed to oppose the motion, and further failed to appear at oral argument on the matter despite having received appropriate notice.

The ALJ found, *inter alia,* that: pursuant to *N.J.S.A.* 18A:38-1, petitioner has the burden of proof in a determination of residency ineligibility; petitioner failed to participate in scheduled proceedings and provided no excuse for failure to provide discovery as required by *N.J.A.C.* 1:1-10.4; and petitioner has failed to file an answer to the Board's counterclaim for tuition. The ALJ concluded that he was compelled to grant the Board's motion to dismiss the petition. Accordingly, the ALJ ordered that the petition be dismissed, and further ordered that the respondent's counterclaim for tuition reimbursement in the amount of $17,403 be granted. Additionally, the ALJ ordered that Z.R. be permitted to attend school in Woodbury through December 23, 2015, the last school day prior to the district's winter recess.

Upon review, the Commissioner concurred with the ALJ findings and conclusions, with modification regarding the amount of tuition reimbursement owed to the Board. The Commissioner declined to award $333 in tuition for the three days that the ALJ ordered the school district to permit Z.R. to attend school through December 23, 2015, because the record contains no information to show that Z.R. did, in fact, continue to attend school through that date. Accordingly, the Commissioner ordered petitioner to reimburse the Board in the amount of $17,070 for tuition costs incurred during Z.R.'s period of ineligible attendance in Woodbury schools.

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

January 22, 2016

24-16

OAL DKT. NO. EDU 3310-15
AGENCY DKT. NO. 30-2/15

| | | |
|---|---|---|
| C.G., ON BEHALF OF MINOR CHILD, Z.R., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner finds that petitioner failed to sustain her burden of establishing that she was a domiciliary of Woodbury between January 23, 2015 and December 18, 2015.[1] As a result, Z.R. was not eligible to receive a free public education in Woodbury during this time.

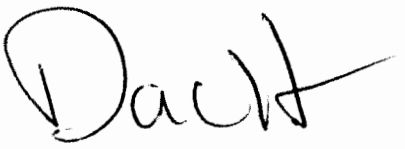
Accordingly, the Initial Decision of the OAL is adopted, as modified herein.[2] Respondent's motion to dismiss the petition is hereby granted and the petition of appeal is

[1] As indicated in the Initial Decision, petitioner failed to appear at the scheduled OAL hearing and failed to provide discovery in accordance with *N.J.A.C.* 1:1-10.4.

[2] The Commissioner concurs with the Administrative Law Judge that respondent is entitled to tuition reimbursement in the amount of $100/day for 97 days of ineligible attendance during the 2014-2015 school year ($9,700). With regard to the 2015-2016 school year, the certification of Superintendent Joseph Jones indicates in Paragraph 5 that the applicable tuition rate is $111/day. However, Paragraph 7 of that same certification states that the tuition rate is $110/day for 67 ineligible days of attendance through December 18, 2015 ($7,370). Using these figures, the grand total becomes $9,700 + $7,370 = $17,070, as illustrated in the certification. Yet, the ALJ awarded $17,403 - adding on 3 additional days at the rate of $111/day, as he ordered that Z.R. would be permitted to attend school in the district through December 23, 2015. The Commissioner declines to award the additional $333 because the record does not contain information indicating that Z.R. did – in fact – continue to attend school in the district through December 23, 2015.

dismissed. Respondent's counterclaim for tuition is granted. Petitioner shall reimburse the Board in the amount of $17,070 for tuition costs incurred during the time period that Z.R. was ineligible to attend school in Woodbury.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 1/22/16

Date of Mailing: 1/22/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSING PETITION AND**
**GRANTING COUNTERCLAIM**
**FOR TUITION - FAILURE TO**
**PROVIDE DISCOVERY**
OAL DKT. NO. EDU 03310-15
AGENCY DKT. NO. 30-2/15

**C.G. ON BEHALF OF MINOR CHILD Z.R,**
Petitioner,
v.
**CITY OF WOODBURY BOARD OF EDUCATION,**
**GLOUCESTER COUNTY,**
Respondent.

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No appearance by or on behalf of **C.G.**, petitioner, pro se

**Tracey L. Schneider,** Esq., for respondent (Parker McCay P.A., attorneys)

Record Closed: December 18, 2015 Decided: December 18, 2015

BEFORE **JOSEPH A. ASCIONE,** ALJ:

Petitioner, C.G. on behalf of minor child Z.R (C.G. o/b/o Z.R.), opposed the respondent's claim that Z.R. did not reside within the City of Woodbury, Gloucester County and on February 17, 2015, brought this action to the Commissioner of Education

seeking a determination that Z.R. resided in the City of Woodbury, Gloucester County. The City of Woodbury Board of Education, Gloucester County (COWBOE) counterclaimed for tuition in the amount of $100 per day for each day during the 2013-15 school year attended by Z.R. in the COWBOE.

On March 9, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2, and N.J.A.C. 1:1-18.7(a), to ascertain residency of petitioner and tuition due if any. On November 5, 2015, respondent moved to dismiss the petition based upon petitioner's failure to provide discovery and seeks tuition. Petitioner provided no opposition to the motion. The undersigned noted the failure to oppose the motion and the matter was scheduled for oral argument on December 18, 2015. Prior to the entry of this Initial Decision the undersigned accepted proofs of the daily tuition amount and the number of days sought by respondent. On that date, December 18, 2015, the record in this matter closed.

## STATEMENT OF FACTS

Based upon the failure to oppose the motion to dismiss for failure to provide discovery and the proofs adduced at the oral argument I **FIND**:

1. On April 24, 2015, the parties and the undersigned conducted an initial prehearing telephone conference. The date of May 4, 2015, was set as the next prehearing telephone conference. Petitioner did not make herself available on May 4, 2015. The undersigned accommodated petitioner and rescheduled the prehearing telephone conference for May 18, 2015.

2. On May 5, 2015, respondent demanded discovery of petitioner.

3. On May 18, 2015, petitioner represented that the requested discovery would be supplied on May 19, 2015. On May 20, 2015, the OAL issued a Prehearing Order setting forth a discovery deadline of June 30, 2015.

4. Petitioner has not provided the requested discovery.

5. The respondent moved on November 5, 2015, to dismiss the petitioner based on petitioner's failure to provide the discovery.

6. Petitioner provided no opposition to the discovery motion. The undersigned noted the absence of opposition, however, requested oral argument on December 18, 2015, for the respondent to provide proof of the amount of the daily cost of education in the district and the number of days sought from petitioner.

7. Petitioner did not appear on December 18, 2015, despite notice of this appearance on December 3, 2015. Respondent presented its proofs on December 18, 2015, by submission of a December 16, 2015, certification from Joseph Jones the superintendent of respondent's school district (R-1).

8. The 2014/2015 reimbursement for tuition due the respondent by petitioner is $100 per day times the ninety-seven days which the petitioner's child attended the school district during the 2014/2015 school year, and the 2015/2016 reimbursement for tuition due the respondent by petitioner is $111 per day times the seventy days which the petitioner's child is allowed to attend the school district during the 2015/2016 school year. The total amount of tuition due is $17,403.00

## LEGAL DISCUSSION

Petitioner has the burden of proof in a determination of residency ineligibility N.J.S.A. 18A:38-1. Petitioner failed to participate in said proceeding and has provided no excuse for the failure to provide the discovery as required by N.J.A.C. 1:1-10.4, or participate in the presentation of her claim. Petitioner has failed to provide an argument as to why the actions of the Department of Education are incorrect. Petitioner has failed to file an answer to the counterclaim for tuition reimbursement. Accordingly, the

undersigned is compelled to grant respondent's motion to dismiss the petition and grant the respondent's counterclaim in the amount of $17,403.00.

## CONCLUSION

I **CONCLUDE** that respondent's motion to dismiss petitioner's petition is granted and that the reasonable value to the cost of tuition is $100 per day during the 2014/2015 school year and $111 per day during the 2015/2016 school year; and the petitioner obtained the benefit of ninety-seven days during the 2014/2015 school year and seventy days during the 2015/2016 school year for a total reimbursement of tuition in the amount of $17,403.00.

## ORDER

It is hereby **ORDERED** that petitioner's petition is **DISMISSED** for the failure to provide discovery or otherwise oppose respondent's motion.

It is hereby **ORDERED** that respondent's counterclaim for tuition reimbursement in the amount of $17,403.00, is **GRANTED** in all respects. Z.R. will be permitted to attend the school district through December 23, 2015, the last school day prior to the winter 2015/2016 recess. This Order disposes of all issues in controversy regarding this matter.

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

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

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

December 18, 2015

DATE

**JOSEPH A. ASCIONE**, ALJ

Date Received at Agency: 12/18/15

Date Mailed to Parties: 12/22/15

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## APPENDIX
## LIST OF WITNESSES

**For Petitioner:**

None

**For Respondent:**

None

## LIST OF EXHIBITS

**For Respondent:**

Motion to Dismiss and supporting papers

R-1 December 6, 2015, certification of Joseph Jones

25-16

BRIDGEWATER-RARITAN EDUCATION ASSOCIATION, ON BEHALF OF TAMARA MANZUR,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

Petitioner Bridgewater-Raritan Education Association asserted that Tamara Manzur – formerly employed as a teacher by the respondent Board – had attained tenure in her position, and was improperly terminated from employment at the end of the 2010-2011 school year, in violation of her tenure rights. The Board contended that Ms. Manzur never attained tenure, because her service during the 2007-2008 school year was as a replacement for a teacher who was out on an extended maternity leave and, as such, did not qualify as creditable time toward the attainment of tenure. The within dispute was remanded from the New Jersey Supreme Court (Court) for a determination as to whether Tamara Manzur had sufficient prior notice that the Board designated her as a replacement teacher under *N.J.S.A.* 18A:16-1.1 for the 2007-08 school year. The parties agreed that if it is found that Ms. Manzur is entitled to receive tenure credit for the 2007-2008 school year, she would have obtained tenure in the district prior to her non-renewal in June 2011.

The ALJ found, *inter alia*, that: Ms. Manzur was hired by the Board for the 2006-2007 school year as a temporary employee to replace a full-time teacher who was on maternity leave; she continued to teach in the district full-time for the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 school years; in April 2011, Ms. Manzur was notified by letter that her contract would not be renewed for the 2011-2012 school year; the dispute herein is whether Ms. Manzur – at the time she was told her contract for 2011-2012 was not renewed – was a non-tenured teacher and therefore subject to non-renewal at the discretion of the Board, or a tenured teacher who could not be so summarily removed from her position; the Supreme Court (Court), in *Bridgewater-Raritan Educ. Assoc. v. Board of Educ. of the Bridgewater-Raritan School District, Somerset County*, 221. *N.J.* 349, 361 (2015), concluded that if the respondent Board could not demonstrate that it had provided Ms. Manzur with notice that her 2007-2008 service was still in a replacement, non-tenure accruing role, it could not deny her credit for that year's service toward the attainment of tenure status; the Court construed *N.J.S.A.* 18A:16-1.1 to require a board of education to make an employee aware that he or she is being employed as a "replacement" and therefore would not have the normal expectation that his or her time in service would count toward the acquisition of tenure; in this case, Ms. Manzur did not receive sufficient notice that she was designated as a replacement teacher; and therefore her service during the 2007-2009 school year does count toward the accrual of tenure. Accordingly, the ALJ concluded that Ms. Manzur was tenured at the time of her unlawful non-renewal in June 2011, and is entitled to $127,586.67 in back pay.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision, with modification to the amount due to Ms. Manzur to include back pay for the period between January 2016 and the date upon which the Board offers to return her to employment with the Board. In so doing, the Commissioner noted that, based on the Court's decision in *Bridgewater-Raritan, supra,* it would behoove all boards of education intending to designate an individual as a replacement employee to provide written notice of such designation prior to the commencement of work in the replacement position.

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

January 22, 2016

OAL DKT. NO. EDU 7117-15
(ON REMAND NO. EDU 6095-11)
AGENCY DKT. NO. 125-5/11

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|---|---|---|
| BRIDGEWATER-RARITAN EDUCATION ASSOCIATION, ON BEHALF OF TAMARA MANZUR, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Bridgewater-Raritan Board of Education (Board) and the Bridgewater-Raritan Education Association's (Association) reply thereto.[1]

This tenure dispute was remanded from the New Jersey Supreme Court for a determination as to whether Tamara Manzur had notice that the Board designated her as a replacement teacher under *N.J.S.A.* 18A:16-1.1 for the 2007-08 school year. The Court further directed that, "Manzur is entitled to receive [tenure] credit for the school year in question if she succeeds in her claim that no notice or other source of information of her replacement status was provided to her regarding her service for the 2007-08 school year." It is undisputed that if it is

[1] The Board also submitted a reply to the petitioner's reply exceptions. *N.J.A.C.* 1:1-18.4 makes no provision for replies to reply exceptions; therefore, the Board's submission was not considered.

determined that Ms. Manzur is entitled to receive tenure credit for the 2007-08 school year, she would have obtained tenure in the district when she was non-renewed in June 2011.[2]

Following a hearing at the OAL, the Administrative Law Judge (ALJ) determined that Ms. Manzur did not receive sufficient notice that she was designated as a replacement teacher and therefore her service during the 2007-08 school year counted toward the accrual of tenure. As a result, Ms. Manzur was a tenured employee at the time of her unlawful non-renewal in June 2011, and she is entitled to $127,586.67 in back pay.

In its exceptions the Board argues that the ALJ erred because he imposed a heavier burden on the Board than was required by the Supreme Court when he concluded that verbal notice from a principal is insufficient to satisfy the rudiments of notice required by the Court. The Board contends that under the Supreme Court's holding, verbal notice from a school administrator regarding a teacher's status as a leave replacement is plainly sufficient to preclude tenure accrual under *N.J.S.A.* 18A:16-1.1. The ALJ improperly discounted the verbal notice provided by Principal Diskin and minimized it to the point where he disqualified it as *per se* insufficient, suggesting a fundamental misapprehension of the significance of the role of a school principal.

The Board also maintains that the ALJ erred in finding that Principal Diskin did not give Ms. Mazur notice that her service with the District could continue in 2007-08 as a replacement teacher. Contrary to the ALJ's credibility findings, the indicia of credibility regarding Principal Diskin's and Ms. Manzur's respective testimony weigh in favor of Principal Diskin. The relevant testimony indicated that Principal Diskin provided specific notice

[2] The parties agree that Ms. Manzur was informed that she was designated as a replacement teacher for the 2006-07 school year and that she was not entitled to accrue tenure. Ms. Manzur continued to teach in the District during the 2007-08, 2008-09, 2009-10 and 2010-2011. The Board agrees that Ms. Manzur was a permanent employee during the 2008-09, 2009-10 and 2010-2011 school years.

regarding Ms. Manzur's continued status as a leave replacement teacher for the 2007-08 school year during their conversations in the Spring of 2007. In fact, Principal Diskin's testimony did not waver even when the ALJ engaged in protracted direct questioning of Principal Diskin.

Further, the ALJ erred by failing to address the inconsistencies between Ms. Manzur's testimony and her prior sworn statements, while discounting Principal Diskin's clean and consistent testimony. The Board urges that Ms. Manzur's claims regarding the lack of conversations regarding her potential return for the 2007-08 school year belie common sense. Due to the uncertainty regarding Ms. Manzur's continued employment, common sense suggests that she would have inquired as to her status for the upcoming year. By March of 2007, Principal Diskin knew that Ms. Fischer – the employee who Ms. Manzur replaced during the 2006-07 school year - would be extending her leave of absence for another year. Thus Principal Diskin's testimony was rational while Ms. Manzur's was not, and the ALJ was mistaken in discrediting Principal Diskin's version of events. The Board also stresses that Principal Diskin's testimony was consistent with two sworn statements that he signed in August 2015 in response to the petitioner's discovery request.

Assuming, arguendo, that the ALJ's determination that Ms. Manzur did not receive sufficient notice is adopted, the Board claims that Initial Decision must be modified because any entitlement to pay back should have been substantially reduced. In calculating the back pay, the ALJ improperly assumed that Ms. Manzur would have progressed along the salary guide via increments. The Board suggests that even if Ms. Manzur was not terminated, she would not have advanced along the salary guide until at least the 2011-12 school year because she was not recommended for increment advancement in her 2010-11 annual evaluation. The Board also reiterated the arguments made below as to why Ms. Manzur's award of back pay

should be reduced for certain periods of time due to her failure to mitigate her damages by exercising reasonable diligence and ordinary care in seeking alternate employment.

In reply, the petitioner asserts that the Board's contention that the ALJ erred in questioning whether the notice requirement instituted by the Supreme Court can be satisfied by a principal's verbal remarks is of no moment to the outcome of Ms. Manzur's claim. Although the ALJ acknowledged a potential concern with that type of notice, he thoroughly examined the evidence and found that Ms. Manzur had not been given notice of her replacement status prior to the 2007-08 school year. The ALJ specifically found that no conversation regarding replacement status ever occurred between Principal Diskin and Ms. Manzur prior to the commencement of the 2007-08 school year.

The petitioner also maintains that the ALJ's finding that Principal Diskin did not give Ms. Manzur notice that she was a replacement teacher for 2007-08 was based on a thorough credibility analysis and must be adopted because his credibility determination was not arbitrary, capricious or unreasonable. As a fact-finder, the ALJ was able to observe Principal Diskin's demeanor on the witness stand, and the manner in which he responded to questions and prompting from the Board's counsel, which was only one of many factors upon which the ALJ based his credibility determination. The petitioner reiterated how Ms. Manzur testified credibly that she was not notified of her replacement status for the 2007-08 school year and that her testimony was consistent with the certifications she has made since the beginning of this case. The petitioner also provided a response to each argument advanced by the Board, emphasizing why the ALJ's credibility determinations were not arbitrary capricious or unreasonable.

The petitioner also contends that the ALJ's ruling on back pay correctly applied the facts in this matter to the law and Ms. Manzur's entitlement to back pay is fully supported by

the record. The petitioner claims that the Board's exceptions concerning the amount of back pay owed to Ms. Manzur present the same legally and factually flawed arguments that were rejected below. Therefore the petitioner requests that Ms. Manzur be awarded the back pay determined by the ALJ in the Initial Decision with two modifications. The petitioner claims that the Board should be required to reimburse the Department of Labor for the unemployment benefits that Ms. Manzur received during the period in question. Additionally the petitioner asserts that the Board should be required to pay the difference between Ms. Manzur's current rate of pay and what she would be earning in the Bridgewater-Raritan School District until it is practicable that she return to work at the Bridgewater-Raritan School District in the beginning of the 2016-17 school year.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that Ms. Manzur did not receive sufficient notice that she was being designated as a replacement teacher for the 2007-08 school year.

Pursuant to *N.J.S.A.* 18A:16-1.1, a board of education may designate a person to act in the place of an employee during the employee's absence, disability, or disqualification, but the designated replacement shall not acquire tenure during that temporary service. The Supreme Court found that the term designate in *N.J.S.A.* 18A:16-1.1, "incorporates an obligation that the employer give notice to the employee receiving the specialized designation that takes the employee off the normal service road toward tenure. We construe *N.J.S.A.* 18A:16-1.1 to require a board of education to make an employee aware that he or she is being employed as a 'replacement.'" *Bridgewater-Raritan Educ. Assoc. v. Board of Educ. of the Bridgewater-Raritan School District, Somerset County*, 221 *N.J.* 349, 361 (2015).

In light of the fact that there is no documentation stating that Ms. Manzur was designated as a replacement teacher prior to the commencement of the 2007-08 school year, the testimony of the relevant witnesses becomes paramount. The ALJ evaluated the testimony of Ms. Manzur and Principal Diskin, their prior statements and the documentary materials, and found that the greater weight of the credible evidence is that Mr. Diskin did not specifically tell Ms. Manzur during the Spring of 2007 that she was being offered the opportunity to accept a position as a replacement for Ms. Fisher, who would be remaining on maternity leave. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility.[3] Therefore, the ALJ's determination that Ms. Manzur did not receive sufficient notice that she was being designated as a replacement teacher for the 2007-08 school year is fully supported by the record.

Additionally, despite the Board's assertion in its exceptions, the ALJ did not rule that a verbal notice from a principal is insufficient as a matter of law. In the Initial Decision, the ALJ expressly stated that because it was already determined that Principal Diskin did not give

[3] The record did not contain a transcript from the hearing conducted at the OAL on September 17, 2015. The Board submitted a recording of the hearing along with the exceptions it filed. However, it should be noted that audio recordings of the hearings at OAL are only reviewed in connection with Orders on Emergent Relief. If a party intends to reference witness testimony in its exceptions, the actual transcripts must be provided.

Ms. Manzur adequate notice, it was not necessary to reach a determination on that issue. The Commissioner agrees that it is not necessary to explore the extent of notice that was envisioned by the Supreme Court in light of the fact that Ms. Manzur did not receive any notice that she was being designated as a replacement teacher for the 2007-08 school year.[4]

The Commissioner is also in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that Ms. Manzur did not fail to mitigate her damages so as to warrant the reduction of back pay. The objections raised in the exceptions filed by the Board generally reiterate the arguments previously made before the ALJ, which were clearly taken into account by him in determining the amount of back pay owed to Ms. Manzur. The Board attempts to argue that Ms. Manzur's back pay should be reduced for the failure to mitigate her damages, notwithstanding the fact that Ms. Manzur applied for at least 90 teaching jobs following her nonrenewal. The Board has not established that Ms. Manzur failed to make "a reasonable and diligent effort to obtain other employment." *See, Bonnie Goodman v. London Metals Exchange, Inc., et al.*, 86 *N.J.* 19, 36 (1981). Therefore, the amount of back pay that Ms. Manzur is entitled to receive shall not be reduced.

Ms. Manzur was hired as a teacher at Cedar Hill Preparatory School at a lesser salary than she would have made at Bridgeton-Raritan for the 2014-15 and 2015-16 school years. It is undisputed that Ms. Manzur was out on maternity leave from September 2015 through December 2015 and she is not entitled to any back pay for that period. Further, in the Initial Decision, the ALJ appropriately determined the amount of compensation Ms. Manzur was entitled to receive for the 2014-15 school year, which was the difference in compensation between Ms. Manzur's rate of pay at Cedar Hill and what she would be earning in the

[4] Based on the Supreme Court's decision in *Bridgewater-Raritan, supra*, it would behoove all boards of education intending to designate an individual as a replacement employee to provide written notice of such designation prior to the commencement of work in the replacement position.

Bridgewater-Raritan School District. Under *N.J.S.A.* 18A:6-30, an employee entitled to back pay after an improper dismissal is entitled to compensation for the period covered by the illegal suspension. Thus, in addition to the $127,586.67 in back pay recommended by the ALJ, the Board shall also reimburse Ms. Manzer for any additional back pay that she is entitled to receive between January 2016 and the date upon which the Board offers to return her to employment with the Board.[5] Despite the petitioner's request, Ms. Manzur is not entitled to compensation from January 2016 through June 2016. Accordingly, the Initial Decision is adopted as the final decision in this matter, as modified above.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 1/22/16
Date of Mailing: 1/22/16

[5] The amount of compensation that Ms. Manzur is entitled to receive for this period shall also be the difference between her pay rate at Cedar Hill and what she would be earning in the Bridgewater-Raritan School District consistent with the ALJ's calculation of back pay for prior years outlined in the Initial Decision.

[6] The District is responsible for reimbursing the unemployment benefits to the Department of Labor, and a copy of this decision will be forwarded to that Department.

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

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 7117-15
AGENCY DKT. NO. 125-5/11
(ON REMAND OAL DKT. NO. EDU 6095-11)

**BRIDGEWATER-RARITAN EDUCATION ASSOCIATION ON BEHALF OF TAMARA MANZUR,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,**

Respondent.

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**William P. Hannan**, Esq., for petitioners (Oxfeld Cohen, attorneys)

**Nicholas Celso**, III, Esq., **John Geppert**, Esq., and **Kyle Trent**, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Record Closed: November 2, 2015 Decided: December 11, 2015

BEFORE **JEFF S. MASIN**, ALJ t/a:

Tamara Manzur, formerly employed as a teacher with the Bridgewater-Raritan Regional Board of Education, whose contract was not renewed by the Board for the 2011-2012 school term, claims that she attained tenure in that position, having served as a teacher in the District for the time required by statute in order to attain tenured status. She therefore seeks a ruling that the Board acted illegally in terminating her in violation of her tenure status. The Board disagrees, arguing that Ms. Manzur's service during the 2007-2008 school year was as a replacement for a teacher, Concetta Fischer, who was out on an extended maternity leave and, as such, it did not qualify as creditable time toward the attainment of tenure. It believes that Manzur would not have attained tenure until September 2001, by which date the Board had already determined not to renew her employment, an action that occurred at the end of the previous 2010-2011 school year.

Manzur was one of three teachers who filed a Petition of Appeal with the Commissioner of Education on December 14, 2009 disputing the Board's denial of their claimed tenured status. An administrative law judge granted a motion for summary decision dismissing the petition and the Commissioner and the Appellate Division agreed with the judge's ruling. The New Jersey Supreme Court granted certification and in a decision issued on May 6, 2015, affirmed the dismissal of the claims of teachers Cassidy and O'Neil, but remanded Ms. Manzur's case for further hearing. Bridgewater-Raritan Educ. Assoc. v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349 (2015). In its decision, the Court determined, for the first time, that in the case of a teacher employed during a school term by the Board as a temporary replacement for a teacher out on maternity leave, where the teacher was then continued in employment in the following school year, if the Board contended that she was still only serving as a temporary replacement for the teacher continuing her absence due to an extension of that maternity leave, the Board had the burden to demonstrate that the teacher had been noticed that her continued employment for the following school year was as a replacement and not as a permanent, tenure track, employee. The Court considered that "on the question of notice of replacement status specifically," the Board was "in the best position to prove'" such notice. The Court reversed the grant of

summary decision as to Ms. Manzur only, and remanded the case for a hearing.

A hearing was conducted in the Office of Administrative Law on September 17, 2015. Thereafter, the parties filed briefs and replies and the record closed on November 2, 2015.

The undisputed facts from which this dispute emerges is that Ms. Manzur was hired by the Board in September 2006, as a temporary employee to replace a full-time sixth grade teacher who was commencing parental leave. She was informed that the job was for the entire 2006-2007 school term, ending in June 2007. Ms. Manzur continued to teach in the District during the school years 2007-2008, 2008-2009 and 2009-2010. The Board agrees that Manzur was a permanent employee during school terms 2008-2009 and 2009-2010. On April 27, 2011, Ms. Manzur was advised by letter from School Superintendent Schilder that her contract would not be renewed for the 2011-2012 school year. Her employment ceased on June 2011. As noted, the Board's position is that Ms. Manzur's service in the 2007-2008 school term was not as a permanent employee, but merely as a continued replacement for the teacher who she first replaced in September 2006, who remained out on an extended leave. As the Board had determined that her tenure date was September 2, 2011, it did not deem her a tenured employee when it decided that her employment would not continue after June 2011.

Tenure is a statutory status that can only be attained under statutory strictures set forth at N.J.S.A. 18A:28-5, which requires that, in part, the employee be employed for "three consecutive academic years, together with employment at the beginning of the next succeeding academic year." "[I]t is settled principle of school law that substitute teacher who 'act in place of' another employee do not earn credit toward tenure for time spent as a replacement" Bridgewater-Raritan Educ. Assoc., supra, 221 N.J. at 360 (quoting Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 74 (1982). The Board contends that in the spring of 2011, Ms. Manzur was not yet entitled to tenure and therefore her contract could be non-renewed as the Board saw fit. However, Manzur

asserts that she was never told that her service for the school term 2007-2008 was as a replacement, and was not told that the service for that year was considered as not counting toward her earning tenure. As such, she understood that her service in 2007-2008, 2008-2009 and 2009-2010 and her employment as of the first day of the 2010-2011 term in September 2010 qualified her for tenure. Manzur contends that the first reference to the Board's understanding that her tenure would not be effective as of the date that Manzur understood came when she received a letter from the Superintendent of Schools, Dr. Michael Schilder, dated September 14, 2009. The letter stated that under New Jersey statutes only service in a permanent position could be counted toward tenure. It announced that Manzur's "tenure earning start date is 9/1/2008" and advised that "you will earn tenure on 9/2/11. Since you were a leave replacement for Concetta Fischer from 1/2/07 to 6/30/07, this time does not count toward tenure." It is noted that while in this litigation the Board contends that Ms. Manzur's service in the 2007-2008 school year was still as a leave replacement for Ms. Fischer, this letter does not state that the service as replacement for Fischer continued for the school year 2007-2008. However, the Superintendent's calculation of the date upon which tenure would be attained implies that the service in that 2007-2008 term did not count, as if it did, tenure would have been attained in September 2010 (three consecutive academic years," 2007-2008, 2008-2009, 2009-2010, "together with employment at the beginning of the next succeeding academic year," 2010-2011, N.J.S.A. 18A:28-5).

In considering the state of the proofs on Ms. Manzur's case as they existed at the time of the motion for summary decision, the Supreme Court noted that while the Board contended that replacement status for 2007-2008 could be "inferred" from the September 2009 letter for Superintendent Schilder, the Board

> produced no evidence to establish that the position Manzur occupied in 2007-2008 was one that she was told was already assigned to another teacher. Indeed, both parties acknowledge that the record does not demonstrate that Manzur was acting in place of Concetta Fischer for the 2007-2008 school year, or that Fischer was "absent" for that year laid the burden to prove notice of replacement status on the Board. In other words, even if Schilder's failure to mention the 2007-2008 school year evinced his continued belief that Manzur worked as a replacement for Fischer for that

year, no evidence proves that Manzur was given notice of the same. Manzur asserted in her affidavit that she was not told that 2007-2008 was a replacement year, as she was before beginning work in the 2006-2007 teaching year.

In this hearing, the Board, attempting to meet its burden to demonstrate that Manzur received notice that her employment for the 2007-2008 school year was as a continued replacement for Concetta Fischer, offered some written materials which it contends at the very least served as a form of notice to Ms. Manzur that her service in 2007-2008 was not counted by the Board toward the attainment of tenure. In addition to the Superintendent's September 14, 2009, letter, it points to an annual summative evaluation for 2009-2010, which reflected a tenure date of September 2, 2011, and another summative evaluation for 2010-2011, which again showed the tenure date as September 2, 2011. Each of these was then consistent with the Superintendent's letter of September 14, 2009, as to the date upon which Ms. Manzur would, if still employed at that time, attain tenure. The annual evaluation issued to Manzur in the spring of 2011, noted that she was not being recommended for renewal or increment progression. In regard to these written materials, it is evident that to the extent they may be understood, at least by inference, to show that the Board did not view Ms. Manzur's employment in 2007-2008 as eligible for tenure credit, none of them directly spoke to the nature of the employment, that is, that it was as a replacement, nor can any of them demonstrate that Ms. Manzur received some sort of timely notice in 2007 that if she accepted employment of the upcoming 2007-2008 term, it was as a replacement and was not permanent employment and was not therefore creditable toward fulfillment of the statutory time needed to attain tenure. As such, I **FIND** that the Board has not provided any evidence that Ms. Manzur was ever provided with any sort of formal, written notice prior to the commencement of the 2007-2008 term that she was acting in a continued replacement mode. Indeed, no writing exists that ever specifically and without the need for inferential analysis, advised her as to her serving as a replacement in 2007-2008.

While the Board has not offered such evidence, it has offered the testimony of

the school principal, Joseph Diskin, who contends that he verbally informed Ms. Manzur that she was continuing as a replacement, and that he did so in the spring of 2007. Mr. Diskin has been principal of the Eisenhower School in the Bridgewater-Raritan District for fourteen years. He is responsible for the hiring, evaluations and observations of teachers. He hired Ms. Manzur in August 2006, as a replacement sixth grade teacher for Ms. Fischer, who was going on maternity leave. At that time, Fischer was expected to be out until January 2007. Manzur advised that she could accept the position as a long-term substitute for Fischer. Later on, Mr. Diskin learned that Fischer was extending her leave and he asked Manzur if she would remain through June 2007. On December 22, 2006, Diskin recommended in writing that Manzur be switched from a long-term substitute to "regular contract status for Concetta Fischer who is on maternity leave as of January 15th." According to Diskin, Manzur was aware that Fischer was on extended maternity leave. Manzur was then hired as of January 2, 2007, as a teacher "replacing" Fischer who is noted in a form entitled, "Certified Staff New Employee Forms Checklist" as on "MLOA." Diskin informed Manzur that he had recommended her for employment until the end of June 2007, telling her that Fischer was on leave until the end of June 2007.

Diskin testified that as is normal in the District, a staffing personnel meeting was held during the spring of 2007, at which meeting a discussion took place as to which staff members were returning to work or were not. He was told that Fischer had decided to extend her leave through the 2007-2008 academic year. According to Diskin, this information as to who is or is not returning is vital so as to assure appropriate staffing for the coming year. In addition, it is important to know this so that the courtesy of information can be provided for those who may wish to pursue other employment for the coming year if the person they have been replacing is returning to work. He contends that he informed Manzur that Fischer was not returning for 2007-2008, and asked her if she was interested in continuing with the position. He testified as follows in response to a question from Board counsel (BC)

> BC: And did you happen to have any conversations in that time period with Ms. Manzur?

Diskin: Yes.

BC: Okay, could you describe them?

Diskin: Just letting her know that Mrs. Fischer—that she would not be returning and she'd be taking another year and if she was interested in continuing in that position. And her response was yes.

BC: Okay. When you say another year in that position.

At this point counsel was cautioned not to ask a leading question.

BC: Okay. Did you say anything further?

Diskin: Yeah just another—if she would like to continue another year in that maternity leave position.

. . .

BC: Okay. Do you have a clear recollection of telling Ms. Manzur what you described?

Diskin: Yes.

BC: And do you recall what she said?

Diskin: She was very happy and appreciative at the time. Again, people who are on maternity leave sometimes from us, it is a touch and go thing—they don't know if they're going to be employed for that following year and she was very pleased.

She accepted and Diskin informed the Human Resources department that the position was filled for 2007-2008. Manzur's contract renewal was reflected in the Board minutes for the May 22, 2007 meeting. Her name is included in this listing of staff renewals under the category "Non-Tenured." Of course, under any conception of the facts here, she was not a tenured employee as of that time, nor was she about to become tenured, as others who are listed as "Going to Tenure." Board minutes for the August 22, 2006 meeting listed Fischer as on paid leave of absence as of May 10, 2006, but additional entries to that original entry show that she continued on extensions of that leave, as unpaid leave, during the 2006-2007 term.

On cross-examination, Mr. Diskin insisted that although the sort of conversation he described with a teacher who needs to be informed of the prospect of continued employment in the coming year was a standard part of his responsibility each year, he had specific recollection of having this discussion with Manzur in the spring of 2007. At the time there were approximately seventy-five teachers, twelve para-professionals, seven lunch aides and five secretaries on staff at Eisenhower School and fifteen were non-tenured teachers. He added that although this "formal" conversation was one that he initiated, there were other conversations regarding Manzur's status for the coming year which she initiated, "other conversations . . . asking me if I knew the status of the individual—if they were returning or not. And my responses to her at that time were that we were not informed and that I would share the information at the appropriate time." These discussions took place before the "formal" conversation, by which time he was aware that Mrs. Fischer was not returning. "It is that time of the year so that is—people who are on maternity leave replacement—that is a question we get asked frequently."

On further questioning concerning his direct testimony, Diskin explained that when he testified that he had spoken to Manzur during what he characterized as the "formal" conversation, he had told her that Fischer was not returning, "When I said before that she was not coming back, I meant that she was not coming back and she was going to be on maternity leave of absence." Asked if he had specifically told Manzur why Fischer was not coming back, he responded, "Well, that's true, yeah, because that's part of what we have to communicate from Human Resources and the Superintendent to the individual . . . the fact that the individual is not going to be returning to her position because she is going to be extending her maternity leave."

Mr. Diskin's first statements for the record regarding these issues were made in August 2015, when he signed two Certifications, dated August 18 and 21, 2015, respectively, which were entered into evidence during his testimony. It is noted that these were produced for the present remand and post-date the Supreme Court's May 2015, decision regarding the importance of "notice." In the first Certification, Mr. Diskin discussed his informing Manzur that she could continue in employment for the following

term as follows:

> 10. During the 2007-2008 school year I informed Manzur that her position as a leave replacement was going to continue throughout the 2007-2008 school year.

In this statement, Diskin makes no reference to conversations in the 2006-2007 school year concerning the fact that Manzur would be continuing as a replacement in the coming term. However, in the second Certification, he expanded upon this description, repeating the above-quoted statement and adding,

> "Many of these conversations occurred in the spring of the 2006-2007 school year. This was because I wanted to ensure that Fischer's position was properly staffed, and because I wanted to ensure that Manzur was aware that she was a replacement; thus, if she wished, she could seek employment in a permanent position either with the Bridgewater-Raritan School District or within another school district."

In addition, the record contains employment contracts entered into between Ms. Manzur and the Board of Education for the school years 2006-2007, 2007-2008, 2008-2009. The contract for 2006-2007 was dated January 23, 2007. It does not identify Manzur as either a replacement or a permanent employee. Neither does the 2007-2008 contract, dated May 22, 2007. It also does not address her status, nor does the 2008-2009 contract.

## Discussion

The dispute between Ms. Manzur and the Board of Education is over whether at the time that she was told that her contract for the school term 2011-2012 was not renewed, she was a non-tenured teacher subject to non-renewal at the discretion of the Board, or instead, a tenured teacher who could not be so summarily removed from her position in the District. She contends that the school term 2007-2008 was the first year in which she attained tenure credit, and that year, with the subsequent years 2008-2009 and 2009-2010, and her service on the first day of the 2010-2011 school year, fulfilled

the service time requirement of the tenure statute (three consecutive academic years and employment as of the first day of the next consecutive academic year). However, the Board denies that she was eligible to receive credit for the 2007-2008 academic year, as she was still then only serving in a replacement role for Concetta Fischer, the teacher whom she had replaced in 2006-2007 while Fischer was on maternity leave, which she extended for the 2007-2008 school year. The Supreme Court concluded that if the Board could not demonstrate that it had provided Ms. Manzur with notice that her 2007-2008 service was still in a replacement, non-tenure accruing role, it could not deny her credit for that year's service toward the attainment of tenured status.

In her opinion for the Supreme Court, Justice LaVecchia noted that while there was a "paucity of case law explaining how someone can be designated as a replacement teacher," nevertheless, the Appellate Division had identified two requirements in N.J.S.A. 18A:16-1.1. These were (1) that the individual was "act[ing] in place of" a teacher, and (2) who is absent or disabled. Platia v. Board of Education of Hamilton, 434 N.J. Super. 382, 391(App. Div. 2014), quoting Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982). The Supreme Court determined that there was a third criterion that must also be demonstrated by a board if it is to successfully argue that a teacher, otherwise having fulfilled the time of service element in the tenure statute, was to be denied tenure status. For the exception which bars a teacher who has, in fact, performed service for an academic year in a district from obtaining credit for that year toward fulfilling the statutory time requirement is just that, "an exception to an otherwise generally applicable statute that confers tenure upon mere completion of service for a period of time." Bridgewater-Raritan, supra at 241 N.J. 349, 361. The additional criteria identified by the Court is that an employer give notice to the employee receiving the specialized designation that takes the employee off normal service road toward tenure," Id. This requirement for notice arises from the wording of N.J.S.A. 18A:16-1.1, which allows a district to "designate" such employees ("In each district the board of education may designate some person to act in place of any officer or employee during the absence . . . ."). Considering the meaning of "designate" "in common parlance," the Court found that its "natural reading contemplates that a person,

who is 'designated' as having some conferred status, is informed that he or she has been so designated or is made aware of that conferred status." The "employer" 'must

> give notice to the employee receiving the specialized designation that takes the employee off the normal service road toward tenure. We construe N.J.S.A. 18A:16-1.1 to require a board of education to make an employee aware that he or she is being employed as a "replacement." That construction reasonably and fairly ensures that a person being offered specific employment as a replacement will not have the normal expectation that his or her time in service will count toward the acquisition of tenure, . . . . Id.

Importantly, the Court noted its concern that in the absence of *a "notice of requirement"* which allows for "transparency," districts could "manipulate those designations to avoid tenure." Id.

It seems apparent from the quoted language of the Court that the intent of the requirement for notice is that such be provided to the "designated" employee in a timely manner. After all, if "notice" is to be make one aware of some vital information that may affect one's rights and the decision-making in respect to the information provided and its possible consequences, such "notice" must be delivered to the intended recipient in a timely manner, or it may well lose, or at least, lessen its intended value. In its decision, the Court speaks of notice as required for the "employee . . . being employed as a 'replacement'" and of "a person being offered specific employment as a replacement." It does a person little good to first be told well after the fact that the service they performed at some past time did not count toward tenure acquisition because the employer is now claiming, at the time of such belated notice, that the service was under a "designation" by the employer that removed the service from the normal tenure track. Here, Ms. Manzur worked for the Board in 2007-2008. The first written suggestion that her 2007-2008 service was not credited toward tenure was in the September 2009 letter, issued over one year after the end of the 2007-2008 term in June 2008, and much more importantly, approximately two and a quarter or more years after the crucial spring 2007 period when Manzur would have had to assess her circumstances in light of such notice that the 2007-2008 employment was under a designation that would

preclude her receiving tenure credit if she accepted that employment. Given this, I **CONCLUDE** that any notice provided in September 2009 or thereafter, express or, as here, at best implied, by the letter and the subsequent tenure-date references in evaluative documents cannot serve as the notice required by the Supreme Court. Any such "notice" here, if it can be elevated to that level, was untimely and of little practical use to the person to whom the Court deems notice to be due.

In the end then, the question is (1) whether Principal Diskin did tell Ms. Manzur that she was being offered a chance to continue in a replacement position for Ms. Fischer for the 2007-2008 term, and (2) whether such a verbal advice from the school principal is the sort of "notice" that the Court found "the board of education" was required to provide the employee in such timely fashion.

The assessment of the credibility of testimony relies upon a breath of considerations such as the consistency and overall sense of the testimony, the demeanor and trustworthiness of the witness, the possible bias, prejudice and motivations of the witness, the sense in which the testimony "hangs together" and the common sense and reasonableness of that which the witness offers. State v. Daniels, 182 N.J. 80, 99 (2004); State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

The Board urges that Diskin's testimony at hearing that he did advise Ms. Manzur in the spring of 2007 that she was being offered the chance to continue in a maternity leave position for 2007-2008 was accurate and worthy of belief, as it was consistent with the fact that the Board knew at the latest on March 27, 2007, that Mrs. Fischer was extending her leave, that the principal and other administrators met to discuss staffing for the coming 2007-2008 term as they would normally do during the spring, that Diskin then learned that Fischer would not be returning as originally thought, and that it was District "practice" to inform leave replacement teachers whether the teacher they were replacing was returning for the upcoming term, as the District needs to know if the replacement will be remaining to fill that absent teacher's position or whether other staffing actions will be required to assure positions are filled. Thus, he

testified, he told Manzur that "Fischer . . . would not be returning and she'd be taking another year and if she [Manzur] was interested in continuing in that position." Board counsel then asked him if there was more to the conversation, "Did you say anything further?" (As if what he had just testified to telling Manzur was not sufficient.) He responded to this seeming prompt, adding that he asked her, "if she would like to continue another year in that maternity leave position." (emphasis added). Interestingly, in his original Certification, in paragraph 9, he stated that while he had "multiple conversations" in which he informed Manzur that she was hired as a replacement for Fischer, he did not give any time frame for these (she was hired in 2006). In paragraph 10, he said that he told her that her position for 2007-2008 was as a leave replacement, but he states that this information was provided to her "during the 2007-2008 school year." It is not stated when during that term this supposedly occurred: whether at its beginning, middle, end, or whenever. But in his subsequent Certification, signed just three days later, paragraph 10 is greatly expanded to include not only this reference to informing Manzur "during the 2007-2008 school year," but to also offer that "many of these conversations occurred in the spring of the 2006-2007 and 2007-2008 school year." Obviously, for the required notice to have been timely, some notice during the spring of 2006-2007 was needed. It is unclear what is meant by "many of these conversations" taking place "in the spring of 2006-2007." Was it one such conversation, the "formal" one mentioned by Diskin when he testified, or does this include others, in which he seems to say that at the time when Manzur asked him he did not yet know if Fischer was returning. Again, the information presented in his first Certification in paragraph 10 does not reference any such spring 2006 conversation(s). It is again as if the first Certification was deemed insufficient to address the need for timely notice, prompting her need for a second, expanded Certification.

Mr. Diskin was apparently not called upon to make statements about his recollections of what happened between he and Ms. Manzur until after the issue of notice became crucial following the Court's May 2015 decision. Thus, at least as the record reveals, his Certifications and testimony were offered over eight years after they purportedly occurred. Ms. Manzur has expressed her surprise at being advised that her ser-

vice in 2007-2008 was not to be credited since at least the filing of a petition with the Commissioner in December 2009, shortly after the September letter was issued. At that time, Manzur was one of many teachers who were claiming to have been affected when the District purportedly disavowed through this letter an earlier policy of crediting employment in a maternity leave replacement position for tenure purposes. That petition was dismissed on motion as not ripe for adjudication, but nevertheless it demonstrates that Manzur had been concerned with the issue of exactly what her status was and the consequences thereof for a much longer period of time than Mr. Diskin is likely to have been. See Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of the Bridgewater-Raritan Sch. Dist., Somerset Cnty., EDU 01199-10, Initial Decision (November 8, 2010), adopted, Commissioner (Dec. 15, 2010), <http://njlaw.rutgers.edu/collections/oal/>.

Another difference in the Certifications is that in the first, Diskin relates that Manzur was assigned to Fischer's classroom in both 2006-2007 and 2007-2008, but in the second he corrects this, noting that in 2007-2008, Manzur "was transferred to a different classroom because she had the same certifications as Ms. Fischer."

Having evaluated the evidence, including the testimony of Diskin and Manzur, their prior statements as recorded in certifications and affidavits, and the documentary materials, I am convinced that the greater weight of the credible evidence is that Mr. Diskin did not specifically tell Ms. Manzur during the spring of 2007 that she was being offered the opportunity to accept a position as a replacement for Ms. Fischer, who would be remaining on maternity leave. I **FIND** that he did tell her that there was a position open for her if she chose to take it; that her employment could continue in the 2007-2008 term. But I do not trust his recollection that he told her that she was continuing as a replacement. He was not called upon to detail any of this information as to the specifics of what he told her until many years after the supposed conversations he now claims to recall occurred. His certifications and his testimony are less than convincing. His testimony lacks the ring of truth that is needed to obtain credit. It seems as if each time he had to be drawn out, prompted, to "recall" elements that he did not at first offer, and while I fully acknowledge that this is not in and of itself fatal to the

credibility of his claims, and that such a pattern does not automatically undermine the credibility of testimony, here, coupled with the fact of how long ago these events happened and the fact that at the time, the need for such specific notice was not appreciated, as well as the question of why Diskin would have such purportedly sure recall of this spring 2006 conversation and its specific contents as he claims (after in each instance having offered a limited and then a more "complete" version of the conversation) I simply do not credit his recall. I do not doubt that he would have told Manzur that a position was available, but I do doubt that he actually told her in the spring of 2007, before she contracted for the job, that it was merely as a continued replacement position or that it was for replacing Ms. Fischer while she continued on extended maternity leave. Thus, I **FIND** that Mr. Diskin did not provide the rudiments of notice to Ms. Manzur required by the Supreme Court's decision.[1]

It should also be noted that even if Diskin told Manzur what he claims to have said in the spring of 2007, he was the school's principal, not the employer. The Board hires employees; principals do not. The Board's contract with Manzur says nothing about temporary or replacement status. The Board never sent her any letter advising her as to the limited nature of the position she was offered in that contract. The Board never advised her of any formal Board action to be taken at a Board meeting to hire her only in a replacement capacity. Whether the mere verbal remarks of the principal could be relied upon by the Board to fulfill its requirement to provide timely notice is open to question, and reliance on such verbal information from staff, not themselves the employer, and not themselves in a position to contract with staff, is of doubtful worth, especially as often, although not here, the staff member purportedly providing the notice may no longer be employed when issues regarding notice surface. But here I do not need to resolve that issue, as I have determined that no such specific conversation

[1] In its reply brief, the Board argues that Mr. Diskin, a public official and school administrator, would not have made a false statement under oath and that as such, the credibility of his assertions after the court noted some concern about his testimony supports that he was testifying accurately. But simply because I do not find his recollection of his actions in the spring of 2007 to be accurate does not mean that I am accusing him of making knowing false statements. Instead, it appears that after so much time, his recall about what occurred, as reflected in his certifications and testimony, is not persuasive.

occurred. Nevertheless, the facts here, including the simple fact of the passage of time as it can impact memory, the advantages gained by the creation of trustworthy records and the Court's expressed concern about possible manipulation of the tenure process, strongly suggest the need for boards of education to fulfill the Court's notice requirement by written communication with staff.

I **CONCLUDE** that the Board has failed to meet its burden to demonstrate timely notice. Therefore, Ms. Manzur, having fulfilled the requirements for receiving tenure as of the first day of the 2010 school term, was improperly not retained when the Board did not renew her contract in the spring of 2011.

Remedy

Ms. Manzur contends that as a result of a decision in her favor she is entitled to back pay in the amount of $127,486.67. This is the result of deducting from a sum she calculates at $228,491, the sum she contends she would have earned had she continued her employment with Bridgewater-Raritan after her non-renewal in June 2011, through the present, minus monies she received from unemployment and from employment that she obtained during the course of the years after she was let go by the District. The Board contends that any back pay to which she may be entitled must be reduced further than she has calculated, contending that she has failed to sufficiently mitigate her damages.

In Goodman v. London Metals Exchange, 86 N.J. 19 (1981)("London Metals"), the Court explained

> "unreasonable refusals to accept other proffered employment or failure to exercise reasonable diligence in seeking other suitable available positions trigger mitigation principles . . . Mitigation depends upon the facts of the case. If the claimant has actually obtained other employment, it is simple enough to credit the employer with the amount of those earnings. Beyond that, there are several complications. In order to invoke mitigation there must, of course, be available jobs. In their absence, mitigation is not feasible. Further, if

> positions are available, mitigation will apply if the claimant has not made a reasonable and diligent effort to obtain other employment. It is possible that even though such an effort was made, the claimant may not have been successful finding work. In that situation mitigation would not be appropriate." Id. at 35-36

In London Metals, supra and O'Lone v. Dep't of Human Services, 357 N.J. Super. 170 (App. Div. 2003), the courts have placed the burden to demonstrate that an employee failed to adequately seek to mitigate damages upon the employer, which must show the existence of jobs that were available for the employee during the relevant period.

Ms. Manzur became unemployed after her non-renewal at the start of the summer of 2011, and first obtained any employment in December 2013. She received unemployment payments totaling $50,853 from July 2011 through February 2013. She then earned $2,651 working at Tony's Appliance Repair, where she worked from December 2013 until February 2014. She then worked for Newsholme Financial Services, from March 2014 through May 2014, where she earned $7,500. After these non-teaching positions, she secured employment as a teacher at a private school, Cedar Hill Prep, where she remains employed as of the hearing. There, she has earned $40,000.08 for the 2014-2015 school year and is presently under contract with Cedar Hill for the present school year at a salary of $41,000, although she is currently on maternity leave through the end of 2015, and will return to the school in January 2016. Her salary at Cedar Hill is lower than that which she would have earned in comparable years if she had remained employed at Bridgewater-Raritan, where, if she had received the normal increments during the years starting with the 2011-2012 school year, she would have earned a salary of $55,101 for 2011-2012; $55,720 for 2012-2013; $58,535 for 2013-2014, and $59,135 for 2014-2015.

Ms. Manzur presented documentary evidence as to the job searches she claims to have made during the period from July 2011 through December 2013. In addition to the e-mail evidence offered, she testified that she also mailed applications and/or dropped applications of by hand, which are not reflected in the e-mails and thus constitute additional attempts to secure teaching employment which are not themselves reflected in the documentary record. Manzur's documentary material indicates that from

July 2011 through November 2013, she applied for at least seventy-seven positions, although, as noted, she claims this is not a full record of her attempts, only those she can now document. And her evidence details a total of ninety-two jobs applied for from June 2011 through September 2015. She also noted that her contract with Cedar Hill required that she provide ninety days' notice if she was moving to a new position, a requirement that made any attempt to obtain employment in a different teaching position during the course of the school year extremely difficult from a practical standpoint.

In its attempt to meet its burden and show that her attempts to mitigate fell short of the requirement to "exercise reasonable diligence," the Board contends that there were many more available positions that she could have attempted to obtain, offering documentary evidence intended to show this larger pool of opportunity. It notes the many months when Manzur did not, at least according to her documentary record, file any job applications. It points to the existence of over 500 school districts in the State, whereas it offers that Manzur, at least based on the documents, only applied to 18 districts. It notes the many jobs listed on the K12 jobspot.com website that Manzur herself cited as a source she utilized to locate positions. It notes the high concentration of applications filed during the period immediately following her non-renewal (20 percent of the total). After this burst, which it concedes might be deemed "reasonable diligence," it contends that she did not continue to exercise this diligence, certainly until a "burst" of activity starting in August 2013 through November 2013, a period that coincides with a time after she had last received unemployment compensation, which apparently ended following payments in January and February 2013. It analyzes the documentary record, P-18, and argues against any back pay for several periods when the exhibit does not demonstrate any, or many, applications having been filed.

In addition, the Board also argues that, in regard to her estimated earnings if she had remained at Bridgewater-Raritan, Ms. Manzur includes in the calculation the assumption that she would have received the increments that were provided in the several years, when, in fact, she was not recommended for an increment in her 2010-2011 annual evaluation due to performance issues prior to her non-renewal. Of course,

it is the case that at the time that she was not recommended for an increment, the Board determined to non-renew her, and, as this decision holds, that determination to have been in violation of her tenured status at the time the decision was made. It is difficult to know what would have occurred had the District properly understood that she was a tenured teacher. Given that it had no intention of retaining her, it is hard to understand why the evaluation would have recommended that she receive an increment when she was not going to be on the staff for the following school year. Given that it was not intending her return, the Board never went through the process for denying an increment. Therefore, I place little weight upon the recommendation against an increment and **CONCLUDE** that she should be deemed to have been entitled to pay at the incremental rate for the several years when she was improperly denied employment by the District.

In response to the Board's arguments, Ms. Manzur asserts that the Board relies entirely upon her documentary evidence to support the conclusion that during periods when she does not have documentary proof that she applied for positions that she in fact did not do so. But she testified to other applications, made in person, or mailed rather than e-mailed, and thus contends that the full picture of her efforts must be gleaned not only from what she can document, but from the acceptance of her testimony as to her other efforts to obtain employment.

There is no statutory reference, Commissioner's decision or judicial case law that establishes a set formula or benchmark for determining whether an employee has conducted sufficient mitigation to avoid a reduction in the amount of back pay that they would be otherwise entitled to as a result of an improper termination of employment. Under Goodman, the Board's burden in offering the affirmative defense of "mitigation of damages" is to demonstrate the existence of such "comparable employment." If it does so, the decision then must be whether, given the circumstances, the employee acted in seeking such employment with "reasonable diligence." To do so, the employee must be understood to have made what has been characterized as an "honest attempt" to obtain "comparable employment." Zielinski v. Guttenberg Bd. of Educ., 1981 S.L.D. 759, 762. Based upon the record, it is the case that there were some comparable jobs available

over time, but based upon her testimony and the documentary record of her efforts, I **FIND** that Ms. Manzur did exercise such honest effort and acted with due diligence. The Board's attempt to demonstrate that there are innumerable districts and thus potentially many more jobs is a bit of make weight, since there exists no requirement that someone search for jobs in remote areas. And "comparable employment" must mean actual, not potential, positions that might exist.

The record shows that when Ms. Manzur did obtain employment, first in non-teaching positions, but most significantly perhaps when in her teaching position at Cedar Hill Prep, she took employment that paid less than she would have earned at Bridgewater-Raritan. She notes that in London Metals the Supreme Court recognized that at some point in the search for employment, even the most diligent person may find it necessary to take steps to obtain gainful work which may include such as expanding the search area, the nature of possible employment sought and the level of compensation. "With the passage of time circumstances may dictate that the claimant lower his sights and accept employment with lower pay, with different work, or at a more distant location." Id. at 86. This means that the employee may have to lower her sights so as to obtain some reasonable, if not necessarily completely comparable, employment such as she previously had and was improperly excluded from. In this regard the Court quoted from NLRB v. Southern Silk Mills, Inc., 242 F.2d 697, 700 (6 Cir.1957), cert. den. 355 U.S. 821, 78 S.Ct. 28, 2 L.Ed.2d 37 (1957),

> We are of the opinion . . . that the usual wage earner, reasonably conscious of the obligation to support himself and his family by suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay "desirable new employment. . . ."

Given this, I **FIND** no fault in her accepting the job at Cedar Hill, and I accept that given the ninety-day notice requirement and the likelihood that a board of education seeking a mid-term employee to fill a position that presumably already is vacant or is to be so shortly, it is unlikely that a board would offer a position to someone who must wait for

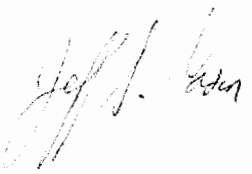
ninety days after being offered the position to first undertake that employment.

I **CONCLUDE** that Ms. Manzur is entitled to receive $127,586.67 in back pay.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

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



December 11, 2015
DATE

**JEFF S. MASIN**, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

## WITNESSES:

**For petitioner:**

Tamara Manzur

**For respondent:**

Joseph Diskin

## EXHIBITS:

**For petitioner:**

P-1 Teacher's Contract (Mentor Program), January 23, 2007

P-2 Teacher's Contract, dated May 22, 2007

P-3 Bridgewater-Raritan School District, Formal Observation Report, dated November 12, 2007

P-4 Bridgewater-Raritan School District, Formal Observation Report, dated December 17, 2007

P-5 Bridgewater-Raritan School District, Formal Observation Report, dated April 2, 2008

P-6 Bridgewater-Raritan School District, Annual Summative Evaluation Report, dated April 9, 2008

P-7 Teacher's Contract, dated May 22, 2008

P-8 Bridgewater-Raritan School District, Formal Observation Report, dated November 5, 2008

P-9 Bridgewater-Raritan School District, Formal Observation Report, dated March 9, 2009

P-10 Bridgewater-Raritan School District, Formal Observation Report, dated March 31, 2009

P-11 Bridgewater-Raritan School District, Annual Summative Evaluation Report, dated April 13, 2009

P-12 Letter to Tamara Manzur from Michael Schilder, Superintendent of Schools, dated September 14, 2009

P-13 Letter to Tamara Manzur from Michael Schilder, Superintendent of Schools, dated April 27, 2011

P-14 State of New Jersey Certificate of Tamara Manzur

P-15 Agreement between the Bridgewater-Raritan Regional Board of Education and the Bridgewater-Raritan Education Association, July 1, 2008-June 30, 2011

P-16 Agreement between the Bridgewater-Raritan Regional Board of Education and the Bridgewater-Raritan Education Association, July 1, 2011-June 30, 2012

P-17 Agreement between the Bridgewater-Raritan Regional Board of Education and the Bridgewater-Raritan Education Association, July 1, 2012-June 30, 2015

P-18 Job Search material

P-19 2011-2012 U.S. Income Tax Returns

P-20 Employee Pay Stub, Tony's Appliance Repair

P-21 Certification of Joseph P. Diskin, dated August 18, 2015

P:-22 Certification of Joseph P. Diskin, dated August 21, 2015

**For respondent:**

R-1 Memorandum from Joseph Diskin to Gerry Nazzaretto, dated August 25, 2006

R-2 Memorandum from Joseph Diskin to Gerry Nazzaretto, dated December 22, 2006

R-3 Certified Staff New Employee Forms Checklist, dated January 2, 2007

R-4 Bridgewater-Raritan Regional School District Human Resources Services Addendum Explanation and Certified Salaries

R-5 Certified minutes of the Board of Education meeting, March 27, 2007

R-6 Letter from Michael Schilder to Manzur re tenure status, dated September 14, 2009

R-7 Bridgewater-Raritan Regional School District Human Resources Services List

R-8 Manzur Employment Contracts for 2006-2007, 2007-2008 and 2008-2009 school years

R-9 Annual Summative Evaluation Report 2009-2010 school year

R-10 Annual Summative Evaluation Report, 2010-2011 school year

R-11 For identification only

R-12 Mitigation Documents Binder

R-13 For identification only

26-16

# STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
## BUREAU OF CONTROVERSIES AND DISPUTES
## TENURE HEARING

| | | |
|---|---|---|
| In the Matter of the Arbitration Between STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, NJ | ) | |
| **PETITIONER** | ) | **OPINION** |
| And | ) | **AND** |
| SHERLENE THOMAS | ) | **AWARD** |
| **RESPONDENT** | ) | |
| Agency Docket 257-9/15 | ) | |

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

| | |
|---|---|
| JERROLD WOHLGEMUTH, ESQ. | COUNSEL FOR PETITIONER |
| ADAM HERMAN, ESQ. | COUNSEL FOR EMPLOYER |

FOR THE RESPONDENT

| | |
|---|---|
| NICHOLAS POBEREZHSKY, ESQ. | COUNSEL FOR RESPONDENT |
| WOLODYMYR TYSCHENKO, ESQ. | COUNSEL FOR RESPONDENT |
| SHERLENE THOMAS | RESPONDENT |

## PROCEDURAL BACKGROUND

Ms. Thomas was a tenured teaching staff member of the State-Operated School District, City of Newark and was assigned as a mathematics teacher. On August 11, 2015, Edwin Reyes, Principal of Technology High School, in the State-Operated School District of the City of Newark, filed a Notice of Inefficiency, (tenure charges) against the Respondent. That Notice of Inefficiency included thirty-five (35) separate counts of an inability of the Respondent to "completely and responsibly execute her duties as a teacher" for the period of September 2013 to the present. Those charges were filed pursuant to N.J.S.A. 18A:6-11, and N.J.S.A. 18A:6-17.3. On or about August 14, 2015, the above charges were served on the Respondent.

On September 8, 2015, Christopher Cerf, Superintendent of the State-Operated School District of the City of Newark, filed a Certification of Determination in support of the Tenure Charges filed by Principal Edwin Reyes. That Certification was filed in accordance with N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3 Superintendent Cerf also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective September 9, 2015.

On September 25, 2014, Jerrold Wohlgemuth, counsel for the Petitioner, filed the tenure charges with David Hespe, Commissioner of Education. That filing included Notice of Charges, Statement of Evidence in Support of Charges, Supporting Documents, Certification of Determination and Proof of Service.

On September 21, 2015, the Respondent filed an answer to the tenure charges. On September, 28, 2015, M. Kathleen Duncan, Director of New Jersey Department of

Education's Bureau of Controversies and Disputes, sent a letter to Messrs. Wohlgemuth and Poberezhsky in which she indicated that the tenure charges and Respondent's answer were reviewed pursuant to N.J.S.A. 18A:6-17.3 c, and upon review *"the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of Respondent's defenses and any motions which may be filed with the arbitrator." Additionally, Ms. Duncan stated that the arbitrator* "shall review those charges brought pursuant to *N.J.S.A. 18A:6-16 which are not dismissed as a result of a motion – under the preponderance of evidence standard."*

Accordingly, on September 28, 2015, the undersigned was appointed arbitrator in the instant matte. Hearings were scheduled for December 7, 17, 21, 2015, and January 20, 2016. Prior to the December 7, 2015, hearing the parties entered into settlement discussions. Those discussions were expanded at the December 7, 2015, hearing. On January 14, 2016, the parties signed a stipulation of settlement, whereby the Respondent resigned her teaching position effective March 31, 2016.

I accept, acknowledge, and agree to the stipulation of settlement and it shall be incorporated into my Award. In view of the Respondent's unilateral resignation, it is my opinion that in accordance with N.J.A.C. 6A:3-5.6 the tenure charges may be considered moot and a review by the Commissioner of Education is unnecessary.[1]

[1] State-Operated School District, City of Jersey City, Hudson County v. Deborah Robinson, Agency 403-11/03 (2004)

## AWARD

Under the auspices of N.J.A.C. 6A:3-5.6 (a), I hereby accept the January 14, 2016, consent settlement entered into evidence by the parties, and order that the tenure charges filed against Respondent, Sherlene Thomas, shall be dismissed as moot.

Dated: January 21, 2016

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 21st day of January, 2016, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

Notary Public

Lake Twp., Wayne County

My commission expires on November 10, 2017

**ADAMS GUTIERREZ & LATTIBOUDERE**
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorney for the State-operated School
District of the City of Newark

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF SHERLENE THOMAS<br><br>and<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | **AGENCY REF. NO. 257-9/15**<br><br>**STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Sherlene Thomas, residing at 108-136 Martin Luther King Boulevard, #1204 B, Newark, New Jersey 07104 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS,** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS,** the State District Superintendent of the School District ("Superintendent") certified tenure charges of inefficiency to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Sherlene Thomas, State-operated*

*School District of the City of Newark, Essex County* ("Tenure Charges"), upon allegations, including, but not limited to, that Respondent received a "partially effective" annual evaluation during the 2013-14 school year and also received an "ineffective" annual evaluation during the 2014-15 school year, and such charges were assigned Docket No. 257-9/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Gerard G. Restaino ("Arbitrator") on September 28, 2015 for a hearing; and

**WHEREAS**, Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, the District is a State-operated school district with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS,** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from her employment without litigation and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for her resignation

from the District effective April 1, 2016 ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Respondent also agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. Upon final approval of the signed Stipulation by the Arbitrator, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same.

4. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be placed on administrative leave with pay and will receive salary for the time commencing on October 10, 2015 until her date of resignation on March 31, 2016. All salary paid for said period shall be subject to all applicable salary withholdings and deductions. Other than the salary that Respondent receives from being placed on

administrative leave with pay for the time period identified above, Respondent will not receive any other monies from the District in exchange for this Stipulation of Settlement. Respondent will be deemed to have been placed on an unpaid administrative leave from September 9, 2015 through October 9, 2015.

5. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for any portion of the 2015-16 school year.

6. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective April 1, 2016, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation.

7. The District will not oppose any application by Respondent for unemployment benefits.

8. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Respondent acknowledges that the District is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral and that said participation will not be considered to be a violation of this Stipulation of Settlement. Aside from such requirements, pursuant to the above-referenced regulation, the District agrees to not independently seek the suspension or revocation of

Respondent's teaching certification or license or seek to prevent her from applying for or receiving pension benefits on any grounds related to the Tenure Charges or her resignation pursuant to this Stipulation of Settlement.

9. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

10. Respondent will not apply for reemployment with the District at any time. Specifically, Respondent will be considered to have permanently resigned from her tenured position as a result of this Stipulation of Settlement. If Respondent does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

11. In exchange for the consideration set forth in paragraph 4 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District or separation from employment with the District. It specifically includes,

without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having

any bearing whatsoever on her employment by and/or termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent also agrees to withdraw any and all pending complaints or actions that have been filed against the District or any of its employees or representatives. In the event the Stipulation is voided, Respondent retains the right to proceed with any of the claims waived, released or discharged in this provision.

12. Notwithstanding Paragraphs 2, 11 and 14 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 11, Respondent agrees not to seek or accept any resulting relief whatsoever.

13. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within

which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

14. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. In the event that the District receives an OPRA request, for which this Stipulation would be responsive to, Respondent understands that the District is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

15. Respondent understands that the instant tenure charges constitutes a public document maintained by the District under OPRA. As such, while the instant tenure charges and related documents will be maintained elsewhere by the District, Respondent's personnel file will not contain the tenure charges or any related documents referencing the tenure charges.

16. This agreement shall not constitute a precedent in any matters involving other District employees.

17. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

18. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

19. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

20. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument.

Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

21. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

22. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

23. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

24. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 1/14/2016

Sherlene Thomas
SHERLENE THOMAS

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 1-14-16

By: CHRISTOPHER CERF
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 1/22/16

Adam S. Herman, Esq.

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the State-operated School
District of the City of Newark

APPROVED:
Dated: 1/21/16

Gerard G. Restaino, Arbitrator

## CERTIFICATION

I, Sherlene Thomas, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/14/2016

Sherlene Thomas

SHERLENE THOMAS

SHERLENE THOMAS
108-136 Martin Luther King Boulevard
#1204 B
Newark, New Jersey 07104

January 14, 2016

Christopher Cerf, State District Superintendent
The Newark Public Schools
Office of the State District Superintendent
2 Cedar Street
Newark, New Jersey 07102

**Re: Irrevocable Letter of Resignation**

Dear Superintendent Cerf:

Kindly accept this letter as my irrevocable resignation from my employment with the Newark Public Schools, effective at the close of business on March 31, 2016.

Thank you for your kind attention to this matter.

Sincerely,

Sherlene Thomas 1/14/16

Sherlene Thomas

cc: Bernard Mercado, Esq., Newark Public Schools
Adam S. Herman, Esq.
Nicholas Poberezhsky, Esq.

State of New Jersey

# PRESCRIPTION BLANK

**SRINIVASA ESWARAPU, M.D.**
SAI MEDICAL CENTER
252 WASHINGTON AVENUE
BELLEVILLE, NJ 07109
(973) 450-9600 NPI # 1346215225

LICENSE # 25MA06800900 DEA # _____

IF PRESCRIPTION IS WRITTEN AT ALTERNATE PRACTICE SITE, CHECK HERE ☐
AND PRINT ALTERNATE ADDRESS AND TELEPHONE NUMBER ON REVERSE SIDE

PATIENT Sherlene Thomas D.O.B. _____

ADDRESS _____ DATE 1/12/16

☐

Ms. Sherlene Thomas is a patient in this office & is being treated for Hypertension. She will be needing a colonoscopy in March-April of 2016. She will be needing her health insurance during this time

MSIIE0415000209

SUBSTITUTION PERMISSIBLE _____ DO NOT SUBSTITUTE _____

DO NOT REFILL _____
REFILL _____ TIMES

SIGNATURE OF PRESCRIBER

*Use a separate form for each controlled substance prescription*

THEFT, UNAUTHORIZED POSSESSION AND/OR USE OF THIS FORM INCLUDING ALTERATIONS OR FORGERY, ARE CRIMES PUNISHABLE BY LAW

27-16

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|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

The Commissioner issued a decision in this residency matter on October 23, 2015, which affirmed the Initial Decision of the OAL with respect to the finding that N.P. was not domiciled within the school district; however, the matter was remanded to the Office of Administrative Law for development of the record and calculation of tuition costs owed to the district for N.P.'s period of ineligible attendance in Burlington Township schools.

On remand, the ALJ found that: subsequent to the Commissioner's October 23, 2015 decision remanding the matter to the OAL, the Board filed a motion for determination of the amount of tuition due, along with an affidavit by the Board's business administrator which clarified both the last day of school for the 2014-2015 school year and the district's tuition reimbursement rate; the affidavit indicated that N.P. attended school in the district for a total of eighty-six school days between February 2, 2015 and June, 18, 2015 – which was the last day of school; the per diem tuition rate in Burlington Township for the period in question was $107.33 per day; and the Commissioner is authorized to assess tuition where – as in the instant case – the evidence does not support the claims of the resident. Accordingly, the ALJ ordered that the respondent is entitled to reimbursement from the petitioner in the amount of $ 9,230.38.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision on remand as the final decision in this matter. Accordingly, B.P. shall reimburse the Board $9,230.38 in tuition costs for N.P.'s ineligible attendance in the Burlington Township School District from February 2, 2015 through June 18, 2015.

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

Issued 1/28/16

OAL DKT. NO. EDU 17253-15
(EDU 8697-15 ON REMAND)
AGENCY DKT. NO. 119-5/15

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this residency matter – which was remanded to the Office of Administrative Law in October 2015 for calculation of tuition costs owed to the school district -- and the Administrative Law Judge's Initial Decision on remand have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, B.P. shall reimburse the Board $9,230.38 in tuition costs for N.P.'s ineligible attendance in the District from February 2, 2015 to June 18, 2015.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/16
Date of Mailing: 1/28/16

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

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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Issued 1/28/16

OAL DKT. NO. EDU 17253-15
(EDU 8697-15 ON REMAND)
AGENCY DKT. NO. 119-5/15

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/16

Date of Mailing: 1/28/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 17253-15
(ON REMAND OAL DKT. NO. EDU 08697-15)
AGENCY DKT. 119-5/15

**B.P., ON BEHALF OF MINOR CHILD, N.P,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,**
Respondent.

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**B.P.**, on behalf of N.P., petitioner, pro se

**David M. Serlin,** Esq., for respondent

Record Closed: December 4, 2015 Decided: December 17, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, B.P., the father of the minor child N.P., appealed the determination of the Burlington Township Board of Education (Board) that N.P. did not reside within the

district and that tuition reimbursement was required. The Board alleges that the minor child, N.P., was not residing at the Burlington Township address provided by the petitioner and seeks repayment of tuition. After a full hearing on the matter, an Initial Decision was issued on September 10, 2015, finding that N.P. did not reside in the district and ordering tuition reimbursement. The Commissioner of Education issued a decision on October 23, 2015, affirming the Initial Decision with respect to the finding of residency, but remanding the case for a determination of the amount of tuition due. The Commissioner found inconsistencies regarding what the last day of school was and remanded for a determination on that issue. The respondent filed a motion for a determination of amount due along with the Affidavit of the Business Administrator, Mary Ann Bell on November 25, 2015, clarifying the last day of school and the tuition reimbursement rate. No opposition was filed to the Motion, and the record closed on December 4, 2015.

## TUITION REIMBURSMENT

The affidavit of Mary Ann Bell, the Interim Superintendent/Business Administrator for the Board, indicates that N.P. was in attendance in the district for the period in question from February 2, 2015 to June 18, 2015, which was the last day of school. The affidavit further indicates that N.P. was enrolled for a total of eighty-nine school days, but had been absent for three of those days. The per diem tuition rate in Burlington Township is $107.33 per day. The reimbursement due for the eighty-six days of school is $9,230.38.

The Board asserts that it is entitled to be reimbursed for tuition for the period of N.P.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a). Tuition shall be assessed as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual

> per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.
>
> [N.J.S.A. 18A:38-1(b)(1).]

In this matter, the affidavit of Ms. Bell indicated a per-diem rate for school year 2012–2013 was $107.33. Ms. Bell indicated that N.P. was in the district for eighty-six days for a total of $9,230.38.

I therefore **CONCLUDE** that the respondent is entitled to reimbursement from the petitioner for the costs of audited tuition in the amount of $9,230.38, representing the amount due from February 2, 2015, through June 18, 2015, based upon her daily attendance record.

## ORDER

It is hereby **ORDERED** that the respondent's determination that N.B. is not domiciled with her father, B.P., in Burlington Township, New Jersey, and was not so domiciled within its school district during the period of February 2, 2015, through June 18, 2015, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $9,230.38, representing the period from February 2, 2015 through June 18, 2015.

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

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

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

December 17, 2015
DATE

Sarah G. Crowley
**SARAH G. CROWLEY**, ALJ

Date Received at Agency: 12/17/15

Date Mailed to Parties: 12/18/15

SGC/vj

## EXHIBITS

**For petitioner:**

None

**For respondent:**

R-1 Affidavit of Mary Ann Bell, dated November 19, 2015

OAL DKT. NO. EDU 3557-15
AGENCY DKT. NO. 33-2/15

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|---|---|---|
| B.J.B., on behalf of minor child, B.W. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

On or about January 14, 2016, this matter was returned to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2(b) in light of petitioner's withdrawal of the Petition of Appeal.

Upon review of the record, the Commissioner notes that – notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn – the Board's answer in this residency matter contains an unresolved counterclaim for tuition for the period of B.W.'s alleged ineligible attendance in the district. Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/16
Date of Mailing: 1/28/16

| | | |
|---|---|---|
| B.J.B., on behalf of minor child, B.W. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, B.W., was not entitled to a free public education in the Pemberton Township Schools based on a residency hearing. Petitioner asserted that she and her child were current residents of Browns Mills, Pemberton Township. Subsequently, the matter was returned to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2(b), in light of petitioner's withdrawal of the Petition of Appeal.

Notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn, the Board's counterclaim for tuition for the period of B.W.'s alleged ineligible attendance in the district remains unresolved. Accordingly, the Commissioner remanded the matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

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

Issued 1/28/16

29-16

OAL DKT. NO. EDU 19090-15
AGENCY DKT. NO. 357-11/15

| | | |
|---|---|---|
| L.S., on behalf of minor child, E.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case the petitioner is seeking an Order requiring the Edison Board of Education (Board) to immediately place E.S. in honors chemistry. The ALJ denied the petitioner's request for emergent relief.[1]

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, *supra*. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying

[1]The recommended Order does not indicate why the request for emergent relief was denied; however the ALJ stated on the record that the petitioner did not show that E.S. would suffer irreparable harm if the relief was not granted and the petitioner did not establish a likelihood of success on the merits.

claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In this case, the petitioner has failed to establish a likelihood of success on the merits. It is undisputed that E.S. did not meet the requirements necessary to be automatically placed in honors chemistry because he is not currently enrolled in an honors math course. Students that are not enrolled in an honors math course must have the approval of the science supervisor in order to be enrolled in honors chemistry. Based on a review of E.S.'s transcripts and the fact that honors chemistry relies heavily on content taught in honors math, the science supervisor determined that it was more appropriate for E.S. to be placed in academic (college prep) level chemistry. At the very least a hearing on the merits is required to determine if the Board's decision to deny the petitioner's request to have E.S. placed in honors chemistry was arbitrary, capricious or unreasonable. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the remaining factors.

The ALJ captioned his decision as an "Initial Decision" with "Order Denying Emergent Relief" despite the fact that *N.J.A.C.* 1:1-12.6 makes no provision for the issuance of an Initial Decision on Emergent Relief. The audio recording of the hearing indicates that the ALJ concluded that a full hearing on the merits was necessary to determine whether the Board's decision to deny petitioner's placement request was arbitrary capricious or unreasonable. Yet, in addition to denying emergent relief, the ALJ dismissed the petition in its entirety without

providing any reasoning whatsoever.[2] Nonetheless, while the Emergent Relief Order was under the Commissioner's review, the parties filed a joint stipulation of dismissal.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/16

Date of Mailing: 1/28/16

[2] Even in the case of an Oral Initial Decision, permitted under *N.J.A.C.* 1:1-18.2, the decision shall be transcribed and "the judge shall identify … the issue or issues to be decided and shall analyze the facts as they relate to the applicable law, and make findings of fact, [and] conclusions of law."

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

***STATE OF NEW JERSEY***

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**ORDER DENYING EMERGENT RELIEF**

OAL DKT. NO.: EDU 19090-15

AGENCY DKT. NO.: 357-11/15

**L.S. o/b/o MINOR CHILD E.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,**

Respondent

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**Leonard E. Seaman**, Esq., parent pro se appearing pursuant to N.J.A.C. 1:1-5.4(A)7

**Ari D. Schneider**, Esq. for respondent (The Busch Law Group, LLC, attorneys)

Record Closed: December 16, 2015 Decided: December 18, 2015

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

This Matter being opened before this Court by Petitioner, L.S. on behalf of Minor Child E.S., (the "Petitioner"), by and through its attorneys, Law Offices of Leonard E. Seaman, on Petitioner's application for emergent relief, and notice being provided to

Respondent, Edison Township Board of Education (the "Board"); and for good cause being shown;

**IT IS** hereby **ORDERED** that Petitioner's Application for Emergent Relief is hereby **DENIED**; and it is further

**ORDERED** that Petitioner's Application to overturn the Board's determination to place E.S. in Level 1 Chemistry for the 2015-2016 school year is hereby **DENIED**; and it is further

**ORDERED** that Petitioner's Application to have E.S. placed in Honors Chemistry for the remainder of the 2015-16 school year is hereby **DENIED**; and it is further

**ORDERED** that a copy of this Order shall be served upon all counsel of record within ___7___ days hereof.

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

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

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

December 18, 2015

DATE

**JEFFREY A. GERSON**, ALJ

Date Received at Agency: December 18, 2015

Date Mailed to Parties: December 18, 2015

sej

Ari D. Schneider, Esq. 021612007
The Busch Law Group LLC
450 Main Streeet
Metuchen, New Jersey 08840
P: (732) 243-9588; F: (732) 243-9590
Attorneys for the Edison Township
Board of Education

| | |
|---|---|
| **L.S. ON BEHALF OF MINOR CHILD E.S.**<br><br>**Petitioner,**<br><br>V.<br><br>**EDISON TOWNSHIP BOARD OF EDUCATION**<br><br>**Respondent** | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>OAL Dkt. No.: EDU-19090-215<br>Agency Ref. No.: 357-11/15<br><br>**STIPULATION OF DISMISSAL** |

Petitioner, L.S. on behalf of minor child E.S. ("Petitioner"), and Respondent, the Edison Township Board of Education ("Respondent"), by and through their respective attorneys, hereby agree and stipulate to dismissal of the above-captioned matter with prejudice and without costs or attorneys' fees to either party.

Leonard Seaman, Esq.
Law Offices of Leonard Seaman
Attorneys for Petitioner

Dated: 12/22/15

Ari D. Schneider, Esq.
The Busch Law Group LLC
Attorneys for Respondent

Dated: 12/23/15

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30-16

OAL DKT. NO. EDU 13778-15
AGENCY DKT. NO. 195-7/15

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| A.S., ON BEHALF OF MINOR CHILD, M.S. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

On or about January 28, 2016, this matter was returned to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2(a), in light of petitioner's withdrawal of the Petition of Appeal.

Upon review of the record, the Commissioner notes that – notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn – the Board's answer in this residency matter contains an unresolved counterclaim for tuition for the period of M.S.'s alleged ineligible attendance, which makes reference to an investigation conducted by the district during the 2014-2015 school year. Although the record also contains a letter from the district's attorney to petitioner indicating that the district would not dispute his residency for the 2015-2016 school year, nothing was mentioned regarding the 2014-2015 school year – and the counterclaim filed under docket number EDU 13778-15[1] was never withdrawn.

Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/16
Date of Mailing: 2/02/16

[1] The Commissioner is aware that a related residency matter involving the parties (EDU 3152-15), from which this matter was severed, is still pending at the Office of Administrative Law.

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| A.S., ON BEHALF OF MINOR CHILD, M.S. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner challenged the respondent Board's determination that his child, M.S., was not entitled to a free public education in the Somerset Hills Regional School District, based on a residency investigation. Petitioner asserted that he and his child were current residents of Bernardsville, which is located within the respondent Board's school district. Counsel for the Board subsequently notified petitioner that the District would not challenge the residency of M.S. with respect to the 2015-2016 school year. Accordingly, the petitioner submitted a letter withdrawing the instant appeal, and the Office of Administrative Law (OAL) returned the matter to the Commissioner pursuant to *N.J.A.C.* 1:1-19.2(a).

Upon review, the Commissioner noted that – notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn – the Board's counterclaim for tuition for the period of M.S.'s alleged ineligible attendance in the district during the 2014-2015 school year remains unresolved. Accordingly, the Commissioner remanded the matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

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

Issued 2/02/16

31-16

AGENCY DKT. NO. 284-11/13

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| O.B. AND D.L., on behalf of minor children, N.B. AND K.L., | : | ORDER |
| RESPONDENTS. | : | |

On October 30, 2015, a final agency decision was rendered in this matter, wherein the Commissioner found O.B. and D.L. liable for tuition in the amount of Sixteen Thousand-Four Hundred and Seven Dollars and Sixty Cents ($16,407.60), representing tuition for a period of ineligible attendance by their children, N.B. and K.L., in the Board's school district between December 12, 2012 to June 20, 2013. The Board subsequently notified the Commissioner that O.B. and D.L. have failed to comply with the decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. O.B. and D.L. offered no reasons why the judgment against them should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Otis Boone and Dawn Lovett are now subject to entry of a judgment by the court in the amount of $16,407.60, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/16

Date of Mailing: 2/02/16

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|---|---|---|
| MYKA WASHINGTON | : | |
| Petitioner, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS | : | DECISION |
| Respondent. | : | |
| | : | |

## SYNOPSIS

Petitioner filed an appeal in June 2015 challenging the Board of Examiners' determination to deny her application for a Principal Certificate of Eligibility pursuant to *N.J.A.C.* 6A:9B-11.5. A hearing in the matter was scheduled for November 12, 2015, but petitioner failed to appear. A notice was sent to the parties by the Office of Administrative Law on January 8, 2016, which provided the petitioner with an opportunity to submit an explanation for such nonappearance, but no explanation was filed with the Department.

There being no explanation for the non-appearance filed by the petitioner, the matter was deemed to no longer be a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

Issued 2/02/16

OAL DKT. NO. EDU 8262-15
AGENCY DKT. NO. 98-4/15

| | | |
|---|---|---|
| MYKA WASHINGTON | : | |
| Petitioner, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS | : | DECISION |
| Respondent. | : | |

The record of this matter and advisement of petitioner's failure to appear, transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on January 8, 2016, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/16
Date of Mailing: 2/02/16

[1] Final decisions of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules of court.

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| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| PETITIONER, | : | |
| | : | COMMISSIONER OF EDUCATION |
| V. | : | |
| | : | DECISION |
| C.P., ON BEHALF OF MINOR CHILD, E.V., | : | |
| RESPONDENT. | : | |

## SYNOPSIS

The petitioning Board served a Notice of Ineligibility on respondent C.P. in November 2014, following an investigation into the residency of her daughter which determined that E.V. did not reside in Hamilton Township, but instead was living in the City of Trenton. After a hearing before the Board in December 2014, the petitioner upheld the determination of ineligibility and served a Final Notice of Ineligibility on the respondent – who acknowledged receipt of the certified mail on February 3, 2015. The attorney for the respondent conceded that his client did receive and sign for the letter containing the Final Notice of Ineligibility, but no appeal was filed. On April 29, 2015, the Board filed a petition for an order assessing tuition. Thereafter, on May 28, 2015, C.P. sent a letter in response to the order assessing tuition. The matter was then transmitted to the OAL, where it was filed as a contested case on June 19, 2015. The Board filed a motion for summary decision, and respondent filed a cross motion for same. Through counsel, the respondent filed opposition to the petitioner's motion, and sought to re-litigate the merits of the residency petition. However, no argument was submitted regarding why petitioner failed to timely appeal the Final Notice of Ineligibility.

The ALJ found, *inter alia*, that: it is undisputed that a letter providing notice of respondent's right to appeal the Board's residency determination was received by C.P., and advised her that an appeal must be made in writing to the Commissioner within twenty-one days of the decision; the letter was received, and no appeal was timely filed; the respondent sought to re-litigate the underlying merits of the residency matter, but provided no legal basis to support the request; E.V. attended school in the district during the 2014-2015 school year; the petitioning Board demonstrated at the December hearing that E.V. was not living in Hamilton Township during this period of time, and therefore assessment of tuition is appropriate and permissible under the regulations. The ALJ granted petitioner's motion for summary decision, and ordered that the Board is entitled to reimbursement from the respondent for the cost of tuition in the amount of $13, 723, representing the tuition rate in the District for the 2014-2015 school year.

The Commissioner concurred with the ALJ's granting of summary decision to the Board, and adopted the Initial Decision as the final decision in this matter, with modification to the amount of tuition due based on evidence in the record that indicates the Board is entitled to reimbursement for 172 days of ineligible attendance by E.V., at a daily rate of $76.24. The Commissioner directed the respondent to reimburse the Board in the amount of $13,113.28.

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

February 3, 2016

34-16

OAL DKT. NO. EDU 9007-15
AGENCY DKT. NO. 102-5/15

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| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| C.P., ON BEHALF OF MINOR CHILD, E.V., | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that summary decision should be granted in favor of the Board. The Board determined that E.V. was not a domiciliary of Hamilton for the 2014-2015 school year and was, therefore, not entitled to a free education in the District's schools during that time. The Board informed respondent that an appeal of the Board's residency determination must be filed within twenty-one days, pursuant to *N.J.S.A.* 18A:38-1b. Despite receiving the Board's notice via certified mail, respondent failed to appeal the Board's determination. Accordingly, the Commissioner concurs with the ALJ that respondent may not re-litigate the issue of whether E.V. was entitled to a free education in the District during the 2014-2015 school year, as respondent did not appeal that determination and there is no evidence in the record which would warrant reopening that issue.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against respondent for the time period during which the minor child was ineligible to attend school in

Hamilton. There are inconsistencies in the ALJ's decision with respect to the total amount of tuition owed to the Board and the dates of ineligible attendance by the minor child.[1] A review of the record and the parties' submissions makes clear that there were 172 days of ineligible attendance by the minor child from September 3, 2014 through June 8, 2015. Therefore, the Board is entitled to tuition reimbursement in the amount of $13,113.28 ($76.24 per day for 172 days), pursuant to *N.J.S.A.* 18A:38-1b.

Accordingly, the Initial Decision of the OAL – as modified herein – is adopted as the final decision in this matter. Respondent is directed to reimburse the Board in the amount of $13,113.28 for tuition costs incurred during the time period that E.V. was ineligible to attend school in Hamilton.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/16

Date of Mailing: 2/03/16

[1] The ALJ found that the Board is entitled to $13,723 in tuition reimbursement. This figure represents the full cost of tuition for the entire 2014-2015 school year, rather than 172 days in which E.V. was ineligible to attend school in the District. Additionally, although the ALJ found that the Board was entitled to tuition beginning at the start of the 2014-2015 school year, it appears that she inadvertently wrote September 1, 2014, rather than September 3, 2014. Further, in the ALJ's order, she indicated that the Board was owed tuition starting September 24, 2014, which is inconsistent with her finding that the Board was entitled to tuition from the beginning of the school year.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 09007-15
AGENCY DKT. 102-5/15

**BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,**
Petitioner,
v.
**C.P., on behalf of minor child, E.V.,**
Respondent.

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**Casey P. Acker,** Esq., for petitioner (Lenox, Socey, Formidoni, Giordano, Coley, Lang & Casey, LLC, attorneys)

**Keith Sklar,** Esq., for respondent (Law Offices of Sklar Smith-Sklar, attorneys)

Record Closed: December 11, 2015 Decided: December 24, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Hamilton Township Board of Education (Board) served a Notice of Ineligibility on respondent, C.P. o/b/o minor child, E.V. on November 13, 2014. The respondent appealed and requested a hearing, which was conducted before the Board

on December 18, 2014. On January 23, 2015, the Board upheld the determination of ineligibility and served a Final Notice of Ineligibility on the respondent. The respondent acknowledged receipt of the certified mail on February 3, 2015. The attorney for the respondent has conceded that his client did receive and sign for the letter containing the Final Notice of Ineligibility. No appeal was filed. Accordingly, on April 29, 2015, the Board filed a Petition for an Order assessing tuition. On May 28, 2015, the respondent sent a letter in response to the Order assessing tuition. The matter was transmitted to the Office of Administrative Law where it was filed as a contested case on June 19, 2015. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to -13.

Petitioner filed a Motion for Summary Decision on August 13, 2015. The respondent, through counsel, filed Opposition to the Motion and a Cross-Motion for Summary Decision on September 1, 2015. The Opposition filed on behalf of the respondent seeks to re-litigate the merits of the residency petition. However, no argument is submitted regarding why the petitioner failed to timely appeal the Final Notice of Ineligibility. Counsel for respondent, by letter dated November 17, 2015, acknowledges receipt by his client of the Final Notice of Ineligibility. Counsel claims in the same letter that the respondent "may have filed a letter of appeal", which "may have been filed in the wrong place." I have received nothing further than this unfounded allegation in the form of a letter from counsel. Counsel also asserts that there "may" not have been actual notice, because of a language barrier. I have likewise received no further substantiation of these allegations.

## STATEMENT OF FACTS

The respondent enrolled her daughter, E.V. in the Hamilton Township School District on June 6, 2014. Thereafter, the parents filled out the Parent/Legal Guardian Certification form for E.V. Sometime in September 2014, the District commenced an investigation into the residency of E.V. The investigator conducted surveillance at XXX Sadim Boulevard in Hamilton Township as well as XXX Adeline Street, in the City of Trenton. The investigator conducted surveillance on school days between September 24 and December 10, 2014. Based on the surveillance, the investigator determined that E.V. did not reside in the District, and was residing in the City of Trenton. Accordingly, a

Notice of Ineligibility was sent to the respondent on November 13, 2014. The respondent appealed this decision and a hearing was conducted on December 18, 2015. The respondent appeared, presented witnesses and testified at the hearing. Following the hearing, the Board determined that E.V. was not a resident of Hamilton and on January 23, 2015, issued a Final Notice of Ineligibility. The notice was sent to the respondent via certified mail, return receipt requested. The respondent acknowledged receipt of the Notice of Ineligibility on February 3, 2015. No appeal was filed.

The above is found as **FACT.**

## LEGAL ANALYSIS AND CONCLUSION

In this matter, a residency investigation commenced on September 24, 2015, to determine the residency of E.V. The Board determined the child was not a resident of Hamilton Township and served a Notice of Ineligibility on November 13, 2014. The respondent appealed and a hearing was held before the Board on December 18, 2014. Following the hearing, the Board determined that the child was a nonresident, and issued a Final Notice of Ineligibility on January 23, 2015. The Final Notice was served on the respondent via certified mail, return receipt requested, on February 3, 2015. The notice provides in relevant part that the Board found that the child resides in the City of Trenton. The letter further provided notice of the right to appeal and advised the respondent that an appeal must be made in writing to the Commission of Education within twenty-one days of the decision.

It is undisputed that the letter was received and no appeal was filed. Accordingly, the determination of ineligibility will not be disturbed and the respondent's Motion for Summary Decision is denied. The respondent seeks to re-litigate the underlying merits of the residency issues, but provides no legal basis to support this request. The respondent's attorney, in a one-page letter, asserts that the respondent "may" have filed an appeal in the wrong place, and further that respondent "may" have a language barrier. I received no affidavits or documentary evidence to support such allegations, and thus, the respondent's Cross-Motion for Summary Decision on the

issue of residency is denied. The petitioner's Motion for Summary Decision on the issue of residency is granted and the petitioner's request for tuition assessment as set forth below is hereby ordered.

The petitioner has requested an order of tuition reimbursement from the beginning of the school year. The child in question was enrolled and attending school in the district from September 1, 2014, to June 8, 2015. The District demonstrated at the hearing before the Board that the child was not living in Hamilton Township and thus, the assessment of tuition from September 1, 2014, to June 8, 2015, is appropriate and permissible under the regulations. I therefore **CONCLUDE** that the petitioner is entitled to reimbursement from the respondent for the costs of tuition in the amount of $13,723, representing the tuition rate in the District for the 2014-2015 school year.

## ORDER

It is hereby **ORDERED** that petitioner is entitled to reimbursement from respondent for the cost of tuition in the amount of $13,723, representing the period from September 24, 2014, through June 8, 2015.

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

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

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

December 24, 2015

**SARAH G. CROWLEY, ALJ**

Date Received at Agency: 12/24/15

Date Mailed to Parties: 12/24/15

SGC/vj

## Jennings, Valerie

**From:** Microsoft Outlook
**To:** cacker@lenoxlaw.com; mail@njpalaw.com
**Sent:** Thursday, December 24, 2015 12:00 PM
**Subject:** Relayed: ID for EDU 09007-15

**Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:**

cacker@lenoxlaw.com (cacker@lenoxlaw.com)

mail@njpalaw.com (mail@njpalaw.com)

Subject: ID for EDU 09007-15

33-16

OAL DKT. NO. EDU 8107-14
AGENCY DKT. NO. 152-6/14

| | | |
|---|---|---|
| MAXINE IBRAHIM, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/02/16
Date of Mailing: 2/02/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 8107-14
AGENCY DKT. NO. 152-6/14

**MAXINE IBRAHIM,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY.**
Respondent.

---

**Judson L. Hand,** Esq. for petitioner (Law Office of Alan L. Zegas, attorneys)

**Athina Lekas Cornell,** Esq, for respondent (Sciarrillo, Cornell, Merlino, McKeever and Osborn, attorneys)

Record Closed: December 23, 2015 Decided: December 23, 2015

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

This matter was transmitted to the Office of Administrative Law on March 23, 2015 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves both disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

December 23, 2015
DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: December 28, 2015

Mailed to Parties: December 28, 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: acornell@sciarrillolaw.com

December 22, 2015

**Via Electronic Mail and Regular Mail**
Honorable Ellen S. Bass, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

**Re: M.I. v. New Providence Board of Education**
**OAL Docket No.: EDU-08107-2014N**
**Agency Ref. No.: 152-6/14**

Dear Judge Bass:

Enclosed please find a copy of the fully-executed Confidential Settlement Agreement with Mutual General Releases and Board Certified Minutes approving same. If this meets with Your Honor's approval, please incorporate same into a Final Order.

Thank you for Your Honor's courtesies.

Respectfully submitted,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, L.L.C.

Athina Lekas Cornell
ALC/amm
Enclosure
cc: Dr. David M. Miceli, Superintendent (via electronic mail)
Judson Hand, Esq. (via electronic mail)

**SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC**
Attorneys At Law
238 St. Paul Street
Westfield, NJ 07090
(908) 481-5000
Attorneys For Respondent
New Providence Board of Education

| | |
|---|---|
| MAXINE IBRAHIM,<br><br>Petitioner,<br><br>v.<br><br>NEW PROVIDENCE BOARD OF EDUCATION,<br><br>Respondent. | BEFORE THE COMMISSIONER OF EDUCATION<br>DOCKET NO.: EDU-08107-2014-N<br>AGENCY REF. NO.: 152-6/14<br><br>**CONFIDENTIAL SETTLEMENT AGREEMENT WITH MUTUAL GENERAL RELEASES** |

WHEREAS, in or about August, 2013, Mr. and Mrs. I made allegations regarding the treatment of their daughter, M.I.; and

WHEREAS, the New Providence Board of Education conducted two investigations of the allegations and determined that harassment, intimidation and bullying was not substantiated; and

WHEREAS, the New Providence Board of Education affirmed the results of both investigations; and

WHEREAS, there is a dispute between Petitioner ("M.I. and Mr. and Mrs. I") (for purposes of this Agreement, Petitioner in the matter captioned herein shall be defined as M.I. and Mr. and Mrs. I) and the New Providence Board of Education ("District" or "Board") and C.P. Hereafter Petitioner, as defined herein, and the District and C.P. shall be collectively referred to as the "Parties."

WHEREAS, on June 12, 2014, M.I. filed a Complaint, captioned as M.I. v. New Providence Board of Education, OAL Docket No.: EDU-08107-2014N, Agency Ref. No.: 152-6/14, alleging a violation of the Anti-Bullying Bill of Rights Act; and

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

1. M.I. and C.P. will meet to discuss past events. At M.I.'s discretion, a written letter from C.P. may be sent to her in lieu of an in-person meeting. In the event a written letter is sent to M.I., the Parties, and anyone on their behalf, agree to keep the contents of the letter and the existence of same confidential, and that same shall not be shared with any third parties.

2. The New Providence Board of Education shall place this Agreement on its Agenda for its December 17, 2015 meeting. If approved, the following statement will be read during the "New Business" portion of the meeting:

   > The Board is pleased to advise that it has resolved litigation relating to a complaint of HIB between a student and a member of the school community. We take our responsibility to provide our students with a positive and supportive environment very seriously. We look forward to continuing this tradition.

   The Parties agree that if any questions are raised during a public Board meeting, the New Providence Board of Education will respond by noting that this is a confidential matter and will not be further discussed.

3. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of an administrative law hearing under the school laws. The Parties specifically disclaim any liability to each other. The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have all entered into this Agreement solely to compromise disputed claims.

4. In consideration of the settlement of the captioned matter, the Parties forever waive their right to take any action against each other regarding this matter.

5. In consideration of the settlement of the captioned matter, the Parties shall forever release each other from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, money damages, civil liability, or any other equitable or legal relief.

6. This Agreement contains the entire Agreement and understanding between all Parties and constitutes a full and final Agreement on any and all issues.

7. Any dispute arising out of the breach of this Agreement shall be governed by the laws of the State of New Jersey.

8. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

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

10. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

11. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other Party or their families, family members, agents, officials, administrators, representatives and employees. The Parties further agree that given the resolution of this matter Petitioner agrees to withdraw the letter of November 10, 2015 from Mr. and Mrs. I to New Providence School District Administrators.

12. This Agreement shall be construed as if it were drafted by both Parties contemporaneously.

13. This Agreement is subject to ratification by the New Providence Board of Education.

M.I., Petitioner — Date: 11/18/2015

R.I., Parent — Date: 11/18/15

D.I., Parent — Date: 11/18/15

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION

David C. Hasenkopf, Board President

Date: 12/17/15

C.P.

Date: 12/18/15

# NEW PROVIDENCE SCHOOL DISTRICT

356 ELKWOOD AVENUE, NEW PROVIDENCE, NJ 07974

Fax (908) 464-9041 • www.npsd.k12.nj.us

DAVID M. MICELI, Ed.D.
Superintendent of Schools
908-464-9050 (ext. 225)

SCOTT D. HOUGH
Assistant Superintendent of Educational Services
908-464-9050 (ext. 222)

JAMES E. TESTA
School Business Administrator/ Board Secretary
908-464-9050 (ext. 223)

SANDRA M. SEARING
Director of Curriculum, Instruction, and Supervision
908-464-9050 (ext. 221)


December 22, 2015

ACTION ITEMS

Education Action

Mrs. Cuccaro, Education Chairperson, moved to approve Item 2 as listed below:

2. Approve Confidential Settlement (OAL Docket No. EDU-08107-2014N), copies in the hands of each Board member.

The motion was seconded by Mrs. Misiukiewicz and carried on the following roll call vote:

| | |
|---|---|
| Mrs. Cuccaro | Yea |
| Mr. Dibble | Yea |
| Mr. Dinerman | Yea |
| Mr. Hasenkopf | Yea |
| Mr. Krauss | Yea |
| Mrs. Misiukiewicz | Yea |
| Mr. Smith | Yea |

This is a true copy of the minutes of December 17, 2015.

James E. Testa
School Business Administrator/Board Secretary

JET/JA
J/JT/CertMin/Settlement Item2 Agenda12-17-15

35-16

| | | |
|---|---|---|
| In the Matter of the **TENURE** Hearing | ) | |
| | ) | |
| of | ) | |
| | ) | **OPINION and AWARD** |
| **KIMBLE WRIGHT** | ) | |
| "Respondent" | ) | |
| | ) | |
| and | ) | AGENCY DOCKET NO. 328-10/15 |
| | ) | |
| **STATE OPERATED SCHOOL DISTRICT** | ) | |
| **OF THE CITY OF NEWARK, ESSEX CO.** | ) | |
| "Petitioner/NPS" | ) | |
| | ) | |

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The parties met on December 18, 2015 and January 11, 2016 at the offices of Zazzali Fagella Nowak Kleinbaum & Friedman, Newark, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sworn. Briefs were received as agreed.

**BEFORE**: Mattye M. Gandel, Arbitrator

**APPEARING FOR PETITIONER**:

Robert M. Tosti, Esq.
Sara J. West, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless, LLC

**APPEARING FOR RESPONDENT**:

Aileen O'Driscoll, Esq.
Zazzali Fagella Nowak Kleinbaum & Friedman

| | | |
|---|---|---|
| In the Matter of the **TENURE** Hearing | ) | |
| | ) | |
| of | ) | |
| | ) | **OPINION and AWARD** |
| **KIMBLE WRIGHT** | ) | |
| "Respondent" | ) | |
| | ) | |
| and | ) | AGENCY DOCKET NO. 328-10/15 |
| | ) | |
| **STATE OPERATED SCHOOL DISTRICT** | ) | |
| **OF THE CITY OF NEWARK, ESSEX CO.** | ) | |
| "Petitioner/NPS" | ) | |
| _____ | ) | |

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**BEFORE**: Mattye M. Gandel, Arbitrator

**APPEARING FOR PETITIONER**:

Robert M. Tosti, Esq.
Sara J. West, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless, LLC

**APPEARING FOR RESPONDENT**:

Aileen O'Driscoll, Esq.
Zazzali Fagella Nowak Kleinbaum & Friedman

## **BACKGROUND**:

The matter arose as a result of Tenure Charges filed against Respondent, Kimble Wright. According to a letter dated November 16, 2015 from M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary."

Prior to the first session, Respondent filed a "Motion to Dismiss" and Petitioner responded. The parties met on December 18, 2015 to further discuss their positions and the Charges:

> Charge One:
> Absence Without Leave, thirty (30) items
>
> Charge Two:
> Other Sufficient Cause, two (2) items

However, during that session, Mr. Tosti, on behalf of Petitioner, agreed that the only Charges to be addressed are those relating to

> what happened from September, unless there were other intervening things for historical references that you want to bring in, but from September 2nd of '14, to the end of the school year. That's all I'm interested in.

Based on the initial briefs and the discussions on December 18, 2015, this Arbitrator rendered the following decision on December 28, 2015 denying the "Motion to Dismiss" and restating the scope of the revised Charges as agreed to by Petitioner.

December 28, 2015

Aileen M. O'Driscoll, Esq.
Zazzali Fagella Nowak Kleinbaum & Friedman
One Riverfront Plaza
Newark, NJ 07102-5410

Robert M. Tosti, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless, LLC
One Pluckemin Way
Box 754
Bedminster, NJ 07921

Dear Ms. O'Driscoll & Mr. Tosti;

Re: Parties – **Kimble Wright & State Operated School District of City of Newark**
Docket No. 328-10/15

Respondent made a Motion to Dismiss the tenure charges. However, after carefully rereading the briefs and reviewing the positions stated at the meeting on Friday, December 18, 2015, the following decision was reached.

While the Board had a responsibility to accurately state the specific statute under which it was charging Respondent, the pleadings were sufficient notice that the issue was conduct unbecoming. The School District clearly made a mistake in citing the wrong statute but there was no evidence to suggest that this caused prejudice to Respondent. Further, there is nothing in the charges suggesting that the School District is claiming inefficiency. In the opinion of this Arbitrator, there was clear notice of the charges of conduct unbecoming.

Finally, the cases cited by Respondent can be differentiated from the fact pattern in this matter. The four tenure matters cited dealt with the issue of getting two bites at the apple. In those instances, inefficiency charges were dismissed because the District filed charges under Section 25 and then, after being dismissed, the District attempted to refile the same charges under Section 8. In this matter, there were no inefficiency charges, the charges were not refiled and the only issue was the fact that the Statute cited was 18A:6-17.3 whereas the matter should have been filed under 18A:6-17.1. No harm was done.

Therefore, on Monday, January 11, 2016 the parties will present testimony and evidence as to Respondent's absences during the 2014-2015 school year but will not address the charges of absences during the 2006-2007 school year or of intermittent leave requests for a family member.

Sincerely,

Mattye M. Gandel

## POSITIONS OF THE PARTIES:

**Petitioner's Position:**

As to the Tenure Charges, Petitioner's position is that Respondent was unresponsive to NPS's letters during the 2014-2015 school year; that he was advised on July 18, 2014 that he was required to be examined both by his personal and district physicians to be medically cleared to return to work and that he failed to respond and failed to schedule an appointment with the District's physician. He further failed to respond to an October 2, 2014 letter advising him that his paperwork was insufficient and directing him to provide information from a physician. Similarly, he failed to respond to a Letter of Reprimand dated January 5, 2015 advising him that additional absences would lead to more severe discipline. On March 13, 2015, the District wrote a letter to Respondent regarding his continued absence without authorization and his continued medical leave with insufficient paperwork. Respondent failed to reply.

Further, it is Petitioner's position that Respondent was duty bound to respond to the July 18, 2014 letter advising of his assignment in the fall and his failure to report his status and intentions created a misunderstanding at the Talent Office. He did not report to work on September 4, 2015 but reported to his assigned location, Fast Track, on September 9, 2015 for only four days, which enabled him to receive a fully replenished bank of sick days. Petitioner asserts that while no one was looking closely at Respondent's activities, his AFLAC, private insurance, forms remained unchallenged and he remained out of work.

Additionally, Petitioner contends that though NPS employees filled out the AFLAC forms, which covered non-medical questions, that did not mean that his medical leave was authorized. Respondent continued to receive letters from NPS and should have responded as he was the person who knew best the disconnect between his AFLAC forms and the letters he was receiving from NPS. Rather, Respondent avoided an examination by a District physician and pursued a course that would least jeopardize his medical status as "disabled."

Therefore, as Respondent thwarted efforts by NPS to gather information and assess the validity of his absence, Petitioner asks this Arbitrator to sustain the Tenure Charges and not reinstate Respondent to the District.

**Respondent's Postion:**

Respondent's position is that the purpose of the tenure act is to ensure competent and efficient school systems by affording teachers security in their positions and protection from dismissal and by preventing boards of education from abusing their superior power. In the instant matter, Petitioner, having the burden of proof, failed to prove by a preponderance of the evidence that Respondent was AWOL. Rather, the record established that Respondent was diligent and responsible in submitting medical notes to Health Services and requisite forms to Human Resources. Respondent's actions were correct, not contrary to District policy or otherwise unauthorized. With the exception of one letter, no one contacted Respondent to inquire of his status and when he did receive

the AWOL letter, he contacted the Union's general counsel, who communicated with the District's general counsel to no avail. Therefore, any penalty is unjustified.

Further, Respondent cited many decisions supporting the proposition that absenteeism must be prolonged and excessive and that the burden is on the District to prove that it tried and failed in eliciting any change in correcting the pattern of absences. There was no evidence that Respondent did not follow a recognized procedure for reporting his absences; no evidence that he was contacted to determine his status or to advise him that he was proceeding improperly and no evidence that he was required to call subfinder daily for a year to report his absences as he was submitting forms, which the District was approving. No one questioned him on the way he was submitting paperwork.

To the contrary, Respondent asserts that the evidence shows that he suffered a serious injury, chose to recover through a non-surgical, holistic approach, as is his right, submitted documents, which were never questioned, and that once he was cleared to return to work in September 2015, the District sought to terminate him.

Moreover, while Respondent's position is that no penalty is appropriate because Petitioner failed to prove the Tenure Charges, if the Arbitrator determines some penalty is warranted, the doctrine of progressive discipline applies. Respondent, a long time employee, was never progressively disciplined for the alleged AWOL charge and there was no intent on his part to obfuscate the system.

Therefore, Respondent asks this Arbitrator to dismiss the Tenure Charges and to direct Petitioner to reinstate Respondent to a teaching position together with all back pay,

benefits, and emoluments, retroactive to the date the Tenure Charges were filed. Alternatively, mitigating factors warrant a conclusion that progressive discipline be applied with a much less severe penalty.

## **OPINION**:

Respondent has been a teacher for approximately twenty-three (23) years, the last fourteen (14) of which were spent in the Newark Public Schools, until these Tenure Charges were filed on October 23, 2015. Respondent never received any form of discipline prior to these charges. On March 31, 2014, Respondent suffered an off-duty back injury while playing basketball. The record established that Respondent sought medical care immediately and regularly submitted doctors'[1] notes from April 4, 2014 through April 1, 2015 each note stamped as the received by the District's Office of Health Services and that no one from the District questioned these doctors' notes, no one told him that they were insufficient and no one told him he needed better documentation.

Respondent's unrefuted testimony was that because he was injured and could not work, he received disability forms from the District with instructions as to how to fill them out; one form was to be completed by him, a second by his doctor and the third by his Employer. The completion of these forms allowed Respondent to receive disability payments under his private insurance plan. A series of disability claim forms were entered into the record of the hearing beginning with the Initial Disability Claim Form in April 2014

[1] Respondent sought medical care from several chiropractors and there was no evidence to convince this Arbitrator that Respondent was required to go to another kind of doctor for his treatment. He testified that the chiropractors sent him to two medical doctors, who performed an MRI, R-12, and a CT scan and

through April 2015. Each form followed the same pattern. Respondent completed his form, his doctors completed their forms and these forms were presented to the District, which completed its form. Respondent's unrefuted testimony was that upon submitting these forms, he was approved for disability benefits and received his payments under his policy for a full year.

Petitioner claimed that these forms were only signed by two District clerks and only provided responses to non-medical questions. However, the forms completed by the District did not claim to be medical forms but rather sought confirmation that Respondent was a teacher in the District, the number of hours he worked prior to his injury and other non-medical questions. In each instance, while the forms were very difficult to read, it was undisputed that Respondent's doctors completed the forms confirming that Respondent was under their care, for what period of time and the codes for the types of procedures the doctors administered. Of importance was that Respondent's wife's undisputed testimony was that she regularly submitted these forms, plus the doctors' notes, to the Office of Health Services and Office of Employee Resources and that she was never told that she needed more or different information.

The packet of three forms was submitted to the insurance company and Respondent's disability was continually approved. The record established that no one from the District questioned the forms submitted by Respondent and no one told him he was doing anything improper. Therefore, it must be concluded that the District's Office of Health Services as well as its Office of Employee Services were aware of Respondent's

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who recommended surgery or shots in the spine, but Respondent chose to continue with the chiropractor.

medical condition and his inability to return to work. Ultimately, the doctor cleared Respondent to return to work on September 1, 2015.

However, during the 2014-2015 school year the District asserted that it sent Respondent several letters to which he did not respond. Specifically Vanessa Rodriguez, Chief Talent Officer, sent Respondent the same exact two letters except for the dates, JT051[2] (July 18, 2014) and JT053 (September 4, 2014), indicating that Respondent was scheduled to return to work on September 2, 2014 and directed him to "make an appointment with your personal physician and the school district's physician in order to be medically cleared to return to work." The record confirmed that the address on the letters, 12 Vanderbilt Court, Irvington, NJ, was Respondent's correct address. Respondent was not asked if he received these letters.

Another letter dated October 2, 2014, JT057, was entered into the record of the hearing. Though Respondent was not questioned about this letter, his lack of response, if he received it, was reasonable. The letter denied him a leave of absence because of insufficient paperwork and advised him if he had any questions, he could call the Talent Office. Respondent was already approved for disability during this time period and, therefore, there was no reason to respond because he did not need the leave of absence.

He was asked about letters dated January 5, 2015 (JT059) and March 13, 2015 (JT061). Regarding the January 5th letter,[3] Respondent replied that he did not

[2] JT is a Joint Exhibit and is followed by the bates stamp.

[3] This was a strange letter in that it issued a reprimand and docked his pay for one day because Respondent was absent from his duties on January 5, 2015 at Fast Track without calling subfinders to report his absence. However, Respondent had been absent every day beginning in April 2014 and had not reported to work any day from that time until the end of the 2015 school year, while he was on approved disability, except for four days in September 2014. This letter clearly illustrates the District's lack of communication between departments as to Respondent's employment status.

remember receiving it. Though there was no proof that in fact he received it,[4] his unrefuted testimony was that because he had been out on disability since April 2014, he would not have been calling subfinders on a daily basis. As for the March 13th letter, which was sent via UPS, Respondent acknowledged that he received this letter. The March 13th letter from Rodriguez addressed the issue of being AWOL and the possibility of discipline but Respondent did not respond to her directly. His testimony regarding returning to work and in particular the AWOL claim was that forms had been submitted regularly to two departments in the District; that the District knew that he had been going to his doctors and that he was approved for a disability leave and that he believed that he had complied with the requirements.

In fact, though Respondent did not contact Rodriguez, he did enlist the assistance of the Union's attorney, Eugene G. Liss, who sent a letter, dated May 18, 2015 with supporting documentation, Respondent Exhibit R-13, to Bernard Mercado, General Counsel for the NPS requesting that the District not pursue an AWOL charge because Respondent was injured and was regularly submitting disability forms and that Tenure Charges should not be filed.

While this Arbitrator agrees with the District that it would have been reasonable for Respondent to have contacted Rodriguez regarding her letters just to clarify the record, the fact that he did not, given that the District was well aware that he had been approved for disability benefits, was not a reason to bring Tenure Charges against a

[4] Ms. Wright also testified that she had never seen this letter before the hearing.

twenty-three (23) year teacher with no prior discipline and to seek his termination. The burden of proof in this matter is on the District and it has not sustained its burden.

Finally, a letter from Christopher Cerf, State District Superintendent, indicated that, in accordance with TEACHNJ Act when Tenure Charges are filed, Respondent was suspended without pay starting on October 21, 2015 for 120 calendar days, JT014. Despite the fact that Respondent did not believe he had to contact Rodriguez as requested in her letters because he was submitting all the paperwork, it would have been reasonable to have done so and, therefore, Respondent shall receive a one (1) month suspension without pay. Further, not only will Respondent be reinstated to his employment at NPS at a school, preferably Fast Track, where his expertise as a special education educator can be utilized to the fullest for the benefit of the students, but Respondent will also receive three (3) months back pay and benefits.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the Tenure Charges shall be dismissed.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

## A W A R D

1. Tenure Charges are dismissed and reduced to a one (1) month suspension with three (3) months back pay, benefits and emoluments.

2. Respondent shall be reinstated to a school, preferably Fast Track, where his expertise as a special education educator can be utilized.

Mattye M. Gandel

Mattye M. Gandel

Dated: January 28, 2016

State of New Jersey )
:SS
County of Essex )

On the 28th day of January 2016 before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

JENNIFER J FAUST
Notary Public
State of New Jersey
My Commission Expires Nov 3, 2019

50-16

STATE OF NEW JERSEY

COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

WILLIAM CARR

and

CARLSTADT-EAST RUTHERFORD REGIONAL BOARD OF EDUCATION,

Bergen County, New Jersey

Agency Docket No.: 142-6/15

## AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated as Impartial Arbitrator by authority of the Commissioner of Education of the State of New Jersey in accordance with the TeachNJ statute, N.J.S.A. 18A:6-17, and having been duly sworn, and having duly heard the proofs and allegations of the parties, after applying the criteria set forth in the TeachNJ statute AWARDS as follows:

Based on the evidence submitted, the eleven tenure charges bought by the Carlstadt-East Rutherford Regional Board of Education against Respondent William Carr are sustained in part and denied in part.

The Board was entitled to suspend Respondent on April 23, 2015 for the balance of the 2014-15 school year in response to Respondent's actions regarding students that occurred on April 21, and 23, 2015, provided that the District had initiated in a timely manner a process to refer Respondent for a fitness for duty evaluation by an Independent Medical Examiner selected, in the first instance, by the District and for anger management counseling. The District failed to take either action. Filing of tenure charges for these two incidents, rather than suspending Respondent and referring him for evaluation by a medical professional or psychologist was arbitrary, which violated an applicable standard established by the TEACHNJ statute, and thus cannot be sustained. Therefore, the discipline imposed regarding Charge Four and Charge Five is hereby modified as described below.

Respondent shall be reinstated forthwith to his former position as a history teacher at Becton High School. The following penalties shall be assessed for Respondent's proven conduct precipitating the filing of tenure charges in the instant case. The 120-day interval during which Respondent was suspended without pay shall be deemed an unpaid disciplinary suspension for his submission of vouchers to which he signed names other than his own, which is the subject of Charges One and Two, and for his conduct toward colleagues and students, which is the subject of Charge Three, Counts I and II and Charge Six, Counts I, II,

and III. Had the District imposed an appropriate sequence of progressively severe discipline identifying Respondent's perceived shortcomings in the classroom and his interactions with colleagues before preferring tenure charges, a more stringent penalty might have been sustained.

The District shall refer Respondent forthwith for a fitness for duty examination, specifically referring Respondent for anger management counseling and such other therapy or counseling as an Independent Medical Examiner shall determine. The IME shall be selected by mutual agreement of respondent or his representative and the District Superintendent or her representative. In the event of a deadlock on the selection, the parties shall return to this Arbitrator for a determination.

If the neutral IME determines that Respondent is ready and fit to return to his teaching duties at Becton High School, Respondent shall be assigned to similar teaching duties as in the past and shall be eligible for extra-curricular assignments as he was before tenure charges were filed. In the event that the District determines that returning Respondent to full duty immediately after he has been released to work by the IME, or the IME's designated therapist, if any, would be pedagogically disruptive, the District may, at its discretion for sound educational reasons, defer Respondent's return to full, active duty until the beginning of the

2016-17 school year, provided that Respondent is provided with full pay and benefits hereafter through his reinstatement to duty, is listed immediately as a full-time tenured faculty member at Becton High School, is given unfettered opportunity to bid for extra-curricular activity positions for 2016-17, and is offered a teaching schedule that is substantially similar to the schedule he was assigned before tenure charges were filed.

Given the unequivocal testimony by District witnesses establishing that Respondent's submission of vouchers seeking payment of third party vendors for goods and services provided regarding extra-curricular activities for which Respondent was responsible as faculty advisor did not violate any District policy or applicable law, and further considering that Respondent's submission of vouchers on which he had signed the names of others without their authorization constituted improper conduct that violated the generally applicable standards of ethical and fair dealing, the District shall also withhold increments from Respondent for each of the next two years.

By operation of the TEACHNJ statute, Respondent was off the District payroll for 120 days, after which his salary and benefits should have been fully restored pending the outcome of this arbitration

proceeding. If they have not been fully restored as of the 121st day after suspension, all unpaid salary and benefits shall be paid forthwith.

The District's tenure charges based on Respondent's classroom performance have not been sustained by a preponderance of credible evidence. Charge Eight is unduly vague. Therefore, Charges Seven, Eight, Nine, and Ten are hereby dismissed. Charge Eleven, which is an amalgam of the preceding charges, is hereby dismissed as unsupported by the evidentiary record.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the remedy, or the enforcement of the remedy, ordered pursuant to this Award.

February 1, 2016 Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 1st day of February 1, 2016 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

An Attorney at Law of the
State of New Jersey

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Charges Against

WILLIAM CARR

and

CARLSTADT-EAST RUTHERFORD REGIONAL BOARD OF EDUCATION,

Bergen County, New Jersey

Agency Docket No.: 142-6/15

Hearings in the above-entitled matter were held on September 22, 2015, September 25, 2015, October 1, 2015, October 20, 2015, and October 22, 2015 at the Carlstadt-East Rutherford Regional High School District Board offices in East Rutherford, New Jersey, before Daniel F. Brent, duly designated by the New Jersey Commissioner of Education as Impartial Arbitrator pursuant to N.J.S.A. 18A: 6-17, the Teacher Effectiveness and Accountability for the Children of New Jersey (TeachNJ) statute. Both parties participated in these hearings, were represented by counsel, and were afforded full

and equal opportunity to offer testimony under oath, to cross examine witnesses, and to present evidence and arguments. A verbatim transcript was made of the proceedings. The evidentiary record was declared closed upon the receipt of the stenographic transcript and the subsequent submission of post-hearing briefs by both parties.

## NATURE OF THE CASE

Respondent William Carr has been employed as a history teacher at Becton Regional High School in East Rutherford, New Jersey for twenty-six years, during which time he has also coached the debate team, been advisor to the school newspaper, and received accolades for his teaching, including AP level courses, with great success. To motivate and engage his students at various levels of academic rigor, Mr. Carr has developed a repertoire of techniques and antics that have won him admiration and approval from many of his students and colleagues over the years. Respondent has also demonstrated, particularly in the two years before tenure charges were filed against him, passive aggressive behavior and a confrontational attitude toward co-workers and several students that precipitated the tenure charges at issue in the instant case.

More particularly, tenure charges were filed after Mr. Carr was observed engaging in what the Board construed as angry, aggressive, and unprofessional behavior toward two students in two separate incidents that occurred only two days apart in April 2015 while Respondent was monitoring the school cafeteria. These incidents were recorded on video cameras positioned through the school. There is no audio component. The High School Principal and the Disciplinarian testified in support of the District's assertion that, despite a warning after the first incident on April 21, 2015, Respondent again lost self-control and angrily berated a female student until she broke down in tears in the main school office.

The District also cited many interactions between Respondent and other teachers and supervisors in which Respondent was allegedly uncooperative, dismissive, or disruptive. His angry outbursts were characterized by the District as inconsistent with the District's reasonable expectations of professional collegiality and standards of conduct toward students. The eleven tenure charges filed in June 2015 included allegations that Respondent consistently made off-topic, personal, and inappropriate comments to students and that he exhibited odd and concerning behavior in class, including throwing erasers and faking seizures when students gave incorrect answers. Respondent was also charged with disrespectful demeanor towards colleagues and supervisors to the extent that two female supervisors reported feeling

distressed and threatened. According to the District, Respondent has unequivocally demonstrated that he is patently unfit to perform the functions of a teacher.

Respondent was also charged with dishonest conduct and violating District policies by signing vendors' names to multiple payment vouchers for extra-curricular activities such as debate tournament registrations and travel expenses. These violations occurred over many years, but only recently came to the attention of District officials. Although the District made no claim that the Respondent defrauded the District of any funds or that he personally profited from his actions, the District alleged that his deviation from the prescribed protocol for securing payment for vendors regarding extra-curricular activities, which occurred repeatedly over many years and which Respondent readily admitted when confronted, created an adequate independent basis to terminate his employment.

Respondent Carr refuted the tenure charges as unfounded or as insufficient to terminate his employment. Mr. Carr admitted his circumvention of vendor procurement policies, but characterized his conduct as either necessary to register for debate tournaments or similar events in a timely manner where no vendor signature could be obtained before registration fees were due or as regrettable laziness to seek written

vendor confirmation in advance. Respondent also described his theatrical antics in the classroom as an important element in keeping his students alert and engaged with his lessons. According to Respondent Carr, although most students understood and appreciated his rapid-fire references and off-beat humor, some students, including several former students who testified at the arbitration proceedings, did not grasp the subtlety, sarcasm, or humor of his remarks.

Respondent asserted that the absence of any progressively severe discipline addressing his alleged shortcomings in the classroom precluded sustaining the tenure charges regarding his teaching. He further asserted that he had behaved appropriately in fulfilling his cafeteria supervisory responsibilities on April 21 and 23, 2015 and that the District had over-reacted to his comments to the students and to administrators. Respondent defended his interactions with colleagues as within the boundaries of civility, if not collegiality, and cited the absence of discipline for the incidents cited in the the tenure charges as precluding termination of his employment on this or any other basis.

## TENURE CHARGES

The eleven tenure charges signed by the District Superintendant on May 21, 2015 and received by the Commissioner of Education on June 22, 2015 are incorporated by reference herein in their entirety.

## RELEVANT STATUTORY LANGUAGE

### TEACHNJ ACT

8. N.J.S.A. 18a:6-16:

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

8A:6-123 Review, approval of evaluation rubrics.

17.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3 )a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

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

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

18A:6-124 Regulations.

24. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in accordance with an expeditious time frame, to set standards for the approval of evaluation rubrics for all teaching staff members, other than those included under the provisions of subsection b. of section 17 of P.L.2012, c.26 (C.18A:6-123). The standards at a minimum shall include: four defined annual rating categories: ineffective, partially effective, effective, and highly effective.

28. This act shall take effect in the 2012-2013 school year, except that section 17 of this act shall take effect immediately. The Department of Education shall take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act.

Approved August 6, 2012.

17. a. The Commissioner of Education shall review and approve evaluation rubrics submitted by school districts pursuant to section 16 of P.L.2012, c.26 (C.18A:6-122). The board of education shall adopt a rubric approved by the commissioner.

b. The State Board of Education shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals. The standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

c. A board of education shall adopt a rubric approved by the commissioner by December 31, 2012.

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

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

f. The commissioner shall establish a model evaluation rubric that may be utilized by a school district to assess the effectiveness of its teaching staff members.

## OPINION AND ANALYSIS

Respondent William Carr has been, by all accounts, a gifted and dedicated teacher at Becton High School for more than two decades. His devotion to conveying history, politics, and a sense of how government works to generations of students was amply chronicled during the arbitration hearings in this tenure dispute. His dramatic, and sometimes edgy, sometimes outlandish techniques for getting his points across have been part of his teaching repertoire for years. Also part of his mode of presentation and relationship building techniques have been off-beat humor, sarcasm, exaggerated reactions to student responses, and a sincere investment in creating a dynamic learning environment in his classroom, regardless of the skill and ability levels of a particular student or group of students.

Apparently, according to the testimony offered by the District, not every student understood or appreciated Respondent's offbeat, oddball, and energized teaching style. On balance, however, the evidentiary record demonstrated persuasively that Bill Carr has been a talented and effective teacher, extra-curricular activity leader, and mentor for a very long time. If the newly appointed cadre of District management found his style and techniques to be at odds with their concept of good pedagogy, it was incumbent on them to communicate their perception to Respondent long before citing his techniques as evidence of unfitness to teach. No significant or meaningful progressively severe corrective discipline predicated on Respondent's classroom activity or teaching prowess was imposed by the District before tenure charges were filed. Therefore, the District has failed to demonstrate not only that Respondent's behavior in the classroom violated discernible District instructional standards, but also that he was placed on notice, and subsequently disciplined in reasonable increments, for failing to respond to such notice related to his teaching skills.

Furthermore, the derogatory testimony of students who were purportedly offended at his comments about the Marines or other topics raised in class must be discounted substantially, not only because their testimony reflected a lack of understanding of the points Respondent was trying to teach at the time, as established persuasively by his testimony

and theirs, but also because one student witness is the sister of JR, the subject of another tenure charge to be discussed below, and the other student witness was a friend of JR's sister. Their perspective, relevance, and motivation mandate discounting the reliability of their portrayal of Respondent's classroom demeanor as accurate in establishing actionable misconduct beyond Respondent's admitted description of his dramatic classroom antics.

This is not to say that Respondent was above reproach or that her did nothing "creepy" in his classroom remarks. However, the evidentiary record established that District officials should have taken corrective action, beginning with a counseling and increasing incrementally thereafter, rather than precipitously escalating this category of complaint regarding his teaching performance to the basis of a tenure charge.

Nothing in the record established that Respondent made any sexually suggestive or otherwise patently inappropriate remarks to these complainant witnesses. At most, he ventured too far into a grey area of good taste with some of his classroom allusions. None of these remarks justified a conclusion that Respondent was unfit to teach. Thus, in the absence of progressively severe corrective discipline recently imposed and addressing these actions, the District's use of his classroom performance as a basis for a tenure charge was arbitrary and capricious.

The District's imposition of discipline on this basis violated the standard established by the TEACHNJ statute, thereby creating a valid basis mandating the Arbitrator to dismiss Tenure Charges Seven and Eight.

As Respondent readily admitted as soon as he was asked, Respondent is culpable for having signed vendor's names to vendor requisitions related to securing funds for student extra-curricular activities that he had submitted to the District's Business Office over a period of many years. The District acknowledged that it has no evidence that Respondent personally profited financially or in any other way from forging these signatures or that the District suffered any loss or other detriment because of these actions. Nor is there any basis in evidentiary record to dispute Respondent's testimony that he resorted first to this shortcut to resolve a bureaucratic conundrum of needing to register for debate tournaments in advance as there was no vendor or tournament representative who could sign off on the requisition in time to meet registration deadlines. Thereafter, Respondent's practice of signing another person's approval of the vendor requisition was motivated by laziness and expedience. In any event, his actions, especially without disclosure to District officials, were patently wrong and justified discipline.

Although Respondent readily and immediately admitted his longstanding practice as soon as he was asked to explain the voucher signatures, his candor did not complete offset the inherent dishonesty of his actions. Neither does the absence of any indication that Respondent personally profited in any way from this practice exonerate him. Forging an official employer document is a serious offense. Under most other circumstances, forging a vendor's signature would sustain a summary dismissal for conduct unbecoming a District employee. However, the unique testimony adduced in the instant case distinguishes the instant situation. Both the District's auditor and the District's Business Administrator credibly and unambiguously testified that Respondent's submission of vouchers he had signed forging vendors' names, while distasteful and poor practice, did not violate any law or Board policy. But for this credible testimony, the Respondent's actions may have justified dismissal for cause. However, this competent and credible testimony by responsible and experienced District agents precludes summary discharge based on the unique facts and circumstances of the instant case. Respondent's actions nevertheless merit substantial discipline.

The District initially recognized that summary discharge was not justified, and the Board authorized an increment withholding. Moreover, testimony by Union officials described a settlement they thought had

been reached with the District to impose an increment withholding as the sole appropriate penalty for Respondent's voucher related misconduct. This testimony was credible, but the settlement agreement was not formalized before the District Superintendent thereafter discovered the total number of vouchers involved and the long interval during which Respondent's voucher practice had continued. Following the District Superintendent's discovery of the full facts, the increment withholding was escalated to a tenure charge seeking dismissal.

Regardless of which version of the purported settlement deal is more accurate, the discovery of additional evidence of wrongdoing could properly be considered by the Board in modifying its initial penalty. Moreover, given the credible testimony by both the Board's outside auditor and the Business Administrator that no applicable law or District policy was violated by Respondent, the tenure charge emanating from voucher-related impropriety, Charges one and Two must be dismissed.

Regardless of whether Respondent's actions contravened an explicit Board policy, this conduct should not be excused entirely, as District employees are expected to act with integrity in their dealings, particularly with the District. Respondent failed to fulfill this responsibility over an extended period of time. That the procedure to secure payment of extra-curricular activity expenses has since been

modified to eliminate the requirement of obtaining a vendor's certification signature in advance of preparing for payment by the District directly to the vendor is irrelevant and immaterial. Therefore, the category of penalty initially implemented by the Board of an increment withholding shall be increased to an increment withholding of two years duration to reflect the severity and longevity of Respondent's misconduct.

There was extensive testimony describing Respondent's interactions with his peers and supervisors. Stated succinctly, Respondent failed to act in a cheerful and overtly collegial manner. He was grumpy and arrogant, and did not reform his conduct despite repeated admonitions that collegiality was deemed essential to his successful performance of his duties. On the other hand, the responses described by complaining employee witnesses in their testimony exaggerated their sense of alarm and dismay at the Respondent's abrupt or condescending reactions to actions he felt were demeaning to his professionalism. No reasonable basis was adduced in their testimony to justify the level of anxiety and visceral dread described by these witnesses.

According to their accounts of interactions with Respondent as portrayed in their testimony, Respondent may have been unpleasant, but he was never physically threatening or so verbally abusive as to support

a tenure charge seeking immediate dismissal. Discipline short of tenure charges was been warranted, but a tenure charge based on his occasional inappropriate verbal outbursts cannot be sustained.

Pleasant collegial interactions are a reasonable expectation in the workplace, and especially in a school setting. However, not every interaction will be suffused with sweetness and light. The Arbitrator finds that the complaints reported to management by the two complaining employee witnesses were sufficient to justify intervention by management at the level of counseling, and the imposition of progressively severe discipline if counseling failed to remediate the conduct. The eccentric or rude behavior described by these two complainants did not justify sustaining a tenure charge.

Respondent was charged with intentionally thwarting an investigation of a small batch of unclaimed office supplies, which he eventually acknowledged having ordered. The divergent testimony regarding attempts to identify these supplies precludes a finding that Respondent intentionally was uncooperative. The witness who testified about this incident on behalf of the District was indignant about Respondent's dismissive treatment when she raised the issue while he was teaching. The totality of circumstances underlying the supply issue was insufficiently probative of any misconduct to sustain discipline,

much less a tenure charge, based on Respondent's conduct during this sequence of events. Therefore, Charge Six, Counts 1 through 3 are hereby dismissed.

The allegations of out of control behavior with two students while Respondent was performing his assigned cafeteria supervision duty on April 21 and 23, 2015 are more problematic. Video surveillance cameras recorded two incidents involving students in or near the cafeteria. In the first, JR resists Respondent's apparent entreaties that he abide by conditions previously imposed by the school administration limiting JR's access to, and presence in, the cafeteria. These limits were based on multiple prior incidents involving JR, whose prior difficulties at school were also well known to the police officer regularly assigned to Becton High School. This incident forms the basis for Charge Four. The second incident depicts a female student, GC, who, after being told repeatedly by Respondent to return to the cafeteria from a hallway adjacent to the cafeteria, where she had ventured for a drink of water and was meandering to look into what appears to be a gym class, was apparently uncooperative. When Respondent insisted, the student became overtly disrespectful, and according to Respondent, verbally abusive including profanity, and the situation escalated as Respondent walked the student to the main office at a quick pace.

There is no soundtrack for these videos, but the body language and actions of Respondent and JR and GC in the cafeteria, the hallway and the main office support the District's contention that Respondent behaved improperly and overreacted in both situations.

Respondent testified that he was provoked by disrespectful verbal responses by both students while properly performing his assigned cafeteria supervision duties, and that he simply directed them, as emphatically as the situation warranted, to report to the central office when they did not acquiesce to his instructions and thereafter accompanied them to assure prompt compliance with his directives. According to Respondent, his ire as depicted on the video recordings was raised by the failure of administrators to react to the students' disrespectful conduct, including profanity, with sufficient urgency and to impose sufficient and appropriate discipline.

Despite the absence of audio, and accepting Respondent's description of the student's provocative conduct in each incident as accurate, there remains a perceptible unambiguous residue of anger portrayed by Respondent's movements as augmented by visible indicia of his attitude. His testimony corroborated this conclusion. Whatever the students said, Respondent was obligated by virtue of his position and experience to remain the adult in charge of each situation and to act with

professional decorum. According to credible testimony offered by the District regarding JR, Respondent should have called for assistance, rather than leaving his post precipitously. A similar conclusion applies as to the incident involving GC.

Respondent's conduct in the main office and immediately outside the office after the High School Principal closed the door to defuse the situation with GC demonstrated anger management issues justifying legitimate concern by District administrators. Whatever rationale Respondent cited in his testimony to explain his actions on April 21 and 23, 2015, the District reasonably concluded that further intervention was necessary. How this intervention was implemented forms the crux of the instant case.

Respondent was an effective and highly rated teach for more than two decades before multiple interactions with peers and students gave rise to growing concerns about his temperament and what the District perceived as significant deterioration of his self-control. The District's decision to intervene was supported by the evidentiary record, but the District's reaction of filing tenure charges seeking immediate dismissal reaction was unwarranted, arbitrary, and capricious.

If the District, in exercising its managerial discretion, determined that Respondent could no longer be trusted to perform his duties on school premises after the April 23, 2015 incident, the District should have not only suspended Respondent, but also referred Respondent for a fitness for duty evaluation and then for anger management training rather than simply suspending Respondent as its sole disciplinary antecedent to filing tenure charges. If Respondent was behaving too irascibly to perform his duties satisfactorily, he should have been placed on involuntary leave pending an independent medical evaluation and thereafter been afforded treatment consistent with the IME's findings.

The Board's treatment of what it perceived as Respondent's deteriorating job performance after twenty-five years of stellar teaching and prize-winning extra-curricular activity mentoring, coupled with recent sporadic unprofessional outbursts, as the basis for immediately filing tenure charges for conduct unbecoming a teaching staff member and inefficiency was arbitrary and capricious in the context of standards imposed by the TEACH NJ statute. The District's concern with what supervisors perceived to be Respondent's overt or purportedly passive aggressive expressions of anger and unprofessional level of collegiality should have been treated initially as a cause for referral for potential professional intervention to determine if a treatable medical or psychological existed, or at least by imposing progressively severe

discipline, rather than as a basis summarily to dismiss an excellent teacher whose behavior in school was becoming, from the District's perspective, more and more problematic.

The District has not established by either a preponderance of the evidence or by clear and convincing evidence that Respondent William Carr has satisfied the criteria for removal or dismissal of a tenured teacher established by the TEACHNJ statute or under the applicable case law cited as the basis of the eleven tenure charges preferred by the District. The conduct cited by the District in tenure charges comprising the instant case does, however, justify the imposition of substantial discipline. Respondent's conduct also mandates that the District refer Respondent to fitness for duty testing and remedial anger management or other treatment consistent with the findings of an Independent Medical Examiner and as may be deemed appropriate by professional evaluators and therapists.

Therefore, based on the evidence submitted, the District was entitled to suspend Respondent on April 23, 2015 for the balance of the 2014-15 school year in response to Respondent's actions regarding students that occurred on April 21, and 23, 2015, provided that the District had initiated in a timely manner a process to refer Respondent for a fitness for duty evaluation by an Independent Medical Examiner

selected, in the first instance, by the District and for anger management counseling. The District failed to take either action. Filing of tenure charges for the two incidents described in Charges Four and Five, rather than suspending Respondent and referring him for evaluation by a medical professional or psychologist was arbitrary, which violated an applicable standard established by the TEACHNJ statute, and thus cannot be sustained. Therefore, the discipline imposed regarding Charge Four and Charge Five is hereby modified as described below.

Respondent shall be reinstated forthwith to his former position as a history teacher at Becton High School. The following penalties shall be assessed for Respondent's proven conduct precipitating the filing of tenure charges in the instant case. The 120-day interval during which Respondent was suspended without pay shall be deemed an unpaid disciplinary suspension for his submission of vouchers to which he signed names other than his own, which is the subject of Charges One and Two, and for his conduct toward colleagues and students, which is the subject of Charge Three, Counts I and II and Charge Six, Counts I, II, and III. Had the District imposed an appropriate sequence of progressively severe discipline identifying Respondent's perceived shortcomings in the classroom and his interactions with colleagues before preferring tenure charges, a more stringent penalty might have been sustained.

The District shall refer Respondent forthwith for a fitness for duty examination, specifically referring Respondent for anger management counseling and such other therapy or counseling as an Independent Medical Examiner shall determine. The IME shall be selected by mutual agreement of respondent or his representative and the District Superintendent or her representative. In the event of a deadlock on the selection, the parties shall return to this Arbitrator for a determination.

If the neutral IME determines that Respondent is ready and fit to return to his teaching duties at Becton High School, Respondent shall be assigned to similar teaching duties as in the past and shall be eligible for extra-curricular assignments as he was before tenure charges were filed. In the event that the District determines that returning Respondent to full duty immediately after he has been released to work by the IME, or the IME's designated therapist, if any, would be pedagogically disruptive, the District may, at its discretion for sound educational reasons, defer Respondent's return to full, active duty until the beginning of the 2016-17 school year, provided that Respondent is provided with full pay and benefits hereafter through his reinstatement to duty, is listed immediately as a full-time tenured faculty member at Becton High School, is given unfettered opportunity to bid for extra-curricular activity positions for 2016-17, and is offered a teaching schedule that is

substantially similar to the schedule he was assigned before tenure charges were filed.

Given the unequivocal testimony by District witnesses establishing that Respondent's submission of vouchers seeking payment of third party vendors for goods and services provided regarding extra-curricular activities for which Respondent was responsible as faculty advisor did not violate any District policy or applicable law, and further considering that Respondent's submission of vouchers on which he had signed the names of others without their authorization constituted improper conduct that violated the generally applicable standards of ethical and fair dealing, the District shall also withhold increments from Respondent for each of the next two years.

By operation of the TEACHNJ statute, Respondent was off the District payroll for 120 days, after which his salary and benefits should have been fully restored pending the outcome of this arbitration proceeding. If they have not been fully restored as of the 121st day after suspension, all unpaid salary and benefits shall be paid forthwith.

The District's tenure charges based on Respondent's classroom performance have not been sustained by a preponderance of credible evidence. Charge Eight is unduly vague. Therefore, Charges Seven,

Eight, Nine, and Ten are hereby dismissed. Charge Eleven, which is an amalgam incorporating by reference the preceding charges, is hereby dismissed as unsupported by the evidentiary record.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the remedy or the enforcement of the remedy ordered pursuant to this Award.

February 1, 2016 Daniel F. Brent, Arbitrator

Princeton, NJ

**STATE OF NEW JERSEY COMMISSIONER OF EDUCATION**

| | | |
|---|---|---|
| IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE | :: | DOE DOCKET NO. 255-9/15 |
| between | :: | |
| **SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD**, | :: | |
| Petitioner, | :: | **OPINION** |
| -and- | :: | **AND** |
| **HELEN TOBIA**, | :: | **AWARD** |
| Respondent | :: | |

**BEFORE:** MICHAEL J. PECKLERS, ESQ., ARBITRATOR

**DATE(S) OF HEARING:** November 23, 2015; December 1, 2015; December 14, 2015; December 15, 2015

**RECORD CLOSED**: January 22, 2016 (Post-hearing briefs)

**DATE OF AWARD**: February 4, 2016

**APPEARANCES:**

For the Petitioner:

Marc H. Zitomer, Esq., SCHENCK, PRICE, SMITH & KING, LLP
Joseph Roselle, Esq, "
David Shatter, Lakewood State Monitor [November 23, 2015]
Elchanan Freund, Former Lakewood School Psychologist/Case Manager [November 23, 2015 via subpoena]
Joanne Butler, Esq., SCHENCK, PRICE, SMITH & KING, LLP [November 23, 2015]
Thad Thompson, Lakewood State Monitor [December 1, 2015]
Chana Zentman, School Social Worker/Case Manager [December 1, 2015]
Jennifer Kaznowski, Esq., School Social Worker "
Alison L. Kenny, Esq., SCHENCK, PRICE, SMITH & KING, LLP [December 1, 2015]

Katherine Gilfillan, Esq., SCHENCK, PRICE, SMITH & KING, LLP
[December 1, 2015]
Adina Weisz, Supervisor Related Services/I.D.E.A. Coordinator
[December 14, 2015]
Michael Azzara, Lakewood State Monitor [December 14, 2015]
Gila Nussbaum, LDTC [December 14, 2015 via subpoena]

For the Respondent:

Wayne J. Oppito, Esq., NJPSA
Helen Tobia, Supervisor of Social Studies, Fine Arts, Pupil Personnel Services

## I. BACKGROUND CONSIDERATIONS

Helen Tobia is a tenured employee of the School District of the Township of Lakewood, New Jersey, currently serving as the Supervisor of Social Studies, Fine Arts, Pupil Personnel Services since on or about October 2012. On August 7, 2015, the District's State-Appointed Monitor Michael Azzara filed tenure charges against Ms. Tobia, charging her with unbecoming conduct, inefficiency, and other just cause warranting dismissal, pursuant to N.J.S.A. 18A:17-2 and 6-10, et seq. On or about August 26, 2015, a response to the charges was submitted to the Board by Ms. Tobia's counsel. The Lakewood Board of Education thereafter certified the tenure charges to the Commissioner of Education at its August 26, 2015 Meeting by a majority vote of the full membership, and additionally resolved to suspend Ms. Tobia without pay in accordance with N.J.S.A. 18A:6-14. See, CERTIFICATE OF DETERMINATION executed by Asst. Bus. Admin./Board Secretary Kevin Campbell.

These were received by the DOE on September 11, 2015, which acknowledged receipt of the certified tenure charges in a letter to the parties. Respondent Tobia through Counsel Oppito filed an ANSWER to the charges on September 23, 2015, which was received by the DOE Bureau of Controversies and Disputes on September 24, 2015. On October 5, 2015, M. Kathleen Duncan, Director Bureau of Controversies and Disputes advised the parties that:

> following receipt of the respondent's answer on September 24, 2015, the above captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard.

That same date I was advised of my appointment as Arbitrator pursuant to *P.L. 2012, c. 26* by Ms. Duncan under separate cover. On October 13, 2015, a conference call was conducted with counsel, with a discovery schedule that included the propounding of interrogatories memorialized in my correspondence of that same date. Initial hearing dates were also set down. On October 23, 2015, Respondent Tobia filed a motion to disqualify Marc Zitomer, Esq. as counsel of record and/or disqualify other attorneys with the firm of SCHENCK, PRICE, et al. from testifying at hearing. On November 2, 2015, Mr. Zitomer submitted a letter brief in opposition to the motion, with supporting case citation. On November 12, 2015, I issued an ORDER denying Respondent's application. See, Joint Exhibit 5. The positions of the parties on the motion coupled with my findings included the following:

Respondent Helen Tobia

RPC 3.7(a) provides in pertinent part: "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (3) disqualification of the lawyer would work substantial hardship on the client." Assuming arguendo that Mr. Zitomer may demonstrate that there would be substantial hardship to the Lakewood Board of Education by withdrawing at this time in the proceeding (the burden of proof is on Mr. Zitomer) then all attorneys connected to Schenck, Price are disqualified as witnesses.

Although RPC 3.7(b) provides that a lawyer may act as advocate in a trial with another lawyer in the firm likely to be called as a witness, unless precluded by RPC 1.7 or RPC 1.9, RPC 1.7 is the general conflict of interest rule. RPC 1.7(b) reads that a lawyer shall not represent a client which may materially limit the lawyer's responsibility to a third person. Helen Tobia was the Board of Education's employee, representative and/or agent in special education matters in which Schenck, Price represented the Board of Education's interest, but had attorney-client privileged discussions with Ms. Tobia during the conduct of the proceedings and prepared documents for Ms. Tobia to sign on behalf of the Board. In subparagraph (2) it specifically reads that a client may consent to the representation after full disclosure, "except that a public entity cannot consent to any such representation." Of note, paragraph (c) provides that this rule shall not alter ethics opinions.

Essentially, Schenck, Price represented the Board of Education in special education matters in which Ms. Tobia was the Board's employee, representative and/or agent. Attorneys for Schenck, Price discussed privileged attorney-client information with Ms. Tobia and prepared legal documents for Ms. Tobia's signature. There is a clear conflict of interest in having attorneys of Schenck, Price who had privileged discussions with Ms. Tobia testify to those discussions. Ethics Opinion 233 supports why the disqualification of attorneys at Schenck, Price as litigators and witnesses is required. The opinion speaks for itself and is entered in whole in support of this Motion, with the following emphasis:

> [i]f a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in

> the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and a witness are inconsistent, the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

In conclusion, if Mr. Zitomer opines that there is a hardship to the Lakewood Board of Education in his withdrawing from representation in this matter, it is respectfully requested that the Arbitrator disqualify all attorneys of Schenck, Price to be witnesses. Additionally, Respondent reserves the right to forward to the Attorney General's office to quash any subpoena served upon the mediators and/or employees of the New Jersey Department of Education and/or the Office of Administrative Law.

Petitioner School District City of The Township of Lakewood

The New Jersey Supreme Court has recognized that 'only in extraordinary cases should a client's right to counsel of his or her choice outweigh the need to maintain the highest standards of the profession.' Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 220 (1988). In that same case the Supreme Court observed, 'disqualification motions are often made for tactical reasons, but that, 'even when made in the best of faith, such motions inevitably cause delay in the underlying proceedings.' Id., at 219 (citing Evans v. Artek Systems Corp. 715 F.2d 788, 792 (2d Cir. 1983) (quoting Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

Disqualifications cannot be premised on mere "doubt about the propriety of the representation." Realco Services, Inc. v. Holt, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979). Courts recognize that a motion such as this is part of the gamesmanship of litigation and may be brought by a party seeking a tactical advantage. As a result, such motions require close judicial scrutiny in order to "prevent unjust results." In re A & T Paramus Co., Inc., 253 B.R. 606, 613 (D.N.J.) 1999); see also, Smith v. Whatcott, 757 F.2d 1098, 1099-1100 (10th Cir. 1985); J.P. Foley & Co. Inc. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring); Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp, 1319, 1323 (D. Del. 1985). For the reasons that follow, there is absolutely no legal basis for disqualifying this firm in this tenure proceeding.

A. Disqualification is Not Required under Subpart (a).

The undersigned will serve as the lead counsel in this matter and will prosecute the charges on behalf of the Board of Education. The undersigned is not a witness to the charges in this case, did not supply an affidavit and was not listed as a witness in the disclosures provided to opposing counsel, pursuant to N.J.S.A.18A:6-17.1(b)(3). Respondent has not even alleged in her motion that the undersigned "is likely to be a necessary witness." Indeed, even if Respondent had claimed that the undersigned will be a witness, the Court in J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 894 A.2d 681, 2006 N.J. Super. LEXIS 91 (App. Div. 2006), held that Defendant's mere representation, in support of its disqualification motion, that plaintiff's counsel would be called as a witness did not satisfy the threshold requirements of RPC 3.7 which specifies there must be a *likelihood* that a lawyer will be a necessary witness.

Moreover, the Court emphasized that the subject matter of the attorney's testimony could be provided through a lay witness' testimony. See, State v. Tanksley, 245 N.J. Super. 390, 393-94 (App. Div. 1991) (holding that testimony of trial attorney who had been present when his client made a statement to police was unnecessary because defendant had not alleged that the statement was false or argued that it was inadmissible); see also, Host Marriott Corp. v. Fast Food Operators, Inc., 891 F. Supp. 1002, 1010 (D.N.J. 1995) (holding that the record before the Court was insufficient for it to hold that the testimony of defendant's attorney would be "necessary" in the case). Simply put, there is no evidence at this point to suggest the undersigned will be a witness in this case.

It is for this reason that Respondent's reliance on *Opinion 233* is entirely misplaced. *Opinion 233* apparently involves a predecessor to RPC 3.7 which is different in many respects from RPC 3.7. Moreover, in that case, the Advisory Committee recommended that both law firms withdraw because the lawyers who were actually representing their clients in the proceeding were also likely to be witnesses. For the reasons previously discussed, that is not the case here. Therefore, disqualification of the undersigned in this case is neither required, nor appropriate.

Even if the Arbitrator were to somehow conclude that the undersigned will likely be a witness, disqualification would be improper under subpart (3) which addresses substantial hardship

on the client. At this juncture, we are approximately two (2) weeks away from trial and under a statutory mandate to start the hearing within forty-five (45) days from the date the matter was assigned to the Arbitrator, or by no later than November 18, 2015. N.J.S.A. 18A:6-17.1(b)(1). For the Board to have to secure a new counsel at this late juncture would be highly prejudicial to the Board of Education and a virtual impossibility, particularly given the specialty required in the area of employee tenure and school law. See, ABA Model Rules of Professional Conduct Rule 3.7 Comment (2000) (recognizing that in considering whether an attorney should be disqualified "due regard must be given to the effect of disqualification.") Thus, due to the extreme hardship which would flow to the Board, Respondent's motion should be denied.

A. Disqualification is Not Required under Subpart (b).

In this case, several lawyers from the undersigned's firm will be called as a witness which is permitted under subpart (b) unless there is a conflict of interest under RPC 1.7. RPC 1.9 (Duties to former clients) is not applicable to this matter. Respondent makes the blanket statement that there is a conflict in attorneys of Schenck, Price, Smith & King testifying about discussions they had with Respondent. However, Respondent fails to articulate what responsibilities counsel owes to Respondent under RPC 1.7 (a) (2) which would materially limit its responsibilities to the Board. The reason is simple — this firm owes no responsibility to Respondent. Moreover, the RPC 1.7 (a) (2) speaks to a "significant risk" that the lawyer's representation will be limited by responsibilities to a third person. Here, even assuming *arguendo* that there is such a risk, which is vehemently denied, the risk is certainly not "significant."

Finally, Ms. Tobia is not this firm's client, nor does Respondent claim that she is a client of the firm. Rather, this firm represents the Board of Education. Indeed, RPC 1.13 which deals with organizational clients provides that "a lawyer employed to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." Even assuming arguendo that Respondent was a member of the organization's litigation control group, the fact remains that the privilege belongs to the Board, not to Respondent. For all the foregoing reasons, Respondent's disqualification motion must be denied.

STATEMENT OF THE CASE

At the outset of this discussion and as argued by Petitioner, notice is taken of the New Jersey Supreme Court's recognition that 'only in extraordinary cases should a client's right to counsel of his or her choosing outweigh the need to maintain the highest standards of the profession.' See, Dewy v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 220 (1988). The Court went on to opine that "disqualification motions are often made for tactical reasons, but that 'even when made in the best of faith, such motions inevitably cause delay' in the underlying proceedings." Consequently, such motions require close judicial scrutiny to protect against unjust results. See, In re A & T Paramus Co., Inc., 253 B.R. 606, 613 (D.N.J. 1999); see also, Smith v. Whatcott, 757 F.2d 1098, 1099-1100 (10th Cir. 1985); J.P. Foley & Co., Inc. v. Vanderbuilt, 523 F.2d 1357, 1360 (2d Cir. 1975); Kalmanovitz v. G. Heilman Brewing Co., 610 F. Supp. 1319, 1323 (D.Del. 1985).

Parenthetically, as the TEACHNJ statute is in its relative infancy, arbitrators are well-advised to proceed cautiously when faced with such disqualification motions that operate as matters of first impression in this forum. And while guidance from our ALJ forebears is frequently provided and instructive in these tenure cases, Respondent has failed to provide any such citation in support of her application. Instead, my focus is initially directed to RPC 3.7(a), which provides in material part that '[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.'

As the moving party, Respondent assumes the burden of proving its entitlement to the desired relief and clearly has not done so concerning the disqualification of Mr. Zitomer as trial counsel. Instead, there is not currently a scintilla of evidence that he will likely be called as a witness, and as properly argued by Petitioner: Mr. Zitomer does not appear on any witness list provided pursuant to N.J.S.A. 18A:6-17.1(b)(3); he did not file an affidavit in support of the subject tenure charges. Even in the event that such a contingency should arise during the multiple hearings in this case that will be necessary, my review of the numerous emails recently provided by Petitioner pursuant to a discovery request convinces me that the subject matter of the testimony could be alternatively

provided by a lay witness. See, State v. Tanksley, 245 N.J. Super. 390, 393-94 (App. Div. 1991).

However, even assuming *arguendo* that Respondent had demonstrated that there was a likelihood of Mr. Zitomer being called as a witness, Petitioner has established to my satisfaction that his disqualification would work a substantial hardship on the Board of Education. In that regard, the initial hearing is scheduled for November 18, 2015 and there is a statutory mandate that it be completed within forty-five (45) days of the referral to arbitration. The field of school law *vis-à-vis* tenure hearings and particularly special education law is also highly specialized. Accordingly, based upon the foregoing considerations, Respondent's motion with respect to the disqualification of Mr. Zitomer is **DISMISSED WITH PREJUDICE**.

Counsel for Respondent has essentially conceded this result in his brief, but nevertheless insists that the other Schenck, Price lawyers must be disqualified as witnesses based upon RPC 3.7(b). This indicates that '[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 (Conflicts of Interest) or RPC 1.9 (Duties to Former Clients).' On that count, Respondent contends that Helen Tobia was the Board of Education's employee, representative and/or agent for special education matters in which Schenck, Price represented the Board of Education's interest, but had attorney-client privileged discussions with her during the conduct of the proceedings. It is also alleged that the firm prepared documents for Respondent to sign on behalf of the Board.

There are several concerns which militate against the acceptance of this argument at this juncture of the case, and render *Advisory Opinion 233* upon which Respondent relies inapposite. No evidence has been brought forward that the other attorneys who will be testifying have a conflict of interest under RPC 1.7. Rather, I share the view of the Petitioner that Respondent has failed to articulate what responsibilities the law firm owes per RPC 1.7(a)(2) that would materially limit its responsibilities to the Board. As to RPC 1.9, Ms. Tobia is not and has never been a client of Schenck, Price and no argument has been made in that regard. The first prong of the *substantial relationship test* under RPC 1.9(a)(1) has therefore not been satisfied. See generally, Host Marriott Corp. v. Fast Food Operators, 891 F. Supp. 1002, 1010 (D.N.J. 1995).

Furthermore, and as Petitioner has argued, evening assuming

> *arguendo* that Respondent was a member of the litigation control group, any privilege belongs to the Board and not to Ms. Tobia. That said, N.J.S.A. 18A:6-17.1c. requires that '[t]he Arbitrator shall determine the case under the American Arbitration Association rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.' There is no statutory or regulatory prohibition against the firm's attorneys testifying, so the AAA rules control. Rule 27 provides *inter alia*, that '[t]he arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary…'
>
> Accordingly, because it is not clear at this time what testimony the other attorneys for the firm will be offering, Respondent reserves the right to renew her objection to the same at hearing. That should be accomplished by a request for an Executive Session with opposing counsel and I. Following a proffer as to what the testimony will consist of, counsel for Respondent will articulate his objection. A short recess will be taken with a bench ruling then read into the record. Therefore, Respondent's motion for a blanket disqualification of all Schenck, Price attorneys who will testify at hearing is **DISMISSED WITHOUT PREJUDICE** at this time. IT IS SO ORDERED. [*Emphasis added in originals*].

Hearings in the case were thereafter convened at the Lakewood Board of Education, 200 Ramsey Avenue, Lakewood Township, New Jersey, on November 23, 2015; December 1, 2015; December 14, 2015; & December 15, 2015. At that time, counsel were afforded a full opportunity to introduce relevant and admissible documentary evidence; to engage in oral argument; and to undertake the direct and cross-examination of sequestered witnesses who testified under oath, some pursuant to a subpoena as previously indicated. A verbatim transcription of the proceedings was provided by TAYLOR & FRIEDBERG, LLC. Notice is taken that pursuant to my prior ruling on the motion,

Respondent preserved a standing objection to the testimony of all associates and partners of the firm of SCHENCK, PRICE, SMITH & KING, LLC. Post-hearing briefs were undertaken in lieu of closing argument, which following receipt of the transcripts were returnable January 22, 2016. By virtue of the briefing schedule and at my request, on December 23, 2015, Ms. Duncan graciously granted an extension for the issuance of this AWARD until February 5, 2016, which is therefore timely submitted.

## II. FRAMING OF THE ISSUE

*Has the Board satisfied the tenure charges by a preponderance of the credible evidence? If not, what shall the remedy be?*

## III. STATUTORY & REGULATORY FRAMEWORK

### NEW JERSEY STATUTES ANNOTATED TITLE 18A

**18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system.** No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or

members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

**18A:6-16 Proceedings before commissioner; written response; determination**

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

**18A:6-17.1 Panel of arbitrators**

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to,

documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

**18A:6-17.2 Consideration for arbitrator in rendering decision.** a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.

(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

* * *

**18A:46-14. Enumeration of facilities and programs**. The facilities and programs of education required under this chapter shall be provided by one or more of the following:

a. A special class or classes in the district, including a class or classes in hospitals, convalescent homes, or other institutions;

b. A special class in the public schools of another district in this State or any other state of the United States.

c. Joint facilities including a class or classes in hospitals, convalescent homes or other institutions to be provided by agreement between one or more school districts;

d. A joint commission program;

e. A State of New Jersey operated program;

f. Instruction at school supplementary to the other programs in the school, whenever, in the judgment of the board of education with the consent of the commissioner, the handicapped pupil will be best served thereby;

g. Sending children capable of benefiting from a day school instructional program to privately operated day classes, in New Jersey or, with the approval of the commissioner to meet particular circumstances, in any other state in the United States, the services of which are nonsectarian whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide services pursuant to subsection a., b., c., d., e. or f. otherwise;

h. Individual instruction at home or in school whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide a suitable special education program for a child pursuant to subsection a., b., c., d., e., f. or g. otherwise.

Whenever a child study team determines that a suitable special education program for a child cannot be provided pursuant to subsection a., b., c., d., e., f., g. or h. of this section, and that the most appropriate placement for that child is in an academic program in an accredited nonpublic school within the State or, to meet particular circumstances, in any other state in the United States, the services of which are nonsectarian, and which is not specifically approved for the education of handicapped pupils, that child may be placed in that academic program by the board of education, with the consent of the commissioner, or by order of a court of competent jurisdiction. An academic program which meets the requirements of the child's Individual Education Plan as determined by the child study team, and which provides the child with a thorough and efficient education, shall be considered an approved placement for the purposes of chapter 46 of this Title, and the board of education shall be entitled to receive State aid for that child as provided pursuant to P.L.1996, c.138 (C.18A:7F-1 et al.), and all other pertinent statutes.

* * *

## NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

* * *

## SUBCHAPTER 1. GENERAL PROVISIONS

* * *

### 6A:3-1.5 Filing and service of answer

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

**6A:3-5.1 Filing of written charges and certificate of determination**

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

**6A:3-5.3 Filing and service of answer to written charges**

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

**6A:3-5.5 Determination of sufficiency and transmittal for hearing**

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

## CHAPTER 2. PROCEDURAL SAFEGUARDS

**6A:14-2.3 Parental Consent, notice, participation, and meetings**

* * *

(k) Meetings to determine eligibility and develop an IEP shall, if feasible, be combined as long as the requirements for notice of a meeting according to (g) 7ii above and (k) 3 through 5 below are met.

1. Any eligibility meeting for students classified according to N.J.A.C. 6A:14-3.5(c) shall include the following participants:

i. The parent;
ii. A teacher who is knowledgeable about the student's educational performance, a teacher who is knowledgeable about the district's programs;
iii. The student, where appropriate;
iv. At least one child study team member who participated in the evaluation;
v. The case manager;
vi. Other appropriate individuals at the discretion of the parent or school district; and
vii. For an initial eligibility meeting, certified school personnel referring the student as potentially having a disability, or the school principal or designee if they choose to participate.

* * *

**6A:14-3.3 Location, referral and identification**

(a) Each district board of education shall develop written procedures for

students age three through 21, including students attending nonpublic schools located within the school district regardless of where they reside, who reside within the local school district with respect to the location and referral of students who may have a disability due to physical, sensory, emotional, communication, cognitive or social difficulties.

* * *

**6A:14-3.5 Determination of eligibility for special education and related services**

(a) When an initial evaluation is completed for a student age three through 21, a meeting according to N.J.A.C. 6A:14-2.3(k) shall be convened to determine whether the student is eligible for special education and related services. A copy of the evaluation report(s) and documentation and information that will be used for a determination of eligibility shall be given to the parent not less than 1 calendar day prior to the meeting. If eligible, the student shall be assigned the classification "eligible for special education and related services." Eligibility shall be determined collaboratively by the participants described in N.J.A.C. 6A:14-2.3(k)1.

* * *

**6A:14-4.2 Placement in the least restrictive environment**

(a) Students with disabilities shall be educated in the least restrictive environment. Each district board of education shall ensure that:

1. To the maximum extent appropriate, a student with a disability is educated with children who are not disabled;

2. Special classes, separate schooling or other removal of a student with a disability from the student's general education class occurs only when the nature or severity of the educational disability is such that education in the student's general education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily.

3. A full continuum of alternative placements according to N.J.A.C. 6A:14-4.3 is available to meet the needs of students with disabilities for special education and related services;

4. Placement of a student with a disability is determined at least annually and, for a student in a separate setting, activities necessary to transition the student to a less restrictive placement are considered at least annually;

5. Placement is based on his or her individualized education program;

6. Placement is provided in appropriate educational settings as close to home as possible;

7. When the IEP does not provide specific restrictions, the student is educated in the school he or she would attend if not a student with a disability;

8. Consideration is given to:

i. Whether the student can be educated satisfactorily in a regular classroom with supplementary aids and services;

ii. A comparison of the benefits provided in a regular class and the benefits provided in a special education class;

iii. The potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class;

9. A student with a disability is not removed from the age-appropriate general education classroom solely based on needed modifications to the general education curriculum;

10. Placement in a program option is based on the individual needs of the student; and

11. When determining the restrictiveness of a particular program option, such determinations are based solely on the amount of time a student with disabilities is educated outside of the general education setting.

b. Each district board of education shall provide nonacademic and extracurricular services and activities in the manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities.

1. In providing or arranging for the provision of nonacademic and extracurricular services and activities, each district board of education shall ensure that each student with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate.

* * *

**6A:14-6.5 Placement in accredited nonpublic schools which are not specifically approved for the education of students with disabilities**

(a) According to N.J.S.A. 18A:46-14, school age students with disabilities may be placed in accredited nonpublic schools which are not specifically approved for the education of students with disabilities with the consent of the Commissioner of Education, by an order of a court of competent jurisdiction, or by order of an administrative law judge as a result of a due process hearing. Preschool age students with disabilities may be placed by the district board of education in early childhood programs operated by agencies other than a district board of education according [to] N.J.A.C. 6A:14-4.3(d) or by an administrative law judge as a result of a due process hearing.

(b) The Commissioner's consent shall be based upon certification by the district board of education that the following requirements have been met:

1. The nonpublic school is accredited. Accreditation means the on-going, on-site evaluation of a nonpublic school by a governmental or independent educational accreditation agency which is based upon written evaluation criteria that addresses educational programs and services, school facilities and school staff.

2. A suitable special education program pursuant to N.J.S.A. 18A:46-14a through h cannot be provided to this student;

3. The most appropriate placement for this student is this nonpublic school.

4. The program to be provided shall meet the requirements of the student's individualized education program;

5. The student shall receive a program that meets all the requirements of a thorough and efficient education as defined in N.J.S.A. 18A:7A-5c through g. These requirements shall be met except as the content of the program is modified by the IEP based on the educational needs of the student. Statewide assessment and graduation requirements shall apply. Participation in statewide assessment and/or exemptions from graduation requirements shall be recorded in the student's IEP according to N.J.A.C. 6A:14-3.7c7 and 9.

i. All personnel providing either special education programs according to N.J.A.C. 6A:14-4.4 through 4.7 or related services according to N.J.A.C. 6A:14-3.9 shall hold the appropriate educational certificate and license, if one is required, for the position in which they function.

ii. All personnel providing regular educational programs shall either hold the appropriate certificate for the position in which they function or shall meet the personnel qualification standards of a recognized accrediting authority.

iii. All substitute teachers and aides providing special education and related

services shall be employed according to applicable rules at N.J.A.C. 6A:9B-6.5, N.J.A.C. 6A:32-4.7 and this chapter.

6. The student shall receive a comparable program to that required to be provided by the local district board of education according to N.J.S.A. 18A:35-1, 2, 3, 5, 7 and 8, 18A:40A-1, 18A:6-2 and 3, N.J.A.C. 6A:8-3.1, and N.J.A.C. 6A:14-1 through 4. These requirements shall be met except as the content of the program is modified by the IEP based on the educational needs of the student. Exemptions shall be recorded in the student's IEP according to N.J.A.C. 6A:14-3.7(e)7 and 9;

7. The nonpublic school provides services which are nonsectarian;

8. The nonpublic school complies with all relevant State and Federal antidiscrimination statutes;

9. Written notice has been provided to the student's parent regarding this placement which has included a statement that:

i. The nonpublic school is not an approved private school for students with disabilities and that the local school district assumes the ongoing monitoring responsibilities for the student's program;

ii. No suitable special education program could be provided to this student pursuant to N.J.S.A. 18A:46-14; and

iii. This is the most appropriate placement available to this student;

10. The placement is not contested by the parents; and

11. The nonpublic school has been provided copies of N.J.A.C. 6A:14, 1:6A and 6A:32.

* * *

## IV. APPLICABLE BOARD POLICIES

1510 RIGHTS OF PERSONS WITH HANDICAPS OR DISABILITIES/ POLICY ON NON-DISCRIMINATION [Joint Ex. 2, Tab. 16]

It is the policy of the Board of Education that no qualified handicapped or disabled person shall, on the basis of handicap or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in

employment or under any program, activity or vocational opportunities sponsored by this Board. The Board shall comply with §504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. It shall also comply with the Individuals with Disabilities Education Act through the implementation of Policy No. 2460 and Regulations Nos. 2460 through 2460.14.

* * *

Educational Program Accessibility

No qualified handicapped/disabled person shall be denied the benefit of, be excluded from participation in, or otherwise be subjected to discrimination in any activity offered by this district.

The Board has an affirmative obligation to evaluate a pupil who is suspected of having a handicap/disability to determine the pupil's need for special education and related services. The Board directs that all reasonable efforts be made to identify unserved children with handicaps/disabilities in this district who are eligible for special education and/or related services in accordance with Policy No. 2460 and Regulations Nos. 2460 through 2460.14, the Individuals with Disabilities Education Act, §504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.

Section 504 of the Rehabilitation Act requires the Board to address the needs of children who are considered handicapped/disabled under §504 and do not qualify for services under the Individuals with Disabilities Education Act. A pupil may be handicapped/disabled within the meaning of §504, and therefore entitled to regular or special education and related aids and services under the §504 regulation, even though the pupil may not be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act.

No pupil will be denied, because of his/her educational handicap/disability, participation in co-curricular, intramural, or interscholastic activities or any of the services offered or recognitions rendered regularly to the pupils of this district.

There will be grievance procedures for persons alleging discriminatory acts by the Board and/or staff. The due process rights of pupils with handicaps/disabilities and their parents will be rigorously enforced.

* * *

2460 SPECIAL EDUCATION [Id. at Tab 17]

The Lakewood Board of Education assures compliance with Part B of the Individuals with Disabilities Education Act (IDEA) and the New Jersey

Administrative Code 6A:14-1 et seq. Furthermore, the Board will have programs and procedures in effect to ensure the following:

1. All pupils with disabilities, who are in need of special education and related services, including pupils with disabilities attending nonpublic schools, regardless of the severity of their disabilities, are located, identified, and evaluated according to N.J.A.C. 6A:14-3.3.

2. Homeless pupils are located, identified, and evaluated according to N.J.A.C. 6A:14-3.3, and are provided special education and related services in accordance with the IDEA, including the appointment of a surrogate parent for unaccompanied homeless youths as defined in 42 U.S.C. §§11431 et seq.

3. Pupils with disabilities are evaluated according to N.J.A.C. 6A:14-2.5 and 3.4.

4. An Individualized Education Program (IEP) is developed, reviewed and as appropriate, revised according to N.J.A.C. 6A:14-3.6 and 3.7.

5. To the maximum extent appropriate, pupils with disabilities are educated in the least restrictive environment according to N.J.A.C. 6A:14-4.2

6. Pupils with disabilities are included in State-wide and district-wide assessment programs with appropriate accommodations, where necessary according to N.J.A.C. 6A:14-4.10. All pupils with disabilities will participate in State-wide assessments or the applicable Alternative Proficiency Assessment in grades three, four, five, six, seven, eight, and eleven in accordance with their assigned grade level.

7. Pupils with disabilities are afforded procedural safeguards required by N.J.A.C. 6A:14-2.1 et seq., including appointment of a surrogate parent, when appropriate.

8. A free appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one, including pupils with disabilities who have been suspended or expelled from school:

* * *

9. Children with disabilities participating in early intervention programs assisted under IDEA Part C who will participate in preschool programs under N.J.A.C. 6A:14 will experience a smooth transition and have an IEP developed and implemented according to N.J.A.C. 6A:14-3.3(e) and N.J.A.C. 6A:14-3.7

10. Full educational opportunity to all pupils with disabilities is provided.

11. The compilation, maintenance, access to, and confidentiality of pupil records are in compliance with N.J.A.C. 6A:32-7.

12. Provision is made for the participation of pupils with disabilities who are placed by their parent(s) in nonpublic schools according to N.J.A.C. 6A:14-6.1 and 6.2

13. Pupils with disabilities who are placed in private schools by the district Board are provided special education and related services at no cost to their parent(s) according to N.J.A.C. 6A:14-1.1(d) and N.J.A.C. 6A:14-7.5(b)3.

14. All personnel serving pupils with disabilities are highly qualified and appropriately certified and licensed, where a license is required, in accordance with State and Federal law.

15. The in-service training needs for professional and paraprofessional staff who provide special education, general education or related services are identified, and that appropriate in-service training is provided. The district Board shall maintain information to demonstrate its efforts to:

* * *

16. Instructional material will be provided to blind or print-disabled pupils in a timely manner.

17. For pupils with disabilities who are potentially eligible to receive services from the Division of Developmental Disabilities in the Department of Human Services the district will provide, pursuant to the Uniform Application Act, N.J.S.A. 30:4-25.10 et seq. the necessary materials to the parent(s) to apply for such services.

18. The school district will not accept the use of electronic mail from the parent(s) to submit requests to a school official

regarding referral, identification, evaluation, classification, and the provision of a free, appropriate public education.

19. The school district will provide teacher aides and the appropriate general or special education teaching staff time for consultation on a regular basis as specified in each pupil's IEP.

The school District shall provide an Assurance Statement to the County Office of Education that the Board of Education has adopted the required special education policies and procedures/regulations and the district is complying with the mandated policies and procedures/regulations.

2460.1 SPECIAL EDUCATION – LOCATION, IDENTIFICATION, AND REFERRAL [Id. at Tab 19]

All pupils with disabilities, who are in need of special education and related services, including pupils with disabilities attending nonpublic schools, and highly mobile pupils such as migrant workers' children and homeless pupils regardless of the severity of their disabilities, are located, identified and evaluated according to N.J.A.C. 6A:14-3.3.

* * *

2460.8 SPECIAL EDUCATION – FREE AND APPROPRIATE PUBLIC EDUCATION [Id. at Tab 20]

A free and appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one including pupils with disabilities who have been suspended or expelled from school.

* * *

Procedures Regarding the provision of a Free, Appropriate Public Education to Pupils with Disabilities Who Are Advancing From Grade to Grade:

The Director of Pupil Personnel Services through in-service training shall ensure pupils with disabilities who are advancing from grade to grade with the support of specialty designed services, continue to be eligible when as part of a reevaluation, the IEP Team determines the pupil continues to require specially designed services to progress in the general education curriculum and the use of functional assessment information supports the IEP Team's determination.

* * *

## 3281 INAPPROPRIATE STAFF CONDUCT [Id. at Tab 21]

The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within the school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.

In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities. School staff shall not provide transportation to a pupil in their private vehicle or permit a pupil into their private vehicle unless there is an emergency or a special circumstance that has been approved in advance by the Building Principal/immediate supervisor and the parent/legal guardian.

Inappropriate conduct by a staff member outside of their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social network sites, or any other medium that is directed and/or available to pupils or for public display.

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of

Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

* * *

**SEPTEMBER 20, 2006 MEMORANDUM FROM W.T. ANDERSEN, ASSISTANT SUPERINTENDENT FOR CURRICULUM TO MS. TOBIA RE: PROFESSIONAL RESPONSIBILITIES** [Id. at Tab 22]

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Thank you for meeting with Yvette Cucuro and me on September 18, 2006 to clarify your responsibilities as Supervisor of Pupil Personnel Services and Yvette Cucuro's responsibilities as Supervisor of Special Education. I appreciated your thoughtful comments, concerns and suggestions.

Below is a list of your responsibilities:

- Coordinates, assigns, supervises, and evaluates all Child Study Team members;
- Works with Child Study Team members to create their individual Professional Improvement Plans;
- Ensures that Child Study Team members (e.g. school social workers, psychologists, and learning disabilities teacher consultants are informed of the requirements and regulations for disability identification;
- Coordinates instructional services provided to identified students with disabilities with the Supervisors of Special Education and Related Services;
- Supervises the eligibility determination of all students referred for special education;
- Supervises and coordinates IEP procedures to ensure that student evaluations are up-to-date, accurate, and thorough and that teachers have copies of their students' IEPs to facilitate appropriate services and instruction;
- Works with building administrators, the Supervisor of Special Education, the Supervisor of Related Services and Child Study Team members to assure appropriate services for identified students;

- Plans professional development activities and in-service training for members of the Child Study Team on topics related to pupil personnel services, such as legal requirements concerning pupil records and information and improving the quality of report writing.

- Oversees, in conjunction with the Assistant Superintendent of Curriculum and Instruction, the Supervisor of Special Education, Assistant Superintendent for Human Resources, and building administrators that teacher and paraprofessional assignments throughout the district maintain compliance with state program standards;

- Directs the TIENET-IEP pupil information data system program in support of educational services, in accordance with governmental laws and regulations for the school district;

- Attends county meetings related to pupil personnel services and shares information with principals, supervisors and members of the Child Study Team;

- Completes all required state and federal reports accurately and on time;

- Prepares for state monitoring visits by asking questions of appropriate state overseers before monitoring visits to assure that all materials and support documents are complete, accurate and ready for inspection;

- Maintains compliance with federal and state special education regulations;

- Ensures that transition of classified students from elementary to middle school and from middle school to high school are put in place by CST members before the new school year begins;

- Works with CST members to help special education students and their parents cope with transitions from one school to another;

- Develops and maintains compliance programs to meet legal requirements concerning students' rights to privacy and due process of law in accordance with applicable laws and regulations;

- Directs and coordinates activities of the CST secretarial staff engaged in compiling, maintaining, and releasing pupil records and information;

- Confers with staff and reviews records management system to recommend changes to improve system;

- Prepares budgets, reports, and plans for special education programs and keeps accurate records on pupil accounting and expenditures of funds;

- Informs the Director of Transportation of the transportation needs for the students with disabilities during the regular school year and summer sessions;

- Coordinates with the Supervisor of Nurses health services provided for classified students;

- Interviews candidates for positions on the Child Study Team;

- Performs related duties as assigned by the Assistant Superintendent of Curriculum and Instruction in accordance with the school/system policies and practices.

I thank you for your concern and cooperation.

## V. CONTENTIONS OF THE PARTIES

Petitioner Lakewood Township Board of Education

In the case presently before the Arbitrator, the Lakewood Board of Education ("Board" or "District") has proven far beyond a preponderance of the evidence that Respondent, Helen Tobia ("Ms. Tobia" or "Respondent"), a tenured supervisor employed by the Board, has committed numerous acts of unbecoming conduct or other just cause sufficient to warrant her dismissal from her position. Testimony and voluminous documentary evidence introduced at the hearing

proved that during the course of her employment with the Board, Ms. Tobia engaged in a pattern of inappropriate behavior in violation of District policies, procedure and the general standard of behavior to which certificated staff members are expected to adhere. More importantly, many of her actions were in violation of State law and regulation and had a deleterious effect on the District and its students.

In fact, Ms. Tobia's false swearing, under oath, in an affidavit submitted to the Court in a matter directly involving the District, as well as her improper and highly inappropriate directives to her staff regarding special education eligibility determinations, student placements and the use of Section 504 Plans, evidence a clear inability to carry out her duties as a supervisor or act as a role model for the District's students and the community. This is even more evident when one considers that Ms. Tobia's actions cavalierly and negatively affected the education provided to the very students who most require assistance – special education students, and resulted in increased costs to the District and its taxpayers, as well as a negative finding from the New Jersey Department of Education. Consequently, Ms. Tobia's actions mandate her dismissal.

For example, in or about July of 2013, the parents of student M.W. filed a petition for due process and request for emergent relief, seeking to have the student remain at the Special Children's Center ("SCC"), an out-of-District placement. Ms. Tobia submitted an affidavit in opposition to the petition, signed under oath, regarding the SCC's education program. Therein, she indicated that

there were religious symbols and icons present in the school. The ALJ later referenced Ms. Tobia's affidavit when issuing her decision granting the parents' application.

However, the SCC is not, and has never been, a religious institution. Moreover, as the Supervisor of Pupil Personnel Services, Ms. Tobia was fully familiar with the SCC and knew that it was not a religious school. Furthermore, when giving sworn testimony in an unrelated special education matter, Ms. Tobia admitted that her affidavit in the M.W. matter was false and agreed that the SCC was a nonsectarian placement. She also admitted that she had never seen any religious symbols on the walls in the SCC and that she could not attest that the M.W. affidavit was true.

Based on well-settled case law, Ms. Tobia's decision to lie under oath, in and of itself, requires her dismissal, particularly since her false affidavit was related not only to her duties as a District employee but to specific matters involving the education of a District special education student. However, Ms. Tobia also engaged in deplorable and inappropriate behavior when she improperly and illegally directed the District's Child Study Team ("CST") to find certain students eligible or ineligible, as the case may be, for special education related services, and to discontinue the use of Section 504 plans in the District.

Although she was not a member of the CST, she also directed CST members to place students in yeshivas, including giving case managers the

exact wording for insertion into said students' Individualized Education Plans ("IEPs"), despite the fact that the Department of Education had not approved such placements. Due, in part, to Ms. Tobia's actions, a complaint was filed against the District with the Office of Special Education Programs ("OSEP"). OSEP substantiated the complaint and specifically referenced Ms. Tobia's improper conduct in its findings.

As a result of its investigation, OSEP placed the District on a corrective action plan ("CAP"), and ordered that a number of students placed in yeshivas and other unapproved, unaccredited placements be reevaluated and educated in lawful, approved placements. Nevertheless, despite OSEP's findings, Ms. Tobia continued to direct staff to place students in unapproved placements and entered into so-called "parent agreements," by which the District would reimburse parents for monies paid for tuition to private schools, in an apparent effort to subvert the legal requirements for such placements. Finally, in June of 2015, Ms. Tobia refused to sign a certification in support of the District's petition for due process to block a parent's request for certain independent evaluations. Because Ms. Tobia did not sign the certification or even contact Board counsel to discuss same, counsel was unable to file the Petition and consequently, the District became legally required to provide the evaluations at its own expense.

Simply put, Ms. Tobia's actions, particularly given the extent of her admittedly improper conduct when lying under oath, her failure and outright refusal to follow applicable law and regulations governing the provision of an

appropriate education to special needs students and her directives to staff regarding certain students' eligibility or ineligibility for special education, among other similar wrongdoing, demonstrate that she is patently unfit to perform the functions of a certificated supervisor in the District. Certainly, Ms. Tobia's conduct is clear evidence of her blatant disregard for the law as well as her own duties, District policies and procedures, and evidence a lack of integrity in her position. It is also noteworthy that at no point did Ms. Tobia take any responsibility for her actions, but rather, blames everyone from other staff members to the former Board attorneys for her misconduct.

Accordingly, the Board has sustained its burden of proving that Ms. Tobia has committed conduct unbecoming a teaching staff member. Furthermore, her conduct is of such an egregious nature that it is more than sufficient to warrant her dismissal from her position in the District.

## PROPOSED FINDINGS OF FACTS

The following facts were gleaned through witness testimony and documentary evidence presented at the hearing, as well as from Respondent's admissions and responses as set forth in her Answer to the Charges and Answers to Interrogatories (Exhibits J-1, J-2, J-3, B-1-B7).

Ms. Tobia is a tenured employee of the Lakewood Board of Education, currently serving as the District's supervisor of Pupil Personnel Services ("PPS"). Ms. Tobia began employment in the District in or about January of 1995,

becoming tenured as a District teacher approximately three (3) years later in January of 1998. Throughout her employment she has served in a number of positions, having most recently been assigned to her current position in or about July of 2013, where she has served since that time.

## A. Facts in Support of Tenure Charge One (False Swearing/Lying under Oath)

In or about July of 2013, the parents of student M.W. filed a Petition for Due Process and Emergent Relief against the Board, in which they sought placement of M.W. at the SCC, in accordance with the student's IEP. Exhibit J-2, Tab 1. Ms. Joanne L. Butler, Esq., partner at the law firm Schenck, Price, Smith & King, LLP, the newly appointed Board counsel, then contacted Ms. Tobia and discussed the case for approximately thirty-five (35) minutes. Exhibit J-2, ¶7; Exhibit B-1; T. Joanne Butler ("JLB"), 33:18-19. At that time, Ms. Butler was wholly unaware of the SCC in general or whether it was a religious institution. T.JLB, 36:21-25.

During their conversation, Ms. Tobia informed Ms. Butler that the SCC was an unapproved and unaccredited school, that the New Jersey Department of Education had verbally informed the District that students could not be placed at the SCC, and that the SCC had very few, if any, certified teachers. T.34:21-25. Ms. Tobia also informed Ms. Butler that "there were religious symbols, icons, around the building, and there was writing in Hebrew on the building." T.34:25-35:5. Ms. Butler's contemporaneous notes memorializing her conversation with

Ms. Tobia confirm that Ms. Tobia informed Ms. Butler that the SCC was religious in nature. Exhibit B-1.

Based upon Ms. Tobia's information, Ms. Butler then prepared a draft affidavit of facts for Ms. Tobia's signature, which was to be submitted to the Office of Administrative Law in support of the District's opposition to M.W.'s emergent relief application. Exhibit J-2, Tab 1, ¶9. The affidavit reflected Ms. Tobia's statements to Ms. Butler regarding the SCC, including that Ms. Tobia had visited the SCC and was aware of the school's staffing levels, and that there were "religious symbols and icons present in and around the building." Exhibit J-2, Tab 1, ¶10-11.

Ms. Tobia reviewed the affidavit on numerous occasions and went so far as to make multiple edits to the statements contained therein before signing the affidavit. However, at no time did Ms. Tobia modify paragraph 32 of the affidavit, which stated that the "SCC has religious symbols and icons present in and around the building." Exhibit J-2, Tab 1, Exhibits A and B. On July 12, 2013, Ms. Tobia signed the final version of the affidavit which contained paragraph 32 in its entirety, and informed Ms. Butler that it was "accurate and signed." Exhibit J-2, Tab 1, ¶16 and Exhibit C; T.JLB, 43:17-20. The affidavit was submitted to Administrative Law Judge Patricia M. Kerins, who relied upon the information contained therein when rendering her decision on the matter. In fact, Judge Kerins noted in her decision that the Board had raised the issue of whether SCC was sectarian, in an apparent reference to Ms. Tobia's affidavit. Exhibit J-2, Tab

1, Exhibit D at page 8.

At the hearing, Ms. Butler testified that Ms. Tobia told her that she had personally seen religious icons and symbols at the SCC. T.JLB, 37:4-9. Ms. Butler further testified that she believed it was important to include that information in the affidavit because it supported a possible defense to the Petition on behalf of the Board, since the District is prohibited from educating a student in an unapproved, unaccredited or religious institution. T.JLB, 35:6-21, 37:5-9. Ms. Butler also stated that Ms. Tobia never told her that any part of paragraph 32 of the affidavit, regarding the presence of religious symbols and icons at SCC, was incorrect or needed revision prior to its submission to the Court. T.JLB, 46:15-19, 51:15-19.

Nearly two (2) years later, in March of 2015, Ms. Tobia provided testimony in a matter captioned C.F. and L.F. o/b/o L.F. v. Lakewood Board of Education, OAL Dkt. No. EDS 13665-14, before the Hon. John Schuster, ALJ. Exhibit J-2, Tab 5. When asked during her testimony about the affidavit she submitted in the M.W. case, Ms. Tobia admitted that the SCC was not a religious institution. Exhibit J-2, Tab 5 at 275. Ms. Tobia also admitted that she had "no idea" why there was a reference to religious icons and symbols in her prior affidavit. Id.

According to Ms. Tobia, she had "never seen any of those symbols on the walls in [the SCC]," despite having "been there several times." Id. She also testified that she "had to have missed" paragraph 32 in her original affidavit in the

M.W. matter. Id. at 277. When asked how she could have signed the M.W. affidavit and attest that it was true, Ms. Tobia simply replied, "I don't know." Id. Even after reviewing Judge Kerins' decision in the M.W. matter, Ms. Tobia made no attempt to correct the record or inform anyone that her affidavit was false. Id. at 282. Ms. Tobia also admitted during her testimony in the C.F. matter that the affidavit was "not accurate." Id. at 281.

At the hearing in this matter, Ms. Tobia alleged that the statement in her M.W. affidavit regarding the presence of religious icons and symbols at the SCC, as set forth in paragraph 32, was one that "Miss Butler and I devised and put together for the affidavit." However, she stated that she did not stand by statement set forth therein and that "anyone in the District knows there was no religious connotation with SCC. There never has been". T. Helen Tobia ("HT"), 72:24-25, 76:13-16, 25-74:2. On cross-examination, Ms. Tobia further admitted that she made revisions to the affidavit on multiple occasions but did not seek to change the wording of paragraph 32. T.HT, 75:10-77:18. Ms. Tobia also testified that she was "well aware" of the contents of her affidavit, including paragraph 32, when she signed it in July of 2013. T.HT, 79:11-12.

**B. Facts in Support of Tenure Charge Two (Predetermination of Eligibility for Student D.D.)**

In or about May of 2013, Ms. Chana Zentman, a school social worker/case manager employed by the District, was assigned by Ms. Tobia to serve as case manager for student D.D. Exhibit J-2, Tab 12; T. Chana Zentman ("CZ"), 7:6-17.

Ms. Tobia directed Ms. Zentman to hold an eligibility meeting for the student, during which Ms. Zentman and the rest of the CST assigned to D.D. was to review the results of D.D.'s evaluations and determine whether the student was eligible for special education or related services. T.CZ, 9:16-25. According to Ms. Zentman, such a determination must be made collaboratively by the CST, rather than by a single individual. T.CZ, 11:4-10.

Prior to the eligibility meeting taking place, and despite the fact that Ms. Tobia was not even a member of the CST, much less assigned to D.D.'s team specifically, Ms. Tobia copied Ms. Zentman on an email, dated May 29, 2013, and stated that "[Ms. Zentman] is to schedule an eligibility meeting. **The student is not eligible**." Exhibit J-2, Tab 12 [*Emphasis supplied*]. Upon receiving the email, Ms. Zentman became concerned that the student had been determined to be ineligible for special education when she had not yet reviewed the results of his evaluations. T.CZ, 14:2-4.

In the afternoon on May 29, 2013, Ms. Zentman followed up with Ms. Tobia via email, in which Ms. Zentman indicated that she had concerns with regard to Ms. Tobia's predetermination of D.D.'s eligibility. Exhibit J-2, Tab 13. Ms. Tobia replied to Ms. Zentman, again stating that "The student is not eligible and based on the assessments will not be eligible for special ed and related services." Id.

D.D.'s eligibility meeting took place on June 17, 2013, after which the

student was found ineligible for special education services. Exhibit B-2, T.CZ,19:14-20:5. The student's eligibility conference report was dated June 14, 2013, which further indicated that the student's eligibility status was predetermined. Exhibit B-3.

At the hearing, Ms. Zentman testified that it was not within Ms. Tobia's purview to make such a determination regarding a student's eligibility or ineligibility for special education. T.CZ, 16:8-10. Ms. Zentman also testified that both before and after the eligibility meeting was held, she continued to express her concerns to Ms. Tobia regarding her directive to predetermine the student's ineligibility, particularly since Ms. Zentman had reviewed the student's evaluations, which, in her view, were sufficient to support the classification of the student for special education purposes. T.CZ, 16:8-17:14.

In fact, on June 6, 2013, Ms. Zentman emailed Ms. Tobia to discuss the results of D.D.'s evaluations. Exhibit B-6. Therein, Ms. Zentman informed Ms. Tobia that the evaluating doctor stated that "the student is appropriate to receive all supporting educational services possible . . . possible classification and other health impaired, emotionally disturbed would be appropriate for [the student]." Id. Ms. Zentman again expressed her concerns to Ms. Tobia regarding the student's classification status, noting that "this seems to be a strong implication to classify which concerns me if we're going to be determining ineligible." Id. Ms. Tobia continued to insist to Ms. Zentman that the student was not eligible for special education. T.CZ, 21:15-22:8.

Ms. Zentman also brought her concerns regarding Ms. Tobia's directive to find the student ineligible to Elchanan Freund, then-Supervisor of the Child Study Team. According to Mr. Freund, Ms. Zentman felt "trapped" by Ms. Tobia's directive and that the District may have been "inhibiting [D.D's] ability to receive the appropriate services," by finding him ineligible even though Ms. Zentman's review of his evaluations supported a determination that he was eligible for special education. T. Elchanan Freund ("EF"), 20:16-24. Mr. Freund also testified that he and Ms. Zentman had a telephone conference with Ms. Tobia, who again repeated her directive that "this child is not eligible." T.EF, 21:18-23. According to Mr. Freund, at the conclusion of that conversation, Ms. Zentman "had no choice but to find [D.D.] ineligible." T.EF, 22:16-25.

Ms. Zentman also testified she was so troubled that D.D.'s ineligibility had been predetermined by Ms. Tobia that she informed her union of Ms. Tobia's actions. T.CZ, 21:13-14, 22:12-3:17. Because the directive to find D.D. ineligible for special education had come from Ms. Tobia, who was Ms. Zentman's direct supervisor, the union advised Ms Zentman to follow the directive so as not to be found insubordinate. T.CZ, 22:19-23:15. Consequently, Ms. Zentman and the other members of the CST found D.D. ineligible because "we were given a directive that the student's not eligible . . . by Ms. Tobia." T.CZ, 20:15-18. After the student was determined to be ineligible, the student's parents filed a petition for due process against the District. T.CZ, 23:18-20.

Ms. Tobia later testified on behalf of the Board in the due process hearing

for D.D. During her testimony in that proceeding, she admitted that D.D.'s eligibility conference report was dated prior to the date on which the eligibility meeting actually took place, and that the student's ineligibility was pre-determined. Exhibit J-2, Tab 8 at 149. In fact, when asked by D.D.'s counsel whether "you predetermined ineligibility, correct?" Ms. Tobia replied "yes." Id. at 248.

In January of 2014, six (6) months after the student's June, 2013 eligibility meeting in which he was found to be ineligible, D.D. was ultimately found eligible for special education services. T.CZ, 24:22-25. The student was classified as "multiply disabled," and placed in an out-of-District program. T.CZ, 25:1-11.

### C. Facts in Support of Tenure Charges Three and Four (Placement of Various Students, Including Y.T., in Unapproved, Unaccredited Schools and/or Yeshivas/OSEP Investigation)

Beginning in the spring of 2013, the District began to receive a significant number of records requests relating to students who had been placed in private, unaccredited and/or religious schools from a local attorney, Michael Inzelbuch. T.EF, 24:1-25:5. These records requests sought a number of students' entire student file, and oftentimes were a precursor to litigation. Id. At the time the records requests were received, Ms. Tobia had complete oversight over District litigation matters involving special education students. T.EF, 11-21; Exhibit J-2, Tab 4, Affidavit of Elchanan Freund at ¶5-7.

At the time the records requests were received, Mr. Freund attended a

meeting with Ms. Tobia and Laura Winters, District Superintendent, to discuss the handling of the requests and the possibility that litigation might result. T.EF, 26:2-11. At that meeting, Ms. Tobia directed Mr. Freund to hold IEP meetings for each student and to "offer these parents whatever they wanted." T.EF, 26:13-19. Ms. Tobia went on to say that if the parent sought to place their student in an unaccredited, unapproved school, the placement could be done through the student's IEP, despite the fact that such placements were illegal. T.EF, 26:20-27:8, Exhibit J-2, Tab 4 at ¶¶5 and 10.

Mr. Freund then met with each Child Study Team member to inform them that per Ms. Tobia's directive, they were to write IEPs for each student and place the students "wherever the parents wanted to send the children." T.EF, 28:20-25. In addition, during the summer and/or fall of 2013, Ms. Tobia also personally met with case managers and directed them to place students in yeshivas through the use of IEPs. T.EF, 31:13-24. At the hearing, Mr. Freund testified that such placements were improper and that the New Jersey Administrative Code does not allow students to be placed in unaccredited, unapproved schools or religious yeshivas. T.EF, 29:19-31:9.

In or about September of 2013, Ms. Tobia requested that Katherine A. Gilfillan, Esq., an attorney at SPSK, review approximately seventy (70) tuition contracts for special education students who had been placed in out of District placements at Ms. Tobia's request. T. ("KAG"), 7:10-25; Exhibit J-2, Tab 2, Affidavit of KAG at ¶3. Upon her review of the contracts, Ms. Gilfillan had a

number of concerns, including that the contracts were being utilized to place children in either unaccredited, unapproved or religious placements. T.KAG, 8:10-17; Exhibit J-2, Tab 2, ¶4. However, pursuant to New Jersey law and regulation, such placements were impermissible without specific approval from the New Jersey Department of Education. Id. Accordingly, Ms. Gilfillan informed Ms. Tobia, via correspondence dated September 25, 2013, that the contracts governing the placement of students in yeshivas could not be approved. Id., Exhibit 1 to KAG Affidavit at page 3. Specifically, Ms. Gilfillan advised Ms. Tobia that without State approval, the Board "would not legally be able to enter into those agreements." T.KAG, 9:20-23.

At the hearing, Ms. Gilfillan testified that she had numerous conversations with Ms. Tobia regarding the placements of students in yeshivas and the fact that such placements were illegal. T.KAG, 10:12-11:14. Ms. Gilfillan further testified that Ms. Tobia responded that "she wanted to avoid litigation with Michael Inzelbuch at all cost. She wanted to give the parents what they wanted. That would include putting these students at private religious placements." T.KAG, 11:20-25. Nevertheless, Ms. Tobia failed to heed Ms. Gilfillan's advice and took no steps to discourage the placement of students in yeshivas. T.KAG, 13:1-5; Exhibit J-2 at Tab 2, ¶6-7.

Thereafter, in or about January of 2014, a complaint investigation regarding the District's practice of placing students in yeshivas was filed by Mr. Inzelbuch with the New Jersey Department of Education, Office of Special

Education Programs ("OSEP"). In the complaint, Mr. Inzelbuch raised an issue regarding the District's actions to place student Y.T. in Yeshiva Tiferes Torah ("YTT"), an unapproved, unaccredited yeshiva, for the 2013-2014 school year. Exhibit J-2, Tab 14.

During the 2012-2013 school year, Y.T., a then-six-year-old student classified as eligible for special education, attended the School for Children with Hidden Intelligence ("SCHI") via an IEP issued by the District. SCHI was an approved, accredited school for the disabled. T. Gila Nussbaum ("GN"), 8:22-9:2. In or about January of 2013, the student's case manager, Gila Nussbaum, began the process of reevaluating the student for the upcoming 2013-2014 school year. T.GN, 10:9-22. The student's father informed her that he wanted Y.T. to attend YTT as a public school student through an IEP, so that the student would receive an aide and other additional related services that he would not receive if he enrolled in YTT as a private school student subject to a service plan. T.GN, 11:7-18, 8:14-17. The student's father also told Ms. Nussbaum that he had spoken to Ms. Tobia and they had already reached an agreement to place Y.T. in YTT as a public school student for the 2013-2014 school year. T.GN, 14:2-7. Ms. Nussbaum and the CST then arranged for Y.T. to attend YTT pursuant to an IEP. T.GN, 14:22-15:4.

Ms. Nussbaum also sent a letter to the student's parents, dated April 8, 2013, which stated that the student was to attend YTT "full time as a public school student, as per the director of Pupil Personnel Services." T.GN, 20:10-14;

Exhibit B-4. According to Ms. Nussbaum, "Ms. Tobia did give me a directive that [Y.T.] was to be placed at YTT as a public school student, and that's why I did go ahead and include that in the IEP." T.GN, 20:20-22. Ms. Nussbaum also testified that she never completed a Naples application for Y.T.'s placement and did not receive State approval to place the student there. T.GN, 21:1-11. On April 6, 2013, Ms. Tobia emailed Ms. Nussbaum and informed her again that Y.T. was to be a public school student while attending YTT, and that the District would enter into a parent agreement with Y.T.'s parents, by which the parents would be reimbursed for costs related to Y.T.'s education, rather than the school itself. Exhibit R-1.

In or about March of 2014, OSEP substantiated the complaint and placed the District on a Corrective Action Plan ("CAP"). Exhibit J-2 at Tab 14. In its initial report, OSEP found that that Ms. Tobia had "issued a directive to the IEP team that the team should write an IEP placing the student at [YTT]," an unapproved, unaccredited yeshiva. Exhibit J-2, Tab 14 at ¶7. OSEP further found that the District had failed to follow procedures to place the student in an unapproved placement. Exhibit J-2, Tab 2 at ¶8. The CAP required the District to submit a list of all students who were being educated in unapproved placements, along with supporting documentation evidencing the approval of any of the placements by either the State or an Administrative Law Judge. Id. at ¶10; Exhibit J-2, Tabs 14 and 15.

Ms. Gilfillan responded to the initial CAP on behalf of the District. T.KAG,

15:4-11, Exhibit J-2, Tab 2, ¶10. Ms. Gilfillan also requested that Ms. Tobia provide her with any approval forms for the placements. Id. While Ms. Tobia initially provided some documentation to Ms. Gilfillan, she was unable to provide any evidence to support the approval of the out-of-district placements. Id. at ¶11, T.KAG, 15:16-16:5.

In or about August of 2014, OSEP issued a supplemental CAP which required the District to hold IEP meetings for those students who had been placed in yeshivas or other unapproved, unaccredited schools. T.KAG, 16:25-17:4. OSEP further directed the District to rewrite the students' IEPs to offer an approved placement for them. Id., Exhibit J-2, Tab 2 at ¶12.

However, after the IEP meetings were held, a large number of the parents of the affected students, if not all of them, filed requests for mediation or petitions for due process, seeking to maintain the students' placements in the yeshivas. Exhibit J-2, Tab 2 at ¶13. In defending these actions and the initial CAP, the District incurred "tens of thousands of dollars" in costs, to be paid for by taxpayer funds. T.KAG, 13:9-21. A large number of administrative time and work hours were also required to not only respond to the CAP, but to schedule and hold IEP meetings and staff briefings. T.EF, 45:14-46:7; Exhibit J-2, Tab 4 at ¶12. In addition, the District's State-provided funding for special education programs was placed at risk due to the State's findings. T.KAG, 13:18-21.

## D. Facts in Support of Tenure Charges Five and Six (Improper Actions With Regard to Students S.S., Y.S. and M.W.)

In response to OSEP's directive to hold IEP meetings for students who had previously been placed in unapproved yeshivas, the District convened an IEP meeting for student Y.S. on September 15, 2014 T.EF, 50:25-51:3. At the conclusion of the IEP meeting, the CST recommended that the student be removed from the yeshiva and placed in the District's Clifton Avenue Elementary School. T.EF, 51:21-25. Ms. Tobia, along with Mr. Freund, then met with the student's parents and their education advocate, Rabbi Eisemann. T.EF, 52:3-9.

During the meeting, Ms. Tobia advised Rabbi Eisemann and the student's family to file for mediation or due process in order to allow the student to continue in his yeshiva placement under "stay put." T.EF, 53:24-54:5. Mediation is a process by which parents request a meeting with the District, facilitated by a State-employed mediator, in order to discuss a student's education plan or proposed placement and attempt to reach a resolution of the matter prior to filing a formal petition for due process with the Office of Administrative Law. T.EF, 55:10-17. Once mediation is filed, the student must "stay put" in his or her current placement while the mediation process is ongoing. T.KAG, 18:5-11, T.EF, 59:9-14. Mr. Freund testified that Ms. Tobia advised the parents of their option to filing for mediation or due process in order to "get around" the implementation of the proposed placement. T.EF, 54:12-22, 59:9-14.

Thereafter, in or about October of 2014, the student's parents heeded Ms. Tobia's advice and filed a request for mediation for Y.S., as well as a separate request for his brother, S.S. However, the mediation was never held and the

Department of Education closed the files for both students. T.KAG, 17:5-9; T.EF, 55:3-21. Because the mediations were not held, the proposed placements for the students, which included removing them from their yeshivas and educating them in-District, should have gone into effect by operation of law. T.KAG, 18:12-16, T.EF, 56:1-4.

Via email dated November 11, 2014, Ms. Gilfillan informed Ms. Tobia that the mediations were closed. Exhibit J-2, Tab 2 at Exhibit 6. Therein, Ms. Gilfillan also told Ms. Tobia that "stay put no longer applies and these students should be transitioned to their new placement if, in fact, that was what was proposed for them." Id. However, Ms. Tobia disregarded Ms. Gilfillan's advice and took no steps to implement the new placements for either Y.S. or S.S. T.KAG, 20:1-2. Moreover, the District continued to pay all costs associated with the placements of Y.S. and S.S. in their yeshivas, in direct contravention to OSEP's directive and CAP. T. KAG, 20:3-7, T.E.F., 56:15-19.

Similarly, in response to the CAP issued by OSEP, the District convened an IEP meeting in October of 2014 for student M.W. who had, like S.S. and Y.S., been placed in a yeshiva. T.EF, 57:8-15. At the conclusion of the IEP meeting, the CST determined that the student could be educated in the District's Clifton Avenue School. T.EF, 58:2-11. Ms. Tobia and Mr. Freund then attended a meeting with the advocate retained by M.W.'s family, Rabbi Eisemann, to discuss the newly recommended placement. T.EF, 58:21-59:2.

As she did with S.S. and Y.S., during the meeting to discuss M.W.'s placement, Ms. Tobia again advised the family's advocate to file for mediation or due process in order to prolong the student's placement in his yeshiva. T.EF 59:9-14. By doing so, the District would remain legally obligated to pay for the student's attendance in his unapproved, unaccredited private school. Id. M.W.'s family did, in fact, file a request for mediation subsequent to Ms. Tobia's meeting with Rabbi Eisemann. T. Alison L. Kenny, Esq. ("ALK"), 7:14-20.

## E. Facts in Support of Tenure Charges Seven and Eight (Improper Actions During Mediation Sessions)

On December 29, 2014, Ms. Kenny, along with Ms. Tobia, represented the Board of Education at scheduled mediation sessions for students M.W. and Y.S. Almost immediately at the start of the mediation, Ms. Tobia informed the parents and the State mediator that the placements proposed by the CST for the students were "completely inappropriate." T.ALK, 8:14-17; Exhibit J-2, Tab 4, Affidavit of Alison L. Kenny, at ¶2-3. Instead, Ms. Tobia, on her own, contrary to OSEP's directives and without CST input, agreed to continue each student in their sectarian placements. T.ALK, 9:11-18; Exhibit J-2, Tab 4 at ¶4.

Ms. Kenny advised Ms. Tobia not to enter into any agreement to that effect, because "there was a corrective action plan issued by the State stating that . . . the District was required to remove all students from sectarian placements." T.ALK, 10:2-6; Exhibit J-2, Tab 4 at ¶4, Tab 2 at ¶17. Specifically, Ms. Kenny testified that the agreements were "against the corrective action plan

and that [she] recommended against signing it." T.ALK, 35:11-13.

Ms. Kenny also testified that the mediator was unable to memorialize Ms. Tobia's agreements with the students' parents in writing because the agreement reached between Ms. Tobia and the students' parents was a continuation of an illegal placement. T.ALK, 11:9-22. Ms. Kenny further stated that she was "quite surprised" that Ms. Tobia expressed a viewpoint contrary to the District's official position, particularly since doing so had the potential to compromise the District's position in future litigation and because Ms. Tobia lacked the individual authority to make such a statement or enter into an agreement to maintain the students' placements in their yeshivas. T.ALK, 8:23-9:4; Exhibit J-2, Tab 4 at ¶4.

Furthermore, Ms. Kenny testified that Ms. Tobia's personal feeling on whether the proposed in-District programs for the student were "of no moment, because it is the IEP team that determines the appropriateness of the student's program and placement." T.ALK, 38:12-21. Nevertheless, Ms. Kenny was unprepared for Ms. Tobia's actions during the mediation, as she testified that prior to the start of the mediation session, she had met with Ms. Tobia in preparation for the meetings and "at no time during that discussion did Ms. Tobia opine that the proposed placement in the IEP was inappropriate." T.ALK, 31:24-32:1.

On January 2, 2015, Ms. Gilfillan emailed Ms. Tobia to again inform her that the agreements regarding Y.S. and M.W. were improper. Exhibit J-2, Tab 2,

Exhibit 7. Therein, Ms. Gilfillan stated that "these agreements could be seen as having circumvented the State's directive that these students be placed in approved and accredited placements." Id. In closing, Ms. Gilfillan unequivocally stated that "the District must find appropriate, approved placements for these students in very short order." With regard to Ms. Tobia's actions at the mediation sessions when announcing her personal disapproval of the in-District placements proposed for the students, Ms. Gilfillan told Ms. Tobia that while she may have had some concerns in that regard, "stating as much in front of the parents ensures that we will be unsuccessful at due process," further memorializing the potentially devastating effect that Ms. Tobia's actions had on the District's position in future litigation. Id.

On or about March 9, 2015, Ms. Gilfillan, along with Ms. Tobia, attended mediation for student S.S. As she did with Y.S. and M.W., Ms. Tobia informed Ms. Gilfillan that the program proposed for S.S. was wholly inappropriate for him, despite not having been a member of S.S.'s CST. T.KAG, 24:3-12. Ms. Gilfillan and Ms. Tobia then spoke with the student's case manager, Shana Shiffrin, who stated that the proposed placement was appropriate, that the student had been accepted into the program. T.KAG, 25:6-17, Exhibit J-2, Tab 2 at ¶20. At the mediation, which was attended by the student's parents and their advocate, Rabbi Eiesmann, it was requested by the parents that the student remain in his yeshiva. T.KAG, 26:6-9. Ms. Gilfillan responded that such a placement was improper and that the District could not legally continue the placement as

requested. T.KAG, 26:16-17. The parents then replied that Ms. Tobia had already agreed to continue the placement for S.S.'s brother, Y.S., and were therefore surprised and angry that the same agreement could not be reached for S.S. T.KAG, 27:4-12.

At that point, the mediator suggested that he, Ms. Tobia and Ms. Gilfillan leave the room so that S.S.'s mother had the opportunity to privately with her advocate. Exhibit J-2, Tab 2 at ¶21; T.KAG, 28:22-25. Ms. Tobia refused to heed the mediator's request. Id. When the mediator requested that Ms. Gilfillan again ask Ms. Tobia to leave the room and to "get control of [her] client, Ms. Tobia responded by shutting the door in Ms. Gilfillan's face. T.KAG, 29:8-13; Tab 2 at ¶22. Ms. Tobia then engaged in a private conversation with S.S.'s parent and Rabbi Eisman for approximately ten (10) minutes before allowing Ms. Gilfillan and the mediator to return to the room. Id. The matter did not settle at the mediation, and is currently pending before the Office of Administrative Law as a due process proceeding. Tab 2 at ¶22.

At the hearing, Ms. Gilfillan testified that it was her belief that during those conversations and mediations, Ms. Tobia provided advice to the parents and their advocate, as evidenced by the manner in which they were comporting themselves as if a decision had already been made. T.KAG, 32:4-12. Ms. Gilfillan memorialized her concerns regarding Ms. Tobia's actions during the mediation session in an email to Michael Azzara, State Monitor, dated March 10, 2015. Exhibit J-2, Tab 2, Exhibit 9.

Six months later, on June 1, 2015 Ms. Kenny emailed Ms. Tobia to inquire about the students' placements and again inform her IEPs must be developed to offer an approved or non-sectarian, accredited school. Exhibit J-2, Tab 2, Exhibit 8. Ms. Kenny further opined that "the District cannot begin the 2015-2016 [school year] with the students in the current sectarian placements." Id. Ms. Tobia replied that as of the date of the email, June 2, 2015, the students remained in their current, sectarian placements. In addition, the Department of Education reached out to Mr. Azzara to express its disapproval that the District was continuing to allow students to remain in the yeshivas instead of placing these students in approved placements as required by the CAP issued by OSEP. T. Michael Azzara ("MA"), 64:22-25.

## F. Facts in Support of Tenure Charge Nine (Discontinuance of Section 504 Plans)

Section 504 of the Rehabilitation Act of 1973 requires that eligible students with disabilities receive the necessary accommodations and modifications to their educational program to ensure that these students have access to their education on the same level as their non-disabled peers. T. Adina Weisz ("AW"), 9:14-22. Students eligible for such services are provided with a Section 504 Plan, which sets forth the parameters for the implementation of any accommodations that the student needs. In general, Section 504 Plans are issued to students with physical disabilities. Students with cognitive disabilities, on the other hand, would normally be classified as eligible for special

education. T.AW, 10:6-12.

During the 2012-2013 school year, Ms. Tobia, as part of her duties as Supervisor of Pupil Personnel, oversaw the Section 504 and IEP process. T.AW, 8:13-15. In that capacity, in or about April of 2013, Ms. Tobia issued a directive to all staff to discontinue the use of new Section 504 plans in the District, as she felt that too many students were being provided with Section 504 Plans. T.EF, 60:10-22; T.AW, 9:2-4; T. Jennifer Kaznowski ("JK"), 24:4-7.

Ms. Adina Weisz currently serves as the District's supervisor of Related Services and IDEA Coordinator. As part of her responsibilities, Ms. Weisz implements occupational, physical and speech therapy services pursuant to students' Section 504 Plans. On May 17, 2013, Ms. Weisz emailed Mr. Freund, with a copy to Ms. Tobia, and asked for guidance regarding the implementation of occupational therapy services to a student pursuant to the student's 504 Plan. Exhibit J-2, Tab 9. Ms. Weisz was concerned because although Ms. Tobia had directed staff to discontinue the use of Section 504 Plans, the 504 Plan at issue was already signed by the parties and consequently, the District was legally required to implement the services set forth therein. T.AW, 13:16-24, 28:25-29:4.

One week later, on May 24, 2013, Ms. Weisz again emailed Mr. Freund for guidance and copied Ms. Tobia on that email. Id. Ms. Tobia responded to Ms. Weisz's request and simply informed her to "throw it out," in reference to the student's Section 504 Plan. Id. Although Ms. Weisz did not destroy the Section

504 Plan, she did not implement the services required by the plan, based on Ms. Tobia's email. T.AW, 15:14-15.

In August of 2013, Ms. Weisz emailed Ms. Tobia and asked her to "please advise if we will be servicing students for occupational therapy under a 504 plan for [the 2013-2014 school] year, as there were concerns last year." Exhibit J-2, Tab 9. Via email dated August 26, 2013, Ms. Tobia informed Ms. Weisz that rather than implement Section 504 Plans, the staff was to instead refer all children, regardless of need, to the CST for evaluation to determine whether the students were eligible for special education. Id. When Ms. Weisz again asked Ms. Tobia if she meant that "all new and existing 504 request (sic) should be referred to CST and not provided an evaluation or therapy through a 504," Ms. Tobia replied "yes" in the affirmative. Id.

Ms. Weisz testified at the hearing that she had numerous concerns with Ms. Tobia's directives, in that many students who required Section 504 Plans did not also require special education. T.AW, 17:8-15. Furthermore, on or about November, 20, 2013, a number of staff approached Ms. Gilfillan during a training session, informed Ms. Gilfillan that Ms. Tobia had given a directive not to utilize Section 504 plans and inquired as to whether that directive was legal. T.KAG, 33:16-23, 36:1-4; Exhibit J-2, Tab 2 at ¶¶23-24. Ms. Gilfillan replied that such an action was impermissible, and that "the District has an affirmative obligation to provide students who do not qualify for IDEA with services, including evaluations, through a 504 Plan." T.KAG, 34:1-4.

As a result of Ms. Tobia's directive, there was a substantial drop off in the number of Section 504 plans for students with occupational and physical therapy needs from the 2012-2013 school year, when approximately thirty-six (36) students were serviced pursuant to their individual plans, to the following 2013-2014 school year, when zero students whatsoever were serviced. T.AW, 18:10-18; T.JK, 38:18-34. According to one member of the CST, Jennifer Kaznowski, there was "absolutely" an increase in referrals to the CST due to the elimination of Section 504 Plans in the District. T.JK, 26:9-11.

In addition, Ms. Gilfillan met with Ms. Tobia, Mr. Freund and Ms. Winters after the November 20, 2013 training session and advised that the District was legally prevented from discontinuing 504 Plans. Exhibit J-2, Tab 2 at ¶24. However, Ms. Tobia did not retract her prior directive or issue additional clarification of same. Id. When asked on cross-examination to explain her reasoning for directing Ms. Weisz to throw out a student's Section 504 Plan or to discontinue the use of 504 Plans generally, Ms. Tobia had no answer. T.HT, 109:3-10.

## G. Facts in Support of Tenure Charge Ten (Private Agreements for Out-of-District Placements)

Pursuant to the so-called Naples Act, N.J.S.A. 18A:46-14, the District must submit an application for approval to the New Jersey Department of Education prior to placing a student in an accredited, but unapproved, out-of-District school. The student may not legally be placed in the proposed school

absent the Department of Education's approval. Nevertheless, during the 2013-2014 school year, Ms. Tobia instructed District staff to place students in non-approved schools without State approval through the use of independent parent agreements.

For example, at the hearing, school social worker Jennifer Kaznowski testified that she was the case manager for student R.M. during the 2012-2013 school year. At that time, R.M. was a five year old student attending an out-of-District placement at SCHI. T.JK, 7:10-16. In May of 2013, the CST held an eligibility meeting for R.M. and determined that he no longer required an out-of-District placement. T.JK, 8:19-21. The CST instead believed that an in-District, in-class resource program was more appropriate for the student. T.JK, 9:2-7. However, because the student required a climate-controlled environment, the District could not meet the student's needs and Ms. Kaznowski began to inquire whether other public school districts had the capacity to educate the student. T.JK, 10:8-15. In response, the student's mother raised the possibility of the student attending Orchos Chaim, a private, unapproved, unaccredited yeshiva, and informed Ms. Kaznowski that she would prefer that the student attend the yeshiva rather than a public school. T.JK, 10:16-11:3.

Ms. Kaznowski testified that it was her understanding that Ms. Tobia had engaged in private discussions with Rabbi Mandelbaum, Head Rabbi at Orchos Chaim, regarding the placement of the student at the school. Consequently, on May 13, 2013, Ms. Kaznowski emailed Ms. Tobia and sought guidance on

placing the student at the school. Exhibit J-2, Tab 10; T.JK, 11:15-17. Therein, Ms. Kaznowksi informed Ms. Tobia that the District had not received a Naples approval for the placement from the Department of Education. Id. Ms. Tobia responded that an acceptance letter from the school was required before the student could be placed there, but then directed Ms. Kaznowski to "not hold up the meeting. If the Naples process is not completed by the school, we will do a parent agreement to place the student. Parent will be reimbursed on a monthly basis for tuition." Id.

According to Ms. Kaznowski, the process for entering into a parent agreement of this type was for Ms. Tobia to meet with the student's parents and "come up with an agreement that their child can attend Orchos Chaim, and will work it out between the school, the parent and [the District]." T.JK, 15:5-8. Thereafter, on June 6, 2013, Ms. Kaznowski again emailed Ms. Tobia seeking guidance regarding student R.M. and the fact that he was leaving SCHI prior to the 2013-2014 school year. Ms. Tobia replied that "all IEPs must state an approved placement as recommended by the IEP team." Exhibit J-2, Tab 11. However, Ms. Tobia continued to state that "for existing students who were already placed in other programs, the parents will most probably reject placement. At that point I will meet with the parents to reach an agreement." Id.

Ms. Kaznowski testified that the student's mother also informed her that Ms. Tobia met with the parent on August 6, 2013. When asked what the substance of the meeting was, Ms. Kaznowski replied that it was "to do the

parent agreement so that their child can be placed at Orchos Chaim." T.JK, 20:14-15.

During the 2014-2015 school year, Ms. Kaznowski also served as case manager for student R.J. T.JK, 20:18-24. In August of 2015, R.J.'s parents requested that the student be placed in a nonpublic yeshiva. T.JK, 21:7-14. Ms. Kaznowski, along with Ms. Tobia, met with the parents to discuss the request. At the meeting, Ms. Tobia informed the parent of additional documentation which would substantiate a placement at the yeshiva, and that if the documentation was provided, the student would be placed via an IEP at the school. T.JK, 22:13-25. Ultimately, the documentation was provided, and R.J. was placed at the Bais Faiga yeshiva pursuant to an IEP. T.JK, 23:2-19.

In addition, on various occasions, Ms. Tobia met privately with Rabbis and other principals at various yeshivas to discuss whether students could be placed in those schools. At the conclusion of the meetings, Ms. Tobia then directed students' case managers to modify certain IEPs and place the students into the yeshivas, contrary to the CAP issued by OSEP.

On March 23, 2015, Ms. Rosemarie Frazer, former secretary to Ms. Tobia, testified under oath in the "C.F." matter before the Hon. John Schuster, III, ALJ, in the Office of Administrative Law. Ms. Frazer stated that she was present in many of these meetings between Ms. Tobia and the Rabbis, and that agreements were reached to change the students' placements to yeshivas.

Specifically, Ms. Frazer testified as follows:

> Q So even though we may not always see Helen Tobia's signature, it is your testimony, as her executive secretary, that any child that went out of district, the Shared Services, the rationale, the notice of placement, the IEP, the supporting documentation, for sure, was observed and reviewed and put for Helen's review?
>
> A That's correct.
>
> Q And you're certain on that?
>
> A I am certain.
>
> Q Okay. Now we heard testimony that there were certain students who were not recommended for Yeshiva's, like case managers, and then Helen would meet with maybe Yankie Mandelbaum, Rabbi Mandelbaum, you know Rabbi Mandelbaum, yes?
>
> A Yes, I do.
>
> Q And would meet with others and they would have a meeting with Helen and then we heard testimony and we know from parents that magically, almost, the placement, whether it be wherever it was, an approved placement or accredited place was then changed to a Yeshiva; are you aware of that?
>
> A Yes.
>
> Q Ms. Frazer, I'll let you testify without asking -- I asked you if you're aware, and you said "yes," and I appreciate your honesty, as does the court, that there were cases you know of where case managers were directed [by Tobia] to change the placements to Yeshivas, correct?
>
> A Correct.
>
> A For the most part the -- what I recall is that Helen [Tobia] and the Rabbis would be speaking about how they could accommodate the student.

Q Oh, good, okay.

A And –

Q What happened next? The IEP was changed to Yeshiva.

A Yes.

Exhibit J-2, Tab 6.

At the hearing, Ms. Tobia did not refute or address these allegations.

**H. Facts in Support of Tenure Charge Eleven (Failure to Sign Certification in Support of Due Process Petition)**

In April of 2015, Ms. Kenny was assigned to represent the Board in a special education matter involving student J.Q. T.ALK, 13:14-18. In May of that year, Ms. Kenny received documentation from the parents' attorney purporting to show that a request for pre-classification evaluations of the student was sent to Ms. Tobia's attention on April 15, 2015. T.ALK, 14:1-4.

On June 1, 2015, Ms. Kenny emailed Ms. Tobia to inquire whether she had ever received the request for evaluations. Exhibit J-2, Tab 3 at Exhibit 2. Ms. Tobia replied that she had been out of the office on April 15th, but would inquire with her staff to determine if anyone else had received it. Id. at ¶6. Having received no answer from Ms. Tobia, Ms. Kenny followed-up with her via email on June 9, 2015. Id. at ¶7. It was determined that the parents' request had been sent to an unused facsimile machine and therefore had not been received by the District. Id.

The District decided to file for due process in order to deny the request for evaluations. T.ALK, 16:3-23. The petition for due process must be filed within fifteen (15) days of the date on which the request for those evaluations was received. Id. In support of the petition, and because the original request was purportedly sent directly to Ms. Tobia, Ms. Kenny drafted a certification for Ms. Tobia's signature in order to address the late receipt of the request. Exhibit J-2, Tab 3 at ¶8. According to Ms. Kenny, a certification from Ms. Tobia was "absolutely necessary to explain the discrepancy that the letter from the parents was dated April 15th and we would not be filing [the due process petition] until early June." T.ALK, 19:20-24. The certification was provided to Ms. Tobia for review on June 16, 2015. Exhibit J-2, Tab 3 at Exhibit 2.

Ms. Tobia responded to Ms. Kenny and informed her that she would not certify to the facts in the certification as she was not familiar with the facts relating to the parents' initial request for evaluations. Id. at Exhibit 3, T.ALK, 21:1-5. However, Ms. Kenny simply required Ms. Tobia to certify that she had not received the initial request for evaluations, rather than to any specific facts related to the child's education or potential classification. T.ALK, 21:8-17. Ms. Kenny then forwarded a revised certification to Ms. Tobia which further narrowed the facts to which Ms. Tobia was to certify and focused solely on whether she had received the initial request for evaluations. T.ALK, 21:23-22:9; Exhibit B-7. Ms. Tobia did not otherwise respond to Ms. Kenny's requests for clarification or return a revised certification to her. Exhibit J-2 at Tab 3, ¶9.

Because Ms. Tobia did not reply to Ms. Kenny's requests for clarification, and would not certify that she had not received the request for evaluations, Ms. Kenny was unable to file the petition to deny the evaluations on behalf of the District. T.ALK, 22:23-24. Consequently, the District became legally obligated to provide, at District expense, all of the independent evaluations that had been requested by J.Q.'s parents, notwithstanding the District's initial position that the evaluations need not be offered to the student. T.ALK, 23:1-3; Exhibit J-2 at Tab 3, ¶10 and Exhibit 4. According to Ms. Kenny, such evaluations would typically cost upwards of $5,000.00 to $10,000.00. T.ALK, 23:13-14.

## I. Facts in Support of Tenure Charges Twelve, Thirteen, Fourteen, Fifteen, Sixteen and Seventeen (Violation of Board Policies and Procedures)

### i. District Job Description

In a September 20, 2006 memorandum to Ms. Tobia from then-Assistant Superintendent W.T. Anderson, Mr. Anderson set forth the expectations of the Board of Education with respect to the job duties of the position of Supervisor of Pupil Personnel Services. Pursuant to the memorandum, the Supervisor of Pupil Personnel Services was expected to, among many other things, satisfy the following minimum requirements:

a) Coordinates, assigns, supervises and evaluates all Child Study Team Members;

b) Ensures that Child Study Team members (e.g., school social workers, psychologists and learning disabilities teacher consultants) are

informed of the requirements and regulations for disability identification.

c) Coordinates instructional services provided to identified students with disabilities with the Supervisors of Special Education and Relates Services;

d) Supervises the eligibility determination of all students referred for special education;

e) Supervises and coordinates IEP procedures to ensure that student evaluations are up-to-date, accurate and thorough, and that teachers have copies of their students' IEPs to facilitate appropriate services and instruction;

f) Works with building administrators, the supervisor of special education, the supervisor of related services and child study team members to ensure appropriate services for identified students;

g) Completes all required state and federal reports accurately and on-time;

h) Maintains compliance with federal and state special education regulations;

i) Works with CST members to help special education students and their parents cope with transitions from one school to another; and

j) Develops and maintains compliance programs to meet legal requirements concerning students' rights to privacy and due process of law in accordance to applicable laws and regulations.

Exhibit J-2, Tab 22.

Ms. Tobia's actions, as set forth above, including her failure to adhere to various laws and regulations, her failure to comply with directives issued by OSEP, her improper directives to CST members and her involvement in, and handling of, student eligibility for special education and Section 504 Plan

implementation, all fall far short of these requirements and did not satisfy the high expectations for a District' supervisor as set forth therein.

### ii. Board Policy #1510

Board Policy #1510, "Rights of Persons with Handicaps or Disabilities Policy on Non-Discrimination," provides, in pertinent part, that:

> The Board has an affirmative obligation to evaluate a pupil who is suspected of having a handicap/disability to determine the pupil's need for special education and related services.
> . . .
> Section 504 of the Rehabilitation Act requires the Board to address the needs of children who are considered handicapped/disabled under §504 and do not qualify for services under the Individuals with Disabilities Education Act. A pupil may be handicapped/disabled within the meaning of §504 and therefore entitled to regular or special education and related aids and services under the §504 regulation, even though the pupil may not be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act.
> . . .
>
> The Board shall not interfere, directly or indirectly, with any person's exercise or enjoyment of the rights protected by the §504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 19990, the Individuals with Disabilities Education Act or Title IX.
>
> Exhibit J-2, Tab 16.

At the hearing, State Monitor Azzara testified that Ms. Tobia's actions when directing staff not to implement Section 504 Plans for students who required them, predetermining eligibility for certain students and directing staff to

find students not eligible for special education, were in violation of Policy #1510. T.MA, 41:14-43:24. Specifically, Mr. Azzara noted that the policy at issue provided both that certain students may be eligible for Section 504 Plans even if not eligible for special education, and that the Board has an obligation to evaluate any student to determine whether special education services are necessary. Mr. Azzara then stated that by directing that certain students should not receive Section 504 Plans or should not be given special education subject to an IEP, Ms. Tobia violated the policy. T.MA, 43:19-44:17.

Moreover, as set forth at length supra, as well as by testimony provided by District administrators, case managers and the Board's own attorneys and the documents in evidence, Ms. Tobia, by her actions, violated Policy 1510.

**iii. Board Policy #2460**

Policy #2460, entitled "Special Education, sets forth the responsibilities of the District and its employees with regard to the identification, treatment and education of students eligible for special education. Pursuant to this Policy, the District must ensure that "all pupils with disabilities, who are in need of special education services, including pupils with disabilities attending nonpublic schools, regardless of the severity of their disabilities, are located, identified and evaluated according to N.J.A.C. 6A:14-3.3. Exhibit J-2, Tab 17. In addition, the policy requires that IEPs be "developed, reviewed and revised as appropriate" in accordance with State regulation, and that, to the extent possible, "pupils with

disabilities are educated in the least restrictive environment." Id.

By her actions, Ms. Tobia violated this policy. As set forth supra, at the hearing, the District's case managers, Ms. Kaznowksi, Ms. Nussbaum and Ms. Zentman, each testified that Ms. Tobia had directed them to find students eligible or ineligible for special education, notwithstanding the fact that Ms. Tobia was not a member of the CST or that evaluations of each student appeared to support the opposite outcomes.

Furthermore, Mr. Freund testified that the District is required to educate each student in the "least restrictive" environment possible, which would normally constitute placement in a general education classroom with supports and modifications. T.EF, 48:8-13. Ms. Tobia's actions in directing students be placed in yeshivas contrary to the recommendations of the CST, and her negotiation of parent agreements to accomplish this goal in an apparent attempt to circumvent the law, further demonstrates her disregard for this requirement. See, *generally*, Testimony of Rosemarie Frazer, Exhibit J-2 at Tab 6; CAP issued by OSEP, Exhibit J-2 at Tab 14; Hearing Testimony of Jennifer Kaznowski, Katherine A. Gilfillan, Esq., Adina Weisz and Eli Freund. Similarly, Ms. Tobia's directive to Ms. Zentman that student D.D. be found ineligible for special education services, prior to reviewing any of the student's evaluations, is contrary to law and regulation, and fails to ensure that the student be evaluated pursuant to State regulation, as required by Policy #2460.

Mr. Azzara also testified at the hearing that Ms. Tobia's actions contravened Policy #2460, particularly with respect to the fact that she predetermined that a student was not eligible for special education and directed that students should not receive Section 504 Plans when they may have been legally entitled to receive same. T.MA, 45:9-12. According to Mr. Azzara, Ms. Tobia's actions were "noncompliant" with this Policy. T.MA, 45:11-12.

**iv. Board Regulation #2460.1**

District Regulation #2460.1, entitled "Special Education – Location, Identification and Referral," provides, in pertinent part, that "the Director of Pupil Personnel Services will coordinate the child find activities to locate, identify and evaluate all children, ages three through twenty-one, who reside within the school district or attend nonpublic schools within the school district and who may be disabled." Exhibit J-2, Tab 19.

As set forth supra, Ms. Tobia was not a member of the CST. Nevertheless, she directed that certain students be found ineligible for special education services and that other students should attend specific yeshivas after reaching agreements with the students' parents. Rather than coordinate the location and identification of these children to determine whether the students are disabled or whether it is appropriate to educate them in out-of-district placements, Ms. Tobia unilaterally made these decisions without the necessary input from the CST or an in-depth review of the student's evaluations or individual needs, contrary to the requirements of Regulation #2460.1. See,

Exhibit J-2, Tabs 2, 4, 6, 11, 14 and 15. In fact, while providing sworn testimony in another matter, Ms. Tobia admitted to predetermining eligibility for at least one student, D.D. Exhibit J-2, Tab 5.

Mr. Azzara further testified that that it was his understanding that Regulation 2460.1 concerned the District's obligations to identify students with [special] needs and that the Regulation requires the District to "locate, identify and evaluate children. Not to predetermine that they're not eligible." T.MA, 45:21-46:8.

**v. Board Regulation #2460.8**

District Regulation 2460.8 entitled "Special Education – Free and Appropriate Public Education," mandates, in pertinent part, that "a free and appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one . . ." Exhibit J-2, Tab 20.

The Regulation further provides that referrals of preschool age children are processed in accordance with the requirements set forth in law, and that for special education pupils advancing from grade to grade, "the Director of Pupil Personnel Services . . . shall ensure pupils with disabilities who are advancing from grade to grade with the support of specially designed services continue to be eligible when as part of a reevaluation, the IEP Team determines the pupil continues to require specially designed services to progress in the general education curriculum and the use of functional assessment information supports

the IEP Teams determination." Id.

At the hearing, Mr. Azzara testified that Ms. Tobia's actions with regard to the SCC constituted a violation of this Regulation. According to Mr. Azzara, when he was first appointed by the Commissioner of Education to serve as the District Monitor in 2014, the SCC had been approved by the Department of Human Services as a child care provider. T.MA, 11:21-12:3. Because the school was not approved by the Department of Education, the District was permitted to place classified preschool students in the program only if the students attended inclusion classes with their nondisabled peer. A number of District preschool students had been placed at the SCC pursuant to their IEPs with this understanding. T.MA, 13:3-14. However, upon visiting the school, Mr. Azzara found that all of the classes were self-contained special education classes, rather than inclusion classes. T.MA, 13:12-14. Ms. Tobia informed Mr. Azzara that she was unaware of that fact. Id.

Mr. Azzara also testified that Ms. Tobia had negative feelings towards the SCC in general. For example, the SCC was also in the process of obtaining State approval as a private school for the disabled so that it could educate a greater number of students without the requirement that disabled students only be placed in inclusion classes. T.MA, 11:21-12:3. The SCC requested that the District complete a needs assessment form as part of the application process. T.MA, 12:2-15. When Mr. Azzara discussed the needs assessment with Ms. Tobia, she "became very irritated and started a rant about the school, and she

was not going to sign any needs assessment." T.MA, 17:5-14.

Mr. Azzara further testified that Ms. Tobia also demonstrated her dislike of the SCC by, among other things, underreporting the number of District students that attended the SCC, which negatively affected the school's application to the Department of Education, and scheduling meetings with representatives from the school but failing to attend those meetings. T.MA, 20:9-14, 21:21-22:20.

Mr. Azzara also testified that because District preschool students were placed in the SCC but being educated in self-contained classes, with Ms. Tobia's knowledge, such an action violated both the law and Board Regulation 2460.8. T.MA, 47:4-13. According to Mr. Azzara, had the SCC been approved as a private school for the disabled, or, had the students placed in the SCC been educated in inclusion classes, such placements would have been lawful. T.MA, 47:14-18.

**vi. <u>Board Policy #3282</u>**

Board Policy #3282, entitled "Inappropriate Staff Conduct" provides, in pertinent part, that:

> The Board of Education holds all school staff to the highest level of professional responsibility in their conduct with pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> . . .
>
> School staff's conduct in completing their professional

> responsibilities shall be appropriate at all times.
>
> . . .
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.
>
> Exhibit J-2, Tab 21.

According to Mr. Azzara, Ms. Tobia, by her actions, failed to exhibit the 'highest level of professional responsibility," as required by the Policy. T.MA, 48:9-12. Mr. Azzara stated that Ms. Tobia's demeanor and attempts to mislead him with regard to (i) whether she had visited the SCC; (ii) whether applications for Naples approvals for yeshivas were filed with the State prior to each student placement; (iii) her attempts to circumvent the Naples approval process for yeshivas, which, as sectarian schools, could not be approved by the State for any placement; (iv) her insubordination towards Mr. Azzara, and (v) her attesting to false information on an affidavit later submitted to the Court, among other things, were all evidence of her disregard for her professional responsibilities. T.MA, 48:14-55:9. Mr. Azzara also testified that staff members were fearful of retaliation from Ms. Tobia, further leading to the conclusion that Ms. Tobia's

actions were violative of Policy #3282. T.MA, 56:5-58:5.

## LEGAL ARGUMENT

### POINT I

### THE BOARD HAS PROVEN BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT RESPONDENT COMMITTED CONDUCT UNBECOMING A TEACHING STAFF MEMBER

In the State of New Jersey, a tenured certificated staff member shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." N.J.S.A. 18A:6-10. In tenure cases in which a teacher is alleged to have committed unbecoming conduct, the Board of Education has the burden of establishing the allegations supporting the charges by a preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super. 478 (App. Div. 1989); In Re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ., 1996). The term "preponderance of the evidence" means "the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47 (1975).

The classic definition of this standard holds that if the evidence in support of and against the charges is equally balanced on the scales of justice, where the Board of Education adds so much as the weight of a feather to its proofs, the

Board has carried its burden by a preponderance of the evidence. See, *e.g.*, Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270 (App. Div. 1998). Proof "need not have the attribute of certainty, but it must be well-founded in reason and logic." Id. at 279.

In the New Jersey Supreme Court case of Karins v. Atlantic City, 152 N.J. 532 (1998), the term "unbecoming conduct" is found to be a broadly defined, elastic term encompassing any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. Indeed, in Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957), the Court established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of one's office or position. Moreover, it has been held that a finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather, may be based primarily on an implicit standard of good behavior "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

According to the Commissioner of Education, teachers are professional employees "to whom the people have entrusted the care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Tenure Hearing of William Thomas, OAL Dkt. No.

EDU 2908-07 (October 11, 2007), *quoting* In re Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302.

The evidence at the hearing clearly established that Ms. Tobia is patently unfit to be a supervisor in a public school environment. The Board proffered eighteen (18) tenure charges against Ms. Tobia, including multiple subparts, alleging that she committed unbecoming conduct due to, among other things: (1) false swearing and/or lying under oath on an affidavit submitted to the Court; (2) directing that student D.D. be found ineligible for special education prior to the student's eligibility meeting taking place and despite the fact that Ms. Tobia lacked the authority to make such a determination; (3) directing that the District no longer place students on Section 504 Plans, regardless of their need for such a plan; (4) entering into parent agreements to place students in unapproved, unaccredited yeshivas in contravention to law and a State-issued corrective action plan; and (5) compromising the District's position during mediation sessions.

With these charges in mind, the Board introduced extensive evidence at the hearing which established beyond any doubt that Ms. Tobia committed unbecoming conduct. Importantly, she herself admitted to a great deal of the conduct as alleged during sworn testimony given before the Office of Administrative Law in unrelated special education matters, including that she signed an affidavit containing false information, which was then submitted to the court, and that she predetermined eligibility for a student. Moreover, the

evidence in the record clearly supports a finding of unbecoming conduct for those actions to which she did not admit.

Ms. Tobia's actions have breached the public trust and cast doubt on her ability to perform the functions of her position in light of the high standard of morality and self-restraint imposed on public school employees. In re Emmons, supra. Consequently, the Board has established by a preponderance of the evidence that Ms. Tobia engaged in conduct unbecoming a certificate holder warranting her dismissal.

With regard to Ms. Tobia's actions in signing, under oath, an affidavit containing false information, Administrative Law Judges and the Commissioner of Education have held that engaging in such dishonest actions constitutes unbecoming conduct. For example, in I/M/O Tenure Hearing of John Howard, OAL Dkt. No. EDU 7442-01; 2005 N.J. Agen. Lexis 46 (Cmm'r, 2005), the East Orange Board of Education filed a set of tenure charges against the District's superintendent, alleging that he had lied under oath during a deposition.

During the deposition, the superintendent stated that he had no knowledge about a particular Board employee, did not know where she lived, did not know how long she was employed in the District and had never dated her. However, in a separate certification, the superintendent admitted that he did have a personal relationship with the employee and that the information provided at his deposition was false.

Although the superintendent claimed that he simply corrected the record when he admitted to his personal relationship with the employee and asserted that no criminal charges for perjury were filed against him in an attempt to mitigate his actions, the ALJ found these defenses "irrelevant" and determined that he had committed unbecoming conduct. Initial Decision at 3. According to the ALJ, teaching staff members must be held to a high standard of "honesty, integrity and judgment," and that by lying during a deposition in a case involving his employment, the superintendent "violated fundamental principles underlying out system of justice in circumstances which . . . directly relate to his employment. There is no greater breach of the public trust."

The Commissioner of Education affirmed the ALJ's determination, noting that he "is not persuaded by respondent's contention that correcting his testimony mitigates his conduct. While recantation may be an affirmative defense to perjury, it does not excuse respondent's deceptive and dishonest conduct in a school setting." Cmm'r Decision at 6. According to the Commissioner, the "respondent not only violated the fundamental principles underlying our system of justice, but also violated the public trust placed in him as superintendent of schools. The Commissioner, therefore, finds respondent guilty of conduct unbecoming a teaching staff member." Id. The Commissioner further emphasized that because the respondent was a high-level administrator, the standard of behavior to which he is held is even more stringent than a teacher. Id.

Similarly, the Commissioner, ALJs, and the State Board of Examiners have also found that a staff member's dishonest actions, such as falsifying documents, constitute unbecoming conduct. See, e.g., I/M/O Teaching Certificate of Crawford, OAL Dkt. No. EDE 8665-98, 1999 N.J. Agen. Lexis 270 (1999) (teacher engaged in dishonesty and unbecoming conduct by submitting documents that he knew or should have known contained false information); I/M/O Certificates of Cantz (OAL Dkt. No. EDE 4520-12, 202 N.J. Agen. Lexis 584 (2012) (teacher's actions in submitting a falsified copy of her certificate constituted unbecoming conduct).

In this matter, Ms. Tobia submitted an affidavit to the Court containing information that she knew or should have known to be false. In the affidavit, which was submitted to the OAL on behalf of the Board in a special education matter concerning a dispute over a student's placement, Ms. Tobia certified that she had visited the Special Children's Center and was fully familiar with the school. See, Exhibit J-2, Tab 1, Exhibit C at ¶29. However, in paragraph 32 of that affidavit, Ms. Tobia stated that the "SCC has religious symbols and icons present in and around the building." Exhibit J-2, Tab 1. Despite Ms. Tobia's assertion in her affidavit, the SCC is not, and never has been, a religious institution.

The attorney who represented the Board in that case, Joanne L. Butler, Esq., testified at the hearing that she had no knowledge of the SCC when she prepared the affidavit for Ms. Tobia's signature, and that all information regarding

the SCC was provided by Ms. Tobia, including that the school was a religious institution. T.JLB, 37:4-9; Exhibit B-1.

Furthermore, Ms. Tobia revised the affidavit numerous times before declaring it to be final and submitting it to the Court, yet did not disturb the wording of paragraph 32 with regard to the SCC's religious nature. Exhibit J-2, Tab 1, ¶16 and Exhibits C; and D' T.JLB, 43:17-20. Ms. Tobia went so far as to inform Ms. Butler that the affidavit, including paragraph 32 in its entirety, was "accurate and signed." Id. When issuing her decision in the case, Judge Kerins noted that the Board "has raised an issue whether SCC is sectarian," in reference to Ms. Tobia's assertion. Id.

Two years later, in March of 2015, during sworn testimony before the Office of Administrative Law in another student education matter, Ms. Tobia admitted that the SCC was not a religious institution. Exhibit J-2, Tab 5 at 275. Ms. Tobia also admitted that she had "no idea" why there was a reference to religious icons and symbols in her prior affidavit. Id.

According to Ms. Tobia, she had "never seen any of those symbols on the walls in [the SCC]," despite having "been there several times." Id. Although she testified that that she was "well aware" of the contents of her affidavit when she signed it in July of 2013, T.HT, 79:11-12, she admitted during her testimony in the C.F. matter that the affidavit was "not accurate." Id. at 281.

Thus, Ms. Tobia's assertion in her affidavit that the SCC had religious

icons and symbols in the building was patently, and knowingly, false. In fact, Ms. Tobia was well aware of the SCC, having visited the school on multiple occasions in her capacity as Supervisor of Pupil Personnel Services, and candidly admitted at the hearing that "anyone in the district knows there was no religious connotation with SCC. There never has been". T. Helen Tobia ("HT"), 72:24-25, 76:13-16, 25-74:2.

Ms. Tobia's negative feelings towards the SCC further supports the allegation that she would lie on an affidavit regarding the school. Mr. Azzara testified that Ms. Tobia did not approve of the SCC and that she felt that if the school was approved by the State, it would bankrupt the District. T.MA, 14:9-22, 21:17-19. Mr. Azzara also testified that Ms. Tobia had "intense animosity" towards the SCC and refused to sign a needs assessment in support of the SCC's application to receive State approval. T.MA, 26:21-25. Thus, it stands to reason that she would certify that the school was religious, even if it were not, in an attempt to harm the school and block a family's attempt to enroll their child there.

As in Howard, supra, Ms. Tobia's actions clearly constitute unbecoming conduct and were directly related to her employment. In fact, because her actions had the potential to affect the education provided to a special needs student, including whether the student would remain at his placement in the SCC, Ms. Tobia's improper actions far exceed those of the superintendent in Howard.

Ms. Tobia's attempts to deflect blame and [imply] that Ms. Butler suggested she include information in her affidavit regarding the SCC's religious nature have no basis in fact and as set forth in Howard, have no bearing on the determination of whether her actions constitute unbecoming conduct. The fact that she was not criminally charged with perjury for swearing to false information also does not alter the fact that her actions mandate a finding of severe unbecoming conduct. Moreover, unlike in Howard, she did not even attempt to correct the record after receiving and reviewing Judge Kerin's decision. Exhibit J-2, Tab 5 at 275.

Notwithstanding, and in addition to, Ms. Tobia's admitted unbecoming conduct concerning the affidavit in the M.W. matter, her other actions, including her directive to find student D.D. ineligible for special education, her directive not to place students on Section 504 plans and her actions in entering into parent agreements to place students at unapproved, unaccredited yeshivas, among other things, also constitute unbecoming conduct.

As stated supra, unbecoming conduct is defined as any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. Karins, supra. Unbecoming conduct may be exhibited by a violation of a specific rule or regulation, or may be based primarily on an implicit standard of good behavior "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Emmons supra.

Ms. Tobia's actions not only violated numerous State laws, regulations and directives, but had the potential to, and did, negatively affect the District, its finances and, most importantly, the quality of the education provided to District students. There can be no greater example of activity which destroys the public respect for Ms. Tobia or casts doubt on her competence in the performance of her duties.

As stated herein and at the hearing, there are a number of statutes and regulations governing the determination of eligibility for special education students. For example, N.J.A.C. 6A:14-2.3(k) provides, in part, that a meeting to determine a student's eligibility and develop an IEP shall include the parent, a teacher, the student, one CST member, the case manager, and other appropriate individuals. The determination as to a student's eligibility shall be made only after this meeting takes place. N.J.A.C. 6A:14-2.3(i).

N.J.A.C. 6A:14-3.5(a) provides that "when an initial evaluation is completed for a student age three through 21, a meeting . . . shall be convened to determine whether the student is eligible for special education and related services." If the student is determined to be eligible, the student's educational program and placement must be set forth in his or her IEP. N.J.A.C. 6A:14-3.7. Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. 104, provides certain protections for disabled students who may or may not be eligible for special education, but who require accommodations in order to receive an education on the same level as their non-disabled peers.

The Naples Act, N.J.S.A. 18A:46-14, permits a child study team to place a classified student in a non-approved school if a suitable special education program cannot be provided elsewhere. Such a placement requires the consent of the Commissioner of Education. N.J.A.C. 6A:14-6.5. The Commissioner may only approve the placement when the District certifies, among other criteria, that: (1) the school is accredited; (2) the school is the most appropriate placement for the student; (3) it meets the requirements of the student's IEP; and (4) the school provides services which are nonsectarian. N.J.A.C. 6A:14-6.5(b). See also H.W. and J.W. o/b/o A.W. v. Greater Brunswick Charter School and Highland Park Bd. of Educ., OAL Docket No.: EDS 905-00 (August 28, 2001) ("Under the Naples Act . . . [t]he implementing regulations specify that the private school must meet certain conditions, including that the school must be fully accredited, that it must be nonsectarian, that its teaching staff must be appropriately certified, and that it must comply with State and federal antidiscrimination statutes.").

As set forth in detail above, Ms. Tobia's various actions and directives violated all of these laws and regulations and thus constitute unbecoming conduct. In fact, the requirement that a staff member's actions comport with law and regulation, particularly where the education of students is involved, is self-evident. Knowingly or purposely violating such laws, as Ms. Tobia did, clearly constitutes unbecoming conduct.

At no time was Ms. Tobia a member of the Child Study Team. Nevertheless, she frequently exceeded her authority and issued various directives regarding the placement and education of special education students. For example, in May of 2013, Ms. Tobia assigned Ms. Zentman as case manager for student D.D. and directed her to hold an eligibility meeting for the student. At the same time, Ms. Tobia unequivocally informed Ms. Zentman that "the student is not eligible." Exhibit J-2, Tab 12. When Ms. Zentman asked for clarification because she was concerned that the student may be eligible based on her initial review of the student's evaluations, Ms. Tobia again replied that "the student is not eligible and based on the assessments will not be eligible for special education." Exhibit J-2, Tab 13.

Based on Ms. Tobia's directive, the student was found ineligible for special education. T.CZ, 16:8-10. Six months later, after the student's family filed for due process and the matter proceeded to litigation the Court determined that the student should have been classified and provided with any and all necessary special education and related services. T.CZ, 25:1-11. Ms. Tobia's actions with regard to D.D. caused the District to incur significant legal fees in order to defend the due process petition, and resulted in the student not receiving services for which he should have been entitled under the law.

Similarly, in or about May of 2013, Ms. Tobia directed that no new Section 504 Plans would be written or provided to students. Rather, all students would be referred to the Child Study Team for evaluation for special education. When

Adina Weisz, Supervisor of Related Services, asked Ms. Tobia if her directive meant that students should not be provided an evaluation or therapy through a 504 Plan, Ms. Tobia responded in the affirmative. Exhibit J-2, Tab 9. Additionally, when Ms. Weisz asked whether a particular student's 504 Plan should be implemented because the plan had been signed by the parents, therefore legally requiring the District to adhere to it, Ms. Tobia advised Ms. Weisz to "throw it out." Id.

Ms. Tobia's actions resulted in students being denied services to which they were entitled, and in fact, based on Ms. Tobia's directive, the District did not implement or follow any Section 504 plans whatsoever during the 2013-2014 school year. T.AW, 18:10-18. This resulted in a significant rise in the number of referrals of students to the Child Study Team despite the fact that the students may have merely needed accommodations and not special education services. T.JK, 26:9-11; T.AW, 13:16-24, 28:25-29:4 Exhibit J-2, Tab 2 at ¶24. These actions are clearly contrary to the requirements of Section 504, 34 C.F.R. 104.

Ms. Tobia also entered into numerous agreements with parents and approved the placements of students at yeshivas without proper Commissioner of Education approval under the Naples Act. T.AW, 13:16-24, 28:25-29:4; T.GN, 20:10-14; T.JK, 11:15-17; Exhibit J-2, Tabs 2, 4, 10, and 11; Exhibit B-4. In fact, pursuant to the Act, approval was not possible for these students. Nevertheless Ms. Tobia disregarded the advice of the District's attorneys, Ms. Gilfillan and Ms. Kenny, and continued to effectuate these placements, going so far as to direct

her staff to "offer these parents whatever they wanted." T.EF, 26:13-19.

Per Ms. Tobia, if a parent sought to place their student in an unaccredited, unapproved school, the placement could be done through the student's IEP, despite the fact that such placements were illegal. T.EF, 26:20-27:8, Exhibit J-2, Tabs 2, 3 and 4 at ¶¶5 and 10; T.KAG, T.ALK. At one point, Ms. Tobia ceased to even complete the Naples paperwork since the approvals would not, and could not, be granted. T.MA, 49:7-12.

Ms. Tobia also failed to comply with OSEP's directive to reduce the number of students placed in out-of-District yeshivas. In or about March of 2014, OSEP placed the District on a Corrective Action Plan. Exhibit J-2 at Tab 14. In its initial report, OSEP found that that Ms. Tobia had "issued a directive to the IEP team that the team should write an IEP placing the student at [YTT]," an unapproved, unaccredited yeshiva. Exhibit J-2, Tab 14 at ¶7. In response, OSEP directed the District to hold IEP meetings for all students placed in unaccredited, unapproved private schools and offer them an approved placement. In complete disregard for OSEP's ruling, Ms. Tobia took no steps to transfer the affected students to new placements. T.KAG, 13:1-5; Exhibit J-2 at Tab 2, ¶6-7. Ms. Tobia further advised parents during mediation sessions on ways to maintain their students' current placements, notwithstanding the recommendations of the District's attorneys, CST or the requirements of the CAP, and also refused to sign a certification of facts to support the District's petition to block a request for independent evaluations filed by the parents of

students J.Q. See, *e.g.*, Exhibit J-2 at Tabs 2, 3, and 4.

All of Ms. Tobia's actions, as set forth above, had a negative effect on the District. Her misconduct required the District to expend significant legal fees in the defense of numerous due process petitions, as well as in preparing a response to the CAP issued by OSEP. Furthermore, Ms. Tobia's actions resulted in negative attention being placed on the District from the Department of Education and potentially jeopardized the District's receipt of State aid. T.KAG, 13:9-21; T.EF, 45:14-46:7; T.MA, 64:22-25; Exhibit J-2, Tab 5 at ¶12.

More importantly, Ms. Tobia's actions had the potential to negatively affect the education provided to District special needs students. As stated supra, numerous students were placed in unapproved, unaccredited yeshivas, which is prohibited by law. Moreover, students were denied educational services to which they may have been entitled, including services pursuant to Section 504 plans for extended periods of time. In addition, students did not receive all necessary services, as recommended by the CST, while due process petitions were ongoing, some of which, including the D.D. petition, were filed as a direct result of Ms. Tobia's actions.

Therefore, as set forth above and as proven by the testimony introduced at the hearing and in the documentary evidence submitted by the Board, Ms. Tobia's actions were in violation of law, regulation and State directive, and resulted in harm to the District and its students. Thus, her actions clearly

constitute unbecoming conduct.

In addition to the specific instances above, Ms. Tobia's actions, taken as a whole, also constitute insubordination. Generally, insubordination is an action or series of actions which demonstrate a willful refusal to comply with a supervisor's directive. In re Tenure Hearing of Ingram, OAL Dkt. No. EDU 9068-01, *aff'd* St. Bd. of Educ. (2002). Insubordination has also been found to include a failure to comply with District policies. In re Certificates of Resto, OAL Dkt. No. EDU 3869-04, *aff'd* St. Bd. of Educ. (2005) (Violation of policy constituted unbecoming conduct and reflected "a disregard for the appropriate role of a teacher, which in turn lowers students' respect for authority").

Insubordination, on its own, constitutes conduct unbecoming a teaching staff member. In re Tenure Hearing of Getty, 2009 N.J. Agen. Lexis 319, *aff'd*, Cmm'r, 2009 N.J. Agen. Lexis 731; In re Tenure Hearing of Duran, et al., OAL Dkt. NO. EDU 6754-06, Agency Dkt. No. 307-9/06 (2007) (Finding that insubordination may be, but need not be, an outright refusal to obey directives); In re Certificates of Turner, S.B.E. Dkt. No. 0405-257 (St. Bd. of Exam., 2005) (Failure to follow directives constitutes insubordination).

There is no doubt that Ms. Tobia was insubordinate by failing to comply with District policies regarding the identification of special education students, the provision of special education to eligible students, the implementation of Section 504 Plans and the maintenance of a healthy workplace environment. Exhibits J-

2, Tabs 16-22. She also failed to adhere to, and actively disregarded, the State's corrective action plan and directive that the District take steps to effectuate the removal of students from unapproved yeshivas. Ms. Tobia refused to comply with legal advice and various requirements set forth in New Jersey and Federal law concerning special education students, and consistently provided false or misleading information to direct requests from the State Monitor appointed by the Commissioner of Education to oversee the District. T.MA, 14:9-15, 53:17-24.

Taking the facts of this matter into account, there can be no dispute that Ms. Tobia committed numerous instances of conduct unbecoming a teaching staff member by engaging in all of the actions alleged by the Board in the tenure charges. Exhibit J-1. Each of Ms. Tobia's actions were documented and supported by the evidence in the record, fall far short of the high standard required of an individual serving in Ms. Tobia's position, and violate the implicit standard of good behavior for public school employees, "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super at 140. Any one of her actions in this regard, taken independently, would constitute unbecoming conduct. All of them, when considered together, mandate such a finding.

## POINT II

## THE TESTIMONY PRESENTED AT THE HEARING BY MS. TOBIA WAS CONTRADICTORY, SELF-SERVING AND NOT CREDIBLE

Ms. Tobia's testimony was not credible and should be given no weight.

The trier of fact is the individual best situated to judge whether a witness is credible. I/M/O Tenure Hearing of Dennis Cooke, 1991 S.L.D. 1381, *citing* In re Perrone, 5 N.J. 513, 522 (1950). A finding of credibility results from that which "common experience and observation of mankind can approve as probable in the circumstances" and which is derived from "that quality of testimony or evidence which makes it worthy of belief." Id. To be believed, testimony must itself be credible. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Perrone, supra. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In order to assess credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). In addition, the witness' interest in the outcome, motive or bias should be considered. State v. Spruill, 16 N.J. 73 (1954) (Court looked to the interest of a party in the outcome of a trial as a factor in evaluating the evidence).

With this in mind, a great deal of Ms. Tobia's testimony at the hearing was contradicted by her own statements, other testimony and documentary evidence. These contradictions cast doubt on the veracity of her denials and testimony relating to the conduct as alleged herein. During her testimony, Ms. Tobia

embellished certain points in an effort to appear blameless and attempted to shift the blame from her own wrongful actions to other individuals.

For example, Ms. Tobia testified unequivocally that she did not supervise the District's special education department in September of 2013. T.HT., 66:13-18. However, Ms. Tobia submitted a sworn affidavit in a Federal court matter, dated September 17, 2013, in which she stated that she "supervise[d] the District's special education department." Exhibit B-5. After being asked on cross-examination whether the affidavit was false, Ms. Tobia was evasive and would not admit that it was untrue, yet again declared that she "did not supervise the special education department in 2013." T.HT, 69:11-18. After again being asked regarding the veracity of the affidavit, Ms. Tobia simply replied "I don't know. I don't know how we got to that point there." T.HT, 70:15-20. She also blamed the Board's attorney, Katherine A. Gilfillan, Esq., who prepared the affidavit for Ms. Tobia's signature. T.HT, 71:1-6.

Regarding the affidavit she submitted in the M.W. matter concerning the SCC (Exhibit J-2, Tab 1), Ms. Tobia repeatedly answered in the affirmative when asked whether the affidavit was true and accurate. T.HT, 72:7-12, 74:7-9. In her answers to interrogatories, submitted under oath, Ms. Tobia also stated that the affidavit was true to the best of her knowledge and belief. Exhibit B-2, Answer to Question 6. She also testified that paragraph 32 of the affidavit, which stated that "the SCC has religious symbols and icons present in and around the building," was a true statement. T.HT, 72:20-25.

In response to the very next question, however, in which Ms. Tobia was asked for clarification concerning that statement and whether she stood by the contents of paragraph 32 of the affidavit, Ms. Tobia answered "No, I do not." T.HT, 73:13-16. Ms. Tobia further conceded that paragraph 32 of the affidavit, concerning religious symbols and icons in the building, is "not true because I don't know them to be religious symbols."

In addition, Ms. Tobia testified that she was aware of the affidavit prior to signing it, made revisions to the affidavit and knew that paragraph 32 was present in the affidavit prior to signing it. T.HT, 77:12-78:4. However, in the C.F. matter, Ms. Tobia testified that she was not aware that paragraph 32 was contained in the M.W. affidavit when she signed it, that she "must have missed it," and that the SCC does not have religious symbols and icons. Exhibit J-2, Tab 5 at 277; T.HT, 78:4-17.

Ms. Tobia also continually attempted to try and shift responsibility to Ms. Butler for including paragraph 32 in the M.W. affidavit. However, Ms. Butler testified unequivocally that at the time she prepared the affidavit for Ms. Tobia's signature, Ms. Tobia informed her that the SCC was a religious school. Exhibit B-1. Ms. Butler's handwritten notes from her conversation with Ms. Tobia further support her recollection. Id. Ms. Butler also testified that she had only been representing the Board at that time for a matter of days, and was completely unaware of what type of school the SCC was. Exhibit J-2, ¶7; Exhibit B-1; T.JLB, 33:18-19, 34:25-36:25.

Regarding student D.D., Ms. Tobia testified that she "absolutely" did not predetermine the student's eligibility for special education prior to his case manager scheduling his evaluation meeting. However, during her testimony in the D.D. due process matter, Ms. Tobia, under oath, admitted that D.D.'s eligibility conference report was dated prior to the date on which the eligibility meeting actually took place, and the student's ineligibility was pre-determined. Exhibit J-2, Tab 8 at 149. In fact, when asked by D.D.'s counsel whether "you pre-determined ineligibility, correct?" Ms. Tobia replied "yes." Id. at 248.

Furthermore, despite her prior testimony in the D.D. matter, Ms. Tobia, when presented with her May 29, 2013 email to Ms. Zentman, in which she informed Ms. Zentman that the student was not eligible, provided evasive answers and refused to acknowledge the contents of the email. T.HT, 91:15-17. Ms. Tobia also stated that she was trying to avoid litigation by including this information in her email to Ms. Zentman, but could not explain how finding a student ineligible, rather than eligible, for special education would lead to less, not more, litigation. T.HT, 95:13-16.

Ms. Tobia's actions in lying under oath clearly and completely demonstrate her lack of credibility. Howard, supra. However, Ms. Tobia also continually provided evasive answers when directly questioned regarding the remaining allegations in the tenure charges. For example, Ms. Tobia continually testified that she did not remember whether she directed staff not to provide students with Section 504 plans, even when presented with emails to that effect.

T.HT, 108:15-111:17. At one point, Ms. Tobia was provided with her email to Ms. Weisz, which stated that students should be referred to the CST rather than placed on a 504 Plan. Exhibit J-2, Tab 9. When asked on cross-examination what that sentence meant, Ms. Tobia stated that she was "not sure what this all says and means here." T.HT, 111:18-20.

Ms. Tobia also testified that she did not know who made the decision to place student R.M. at the Orchos Chaim yeshiva and that she was unaware of the identity of the case manager for the student. T.HT, 122:3-4. However, Ms. Tobia was present during the testimony of Jennifer Kaznowski, the student's case manager, at which time Ms. Kaznowski testified at length regarding R.M.'s placement. Moreover, it was Ms. Tobia herself who determined the placement for R.M. Exhibit J-2, Tab 10. Ms. Tobia also provided evasive answers with regard to Naples approvals and parent agreements to place students in yeshivas, informing Board counsel that his questions over those items were simply issues of "semantics." T.HT, 125:24.

Ms. Tobia's remaining testimony was entirely self-serving and dismissive of the tenure allegations. She did not address or refute the majority of the allegations on her direct testimony, including allegations that she was present during mediation sessions with rabbis or that she held private discussions with parents and rabbis to reach agreements regarding student placement, and no other witnesses testified or responded to the allegations on Ms. Tobia's behalf. Clearly, Ms. Tobia's testimony was offered for the sole reason of self-

preservation and embellished or tailored accordingly.

Furthermore, when questioned regarding her conduct, Ms. Tobia fashioned a number of possible theories and motives to explain her actions, going so far as to blame others for her actions. She also claimed, among other things, that she was merely following attorney advice, despite the voluminous evidence in the record showing that each attorney provided advice to Ms. Tobia regarding her responsibilities with regard to special education student placements and regulations, which she disregarded.

Ms. Tobia also claimed that the false statements in her affidavits were placed there by Ms. Butler and/or Ms. Gilfillan despite her having reviewed and revised each affidavit in depth, and that her directives to staff with regard to student placement and eligibility determinations were intentionally vague and misunderstood. Ms. Tobia never once took responsibility for her actions or expressed remorse. Such facts merely serve to further support the proposition that her testimony was not credible.

To the contrary, the Board's witnesses were credible in all respects. Each witness testified competently and directly regarding the facts comprising the actual tenure charges before the Arbitrator. All of the testimony, including that of Ms. Butler, Ms. Gilfillan, Ms. Kenny, Mr. Azzara, Mr. Freund, Ms. Nussbaum, Ms. Kaznowski, Ms. Zentman and Ms. Weisz, was supported by evidence introduced at the hearing. This evidence including, but was not limited to, emails authored

by Ms. Tobia which directly prove her alleged misconduct, transcripts of sworn testimony given by Ms. Tobia herself and other individuals which address, and confirm, the allegations at issue, and the OSEP CAP, which specifically identifies Ms. Tobia as having improperly directed that a student be placed in an unapproved, unaccredited yeshiva. See, Exhibit J-2. The testimony provided by each of the Board's witnesses complemented, and did not contradict, one another, and unlike Ms. Tobia, none of the Board's witnesses had ulterior motives to fabricate or embellish their testimony. In fact, taking into account the Board's evidence, it is more likely than not that Ms. Tobia engaged in the conduct alleged in the Tenure Charges.

## POINT III

## MS. TOBIA SHOULD BE DISMISSED FROM HER EMPLOYMENT

Ms. Tobia's inappropriate and improper conduct, as set forth in the tenure charges, each of which are independently substantiated, as set forth above, warrants a finding of unbecoming conduct and/or other just cause for dismissal. Moreover, tenure charge eighteen (18) alleges that Ms. Tobia has engaged in a course of behavior which constitutes a pattern of conduct unbecoming a teaching staff member. When the charges are viewed in their totality, a pattern of unbecoming conduct emerges sufficient to warrant Ms. Tobia's dismissal from her tenured position. See, Cowan v. Bernardsville Bd. of Educ., 224 N.J. Super. 737, 751 (App. Div. 1988).

The determination as to whether an employee has engaged in unbecoming conduct warranting dismissal from a tenured position requires consideration of the nature of the act(s), the totality of the circumstances and the impact on the teacher's career. I/M/O Tenure Hearing of Molokwu, OAL Dkt. No. EDU 9650-04 (Dec. 12, 2005), *citing* In re Fulcomer, 93 N.J. Super 404 (App. Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct." Id. However, if an incident is sufficiently flagrant, one incident will suffice to remove a teaching staff member from his or her position. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd* o/b/ 131 N.J.L. 326 (E&A, 1944). See also, I/M/O Tenure Hearing of Stephen Fox, OAL Dkt. No. EDU 7955-04 (Regardless of a teacher's long and distinguished career, one sufficient flagrant event could lead to a tenured teacher's dismissal for conduct unbecoming).

Here, Ms. Tobia's career has been anything but distinguished. Her conduct is of such a sufficiently flagrant level that her dismissal is warranted based on her actions as set forth in each individual tenure charge. In fact, her lying under oath in an affidavit submitted to the Court in a contested case involving the appropriate educational placement of a student is, by itself, sufficient to require her dismissal.

In Howard, supra, the ALJ held that the respondent committed unbecoming conduct by lying under oath. According to the ALJ, "there is no question that this conduct warrants the imposition of the most severe sanction

available." When issuing the decision, the ALJ paid particular attention to the fact the respondent's actions were directly related to his employment. The Commissioner of Education also noted that "[i]n assessing the penalty to be imposed, the Commissioner concurs with the reasoning of the ALJ that respondent's conduct warrants the imposition of the most severe sanction available." Teaching staff members have also had their certificates revoked for engaging in dishonest conduct similar to that exhibited by Ms. Tobia. See, *e.g.*, Crawford, supra; Cantz, supra.

Ms. Tobia's actions were clearly related to her employment, as she submitted a false affidavit to the Court in her capacity as Supervisor of Pupil Personnel Services. The affidavit was provided in support of the Board's opposition to an emergent relief application and petition for due process filed by a student's family. As stated supra, the fact that Ms. Tobia's statements, later proven to be false, were referenced by the ALJ in her decision and had the potential to affect a student's educational placement is only further indicative of the seriousness of this offense. Consequently, her actions clearly violate the fundamental principles of honesty and integrity and the public trust placed in public school employees. Emmons, supra; Howard, supra. Thus, Ms. Tobia's dismissal is warranted.

In addition, her other actions, including (1) directing that a student be found ineligible for special education; (2) directing that students no longer receive Section 504 plans; (3) reaching parent agreements to place students in yeshivas;

(4) disregarding the advice of the District's attorneys and the directives of the New Jersey Office of Special Education Programs; and (5) her general insubordination, among other things, have no place in a school environment. Her actions have had a negative effect on the District and the education provided to its students, and therefore warrant her dismissal from her position.

In fact, in I/M/O Margaret Sidberry, OAL Dkt. No. EDU 9572-97S, a school district filed tenure charges against a school psychologist, alleging that she failed or refused to complete timely reports for special education students as mandated by law. The respondent claimed that a number of mitigating factors were present, including that: (1) she had an excellent employment record; (2) her actions were not deliberate; and (3) staff cutbacks and increased duties led to her inability to complete the reports. Nevertheless, the ALJ ruled that the respondent be dismissed from her position. In doing so, the ALJ found that her actions "resulted in the delayed implementation of programs. Students have been denied access to appropriate educational programs and [the respondent has] contributed to placing the district in jeopardy of noncompliant status." Initial Decision at 24.

The Commissioner concurred with the ALJ's findings and ordered that the respondent be dismissed from her position, rejecting as "untenable" her claim that there was no deleterious effect to students or the District as a result of her actions. The Commissioner specifically found that "at a very minimum, the untimely preparation and submission of her reports delayed the initial or re-

evaluative placement of students in appropriate educational programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and state statutes and regulations governing the rights to classified students." Cmm'r Decision at 9. See also, I/M/O Certificates of Oberwanowicz, Dkt. NO. 0910-218 (2014) (in which a retired director of special education was ordered to surrender his license for a period of thirty (30) months for, among other things, allowing the district to place special education students in sectarian schools and underreporting the number of students placed by the District in a yeshiva on State reports).

In this case, Ms. Tobia behaved in a manner strikingly similar to that of Sidberry and Oberwanowicz. Her actions resulted in the delay of educational services to the very students who need them most – special education students, and in at least one case, a student who she had ordered be found ineligible for services, D.D., was later found to be eligible after a protracted and costly litigation. He received no services during the interim period between the finding of ineligibility and the ALJ's determination that he be entitled to special education services. T.CZ, 25:1-11. Moreover, she ordered that students no longer be placed on Section 504 plans, again denying services to eligible students and continued to allow and negotiate for the placement of students in yeshivas, despite the law's prohibitions against such placements. See, Exhibit J-2.

In addition, her actions not only cost the District thousands of dollars in legal fees, but placed its State funding at risk, particularly since Ms. Tobia

continued to allow students to remain in yeshivas despite a directive from OSEP that it reevaluate those students and place them in approved schools or programs. T.KAG, 13:9-21. Moreover, as set forth at length supra, Ms. Tobia's insistence on participating in and overseeing student placement and eligibility decisions, despite not being a member of the CST, was contrary to law and exposed the District and its students at risk. She also disregarded attorney advice and compromised the District's legal position during mediation sessions by informing the parents that the CST's proposed program for certain students was inappropriate and by reaching agreements with parents to maintain student placements in yeshivas.

All of Ms. Tobia's actions, like those of the respondents in Sidberry and Oberwanowicz, placed the district at risk of legal and administrative penalties. More importantly, her actions jeopardized the education provided to students with special needs. Accordingly, Ms. Tobia has failed to satisfy the standards of one whose profession is inextricably linked to the shaping and teaching of young minds, and who is held to a higher standard than that of the general public. Indeed, as an administrator, Ms. Tobia is held to a higher standard than even a classroom teacher. Howard, supra. Her actions in lying under oath are, alone, sufficient to pierce the inherent trust placed in her and negate her position as a role model in the school community. See, *e.g.*, Howard, supra; Crawford, supra.

The remainder of her unbecoming conduct, all of which is focused on or related to the District's provision of a free and appropriate education to special

needs students, further evidences Ms. Tobia's inability to remain a supervisor in the District. Moreover, her flippant disregard of the severity of the charges, her attempts to deflect blame from her actions and refusal to even address many of the charges does not engender confidence that such actions will not reoccur in the future if she is returned to the District. See, *e.g.*, Karins, supra; Laba, supra; Emmons, supra.

Accordingly, Ms. Tobia's demonstrated pattern of unbecoming conduct is certainly sufficient to warrant her dismissal. Her unbecoming conduct, when taken together as a whole, demands such a penalty.

## POINT IV

## THE BOARD OF EDUCATION IS NOT PRECLUDED FROM INTRODUCING EVIDENCE RELATED TO MS. TOBIA'S CONDUCT DURING MEDIATION SESSIONS

At the hearing, Ms. Tobia's counsel objected to the Board's introduction of evidence concerning Ms. Tobia's actions during mediation sessions. In fact, tenure charge seven and eight directly concern Ms. Tobia's improper behavior during mediation sessions for students M.W., S.S. and Y.S. These charges allege, among other things, that during mediation, Ms. Tobia reached independent agreements with the students' parents to place the students in yeshivas, that she disregarded attorney advice when doing so and that she compromised the District's litigation position by informing the parents that the CST's findings and recommendations for the students' programs, *i.e.*, the very

reason that the parties had gone to mediation, were inappropriate T.ALK, 8:14-17; Exhibit J-2, Tab 4 at ¶2-3.

However, while certain discussions during mediation are confidential in nature, the intent of this confidentiality is to ensure that discussions and settlement offers elicited during mediation are not referred to or relied upon during subsequent due process hearings between the parents and the District. N.J.A.C. 6A:14-2.6(a) provides that "mediation is a voluntary process that is available to resolve disputes arising under this chapter. Mediation shall be available for students age three through 21 years when there is a disagreement regarding identification, evaluation, classification, educational placement or the provision of a free, appropriate public education." [*Emphasis added].* Thus, per the regulation, mediation is utilized only for special education disputes pursuant to N.J.A.C. 6A:14, and only between a school district and a student's parents.

Furthermore, N.J.A.C. 6A:14-2.6(d)(6) provides that "discussions that occur during the mediation process shall be confidential and shall not be used as evidence in any subsequent due process hearings or civil proceedings." Even a cursory reading of this provision, when read together with section (a) of the same regulation, reveals that confidentiality during a mediation session relates only to discussions stemming from disputes arising between the District and the student's parent pursuant to special education law. In other words, mediation, and the rules governing same, does not apply to tenure matters such as the case at issue or to other types of contested cases before the Commissioner or an

Arbitrator.

There is no prohibition against a District from identifying wrongdoing committed by school staff during a mediation session and taking action to address same. Indeed, under Ms. Tobia's interpretation of this regulation, a school district would be prohibited from disciplining a staff member who had yelled at or struck a parent during a mediation session. Such an interpretation is simply absurd and certainly not the intent of the regulation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board has met its burden of proof on each of the tenure charges and that the evidence warrants Ms. Tobia's dismissal from the Lakewood School District.

Respondent Helen Tobia

The Lakewood School District appears to be rather unique to New Jersey. According to the State Monitor, Michael Azzara, there are approximately 6400 students in the Lakewood Public Schools and about 25,000 students attending sectarian schools primarily Orthodox. The majority of the members of the Lakewood Board of Education, which is responsible for the administration and operation of the Lakewood Public Schools, are Orthodox. Thus, the operation of the public schools is controlled by members of the Orthodox community.

Mr. Azzara testified that he was assigned to Lakewood by the New Jersey Department of Education to oversee the financial situation in the school district.

The two primary issues he is addressing are transportation for the nonpublic school students and out of district special education costs. The transportation issue was the cause of the school district's original budget deficit and Mr. Azzara recalled this being an issue in Lakewood when he was still "assistant commissioner back in 2000". Mr. Azzara's educational background is that he has a business administration degree from Rutgers and a M.A. in educational leadership from Kean. He has worked primarily at the NJ Department of Education. He admitted that he never taught in the public schools. He was an assistant superintendent in Paterson, a state operated school district. His duties in Paterson were that he was in charge of the business office, technology, transportation, food services and the operation and maintenance of the plant (facilities).

It was not his role to evaluate principals and assistant principals. He has no background in special education and in fact, the Department of Education appointed a special education monitor for Lakewood, Ms. Teri Sinatra. Ms. Sinatra is the expert in special education and was assigned by the Department of Education to oversee the operation of the special education matters in Lakewood. Ms. Sinatra did not testify in this matter, even though she is the special education monitor assigned to the school district and the issues herein concern special education.

In effect, Mr. Azzara was assigned to Lakewood to try to straighten out the budget deficit, primarily due to "courtesy bussing". "Courtesy bussing" is the

name given to the transportation of students who live less than the state mandated limits for a district to provide transportation for those students. The state limit for elementary school students is two miles and for high school students is 2 1/2 miles. Students living within these limits and are transported are said to be provided with "courtesy bussing". The Department of Education does not reimburse school districts for transportation costs for "courtesy bussing".

Other than Mr. Azzara, the other witnesses for the Board were the litany of attorneys from Schenck, Price, the law firm, including Mr. Zitomer which represents the Lakewood Board of Education, none of which supervised Ms. Tobia. Mr. Azzara testified that when he came to the Lakewood School District, he felt there was a "culture of fear", fear on behalf of those staff members who were Orthodox for reprisals in the Orthodox community, if they made a decision contra to a member of that community. This turns out to be important in that, through the testimony of these witnesses, it becomes apparent that when any controversial decision had to be made, they went to Ms. Tobia, who is not a member of the Orthodox community, to make the decision. In this way, it was easy to blame Ms. Tobia for the decision and no repercussions would come to them in the community. Apparently decisions were controversial enough concerning student placements in the yeshivas, that Robert Singer, the state senator representing Lakewood, and the former mayor of Lakewood, went to Mr. Azzara and told him to fire Ms. Tobia. Thus, even the politicians are involved in

the operation of the Lakewood School District, when it comes to the Orthodox community. Why would it not be so, since this community represents a sizeable voting bloc.

The other underlying theme in this matter is the involvement of Michael Inzelbuch, Esq., an attorney noted for his work in special education. Mr. Inzelbuch was for many years the board counsel in Lakewood and concurrently served as the special education attorney/director/consultant. Prior to becoming board attorney, Mr. Inzelbuch had represented parents in special education matters against the Lakewood Board of Education. He was so successful that the Board appointed him as their general counsel and also the special education attorney/director/consultant. (No one in the district testified to his board actual approved title). During this period of time, when Mr. Inzelbuch headed special education, Ms. Tobia was hired as the Supervisor of Pupil Personnel Services and worked under the supervision of Mr. Inzelbuch. There were other supervisors in charge of special education.

After approximately 12 years, Mr. Inzelbuch was replaced by the Schwartz, Simon law firm as the attorneys in Lakewood. Mr. Zitomer was a member of the Schwartz, Simon law firm at the time. Upon his replacement as board attorney, Mr. Inzelbuch again began representing parents in Lakewood against the Board. Not coincidentally, in all of the cases involving an attorney referred to in this matter, Mr. Inzelbuch was the attorney for the parents.

Helen Tobia is a staff member in the Lakewood School District for over 21 years. She has been a teacher, supervisor, assistant principal and a supervisor again. During the 21 years, her employment service has always been satisfactory to commendable. Mr. Azzara testified that when compiling information for the charges that he signed, items in her personnel file were scarce. The events alleged in most of the charges occurred prior to Mr. Azzara coming to the district as state monitor. There were no disciplinary actions taken against Ms. Tobia, prior to the filing of these charges. There was no progressive discipline and no corrective action plan. Ms. Tobia's file is squeaky clean. The school district did not present one witness who evaluated Ms. Tobia in a negative manner. In fact, the school district did not produce a witness who evaluated Ms. Tobia at all.

For all the following reasons, respondent, Helen Tobia, respectfully requests that the Arbitrator dismiss all of the charges in this matter and reinstate Ms. Tobia, awarding her the 120 day lost in pay and benefits. In the alternative, Ms. Tobia respectfully says that the charges, if true, would not warrant her dismissal and requests that arbitrator award a penalty short of dismissal.

TENURE CHARGES

CHARGE ONE

MS. TOBIA DID NOT WILLFULLY OR DELIBERATELY LIE UNDER OATH

The underlying allegations in CHARGE ONE is that prior to July, 2013,

MW was a student, whose parents were represented by Michael Inzelbuch, Esq. in a special education matter. Robert Mucciolo, Esq. of the law firm of Schwartz, Simon was representing the school district from on or about January, 2013 to June, 2013. According to Ms. Tobia, Mr. Mucciolo had reached out to the Ocean County Supervisor of Special Education concerning whether a program at the Special Children's Center (SCC) would be appropriate for the proposed placement of M.W. Mr. Mucciolo did not receive a response. Mr. Mucciolo also drafted a status update for the Lakewood Board of Education.

While this matter was still ongoing, effective July 1, 2013, the Board appointed new counsel, Schenck, Price. Joanne Butler, Esq. was assigned by the new law firm to represent the Board in the M.W. matter. Over the July 4th, 2013 holiday, Mr. Inzelbuch filed a Motion for Emergent Relief. Ms. Butler, brand new to the case, drafted an affidavit for Ms. Tobia to sign. Ms. Tobia testified that when asked by Ms. Butler what Ms. Tobia may have observed in the SCC, Ms. Tobia responded she saw a "wooden reed-type looking object in the doorway". Neither Ms. Butler nor Ms. Tobia are Jewish. Eventually, Ms. Butler placed in the affidavit for Ms. Tobia to sign that the wooden reed-like object was a "religious" object. Although Ms. Tobia was apprehensive, Ms. Butler told her "to trust her and that she knew what she was doing". Ms. Butler is an experienced special education attorney. When Ms. Tobia signed the affidavit, it was true to the best of her knowledge and belief. (Testimony of Helen Tobia pp 19-27).

In a separate special education litigation, in March 2015 (almost 2 years later) and which by this time, Eli Freund is the Supervisor of the Child Study Team, Ms. Tobia is subpoenaed to testify by the parents' attorney, Michael Inzelbuch. This is one of those situations where Ms. Tobia is being set up to be the "bad guy". Ms. Tobia is being asked to testify in a matter that she was not involved. In her words, she was ambushed and had no preparation. Despite the efforts by Eric Harrison, Esq., the attorney representing the Board, (not with Schenk, Price) to quash the subpoena, Ms. Tobia testified.

Mr. Inzelbuch placed the affidavit from almost two years prior in the M.W. matter. (the only commonality is that Mr. Inzelbuch was the attorney for the parents in both matters). Under Mr. Inzelbuch's examination of Ms. Tobia, as a witness, Mr. Inzelbuch elicited that there was a discrepancy from the affidavit in M.W. and her testimony in D.D., the discrepancy being whether or not the SCC was a religious school. This hardly amounts to lying under oath. Rather, an experienced attorney, Mr. Inzelbuch, found an inconsistency in an affidavit from two years past and her testimony in another special education matter, D.D. which was not a case that she was familiar with. Ms. Tobia was blindsided at the hearing, but did not willfully lie or deliberately mislead.

The Board will point to In the Matter of the Tenure Hearing of Dr. John Howard, Jr., Dr. Howard was the superintendent of schools in East Orange. Dr. Howard admittedly lied under oath at a deposition concerning a romantic relationship he had with a subordinate. Shortly thereafter, he recanted and

admitted the relationship. The situation in the Howard matter and this matter are polar opposites. In a manner of speaking, Howard got caught with his pants down. Here Ms. Tobia had signed an affidavit drafted by an experienced special education attorney, Joanne Butler, who told her to trust her and that she knew what she was doing. Two years later, another experienced attorney, Michael Inzelbuch, crossed her up on the witness stand by asking her questions about that two year old affidavit in a totally different special education matter. Ms. Tobia may not have been a good witness, but she did not intentionally lie.

CHARGE TWO

With regards to the allegations in CHARGE TWO, Ms. Tobia denies any wrongdoing. Again this Charge revolves around the representation of the parents and child, D.D., by the former board attorney, Michael Inzelbuch. With regards to the D.D. matter, see Testimony of Helen Tobia, pp 31-35. Again this is another situation resulting from the changeover of attorneys in July 2013 from Schwartz, Simon to Schenk, Price. Prior to Schenck, Price becoming the attorneys, the former attorney, Marc Mucciolo, Esq. reached an agreement to have D.D. be assessed by the Monmouth-Ocean Education Services Commission. Eventually, there was an agreement on the placement, but not implementation. When Schenk, Price came in, apparently Mr. Inzelbuch made additional demands and the matter was litigated. At all times, the school district was represented by counsel. Furthermore, effective July 1, 2013, Mr. Freund was the Supervisor of the Child Study Teams. Again this is another situation

when someone else had the responsibility (Mr. Freund), but the matter is being put on Ms. Tobia. Also, this event occurred in July, 2013, why did the district wait until August, 2015 to bring this charge. Two years passed without any mention of this to Ms. Tobia. No letter of reprimand, corrective action plan or any other letter was presented to Ms. Tobia for a response.

## CHARGE THREE

## MS. TOBIA DENIES ANY WRONGDOING WITH REGARDS TO THIS CHARGE

Charge THREE is a vague charge intended to paint a broad brush on Ms. Tobia. Ms. Tobia denies any wrongdoing. In May or June, 2013, Schwartz, Simon was the Board's attorneys. The numerous record requests made concerning students all came from the same attorney, Michael Inzelbuch. As previously noted, Mr. Inzelbuch was the longtime Board attorney and special education director/consultant. After his separation from the Board, he again represented parents against the Board, as he did prior to being board attorney. As noted in documents (R-3 and R-4), all tuition contracts were reviewed by the board special education counsel, whether that was Schwartz, Simon or Schenck, Price and placement notification was sent to the Ocean County Office of Special Education. Tuition contracts, once reviewed by special education counsel, were sent to Business Office and Board of Education for approval. The Board of Education and the Business Office approved all tuition contracts. If there was a problem with the contracts in September, 2013 (two years prior to these Tenure

Charges), the attorneys could have advised the Board and the Business Office. The attorneys could have certainly advised the Board that if the student placements were inappropriate, the Board should not pay on the tuition contracts. The tuition contracts were, for the most part, to schools operated by the Orthodox community and the Board of Education majority was Orthodox and approved the contracts. The Board paid on the contracts.

## CHARGE FOUR

Charge FOUR references a complaint investigation by the NJDOE, Office of Special Programs (OSEP) in January, 2014. The complaint was filed with the NJDOE by Michael Inzelbuch. Subsequently, the NJDOE substantiated the complaint and issued a corrective action plan (CAP) to the school district to place students in approved placements. The CAP was just that a plan to correct past problems. Like most CAPs, the district was given a timeline to make corrections. As Ms. Tobia testified, the school district was given a year. Not coincidently, Ms. Sinatra, the special education monitor, was not called by the district to discuss what progress the district was making towards correcting the deficiencies. Rather, the Charges cite deficiencies that were noted by the CAP, but do not indicate how and when the deficiencies were corrected. (See Board document 15) Further this CAP was placed on the Lakewood School District, not Ms. Tobia. This Charge against Ms. Tobia was never proven and Ms. Tobia denies any deliberate refusal to perform her duties. She further denies any gross misconduct which would warrant her dismissal.

## CHARGES FIVE, SIX, SEVEN AND EIGHT

Essentially Charge FIVE concerns the placement of two brothers, Y.S. and S.S. The Charge is about a special education matter that was closed by the state in November, 2014. It erroneously indicates that Ms. Tobia continued tuition payments, when it was well established at the hearing that tuition contracts are reviewed by Special Education Counsel and approved by the Board and the Business Office. Quite clearly, Ms. Tobia does not pay the bills, which requires Board approval and payment from the Business Office. Charges SIX, SEVEN and EIGHT deal with the interaction between Ms. Tobia and Schenck, Price attorneys, Alison Kenny, Esq. and Kate Gilfillan, Esq. Again nothing in these Charges warrants dismissal of Ms. Tobia. With regards to the mediation process in which Ms. Tobia and Ms. Gilfillan were involved, it must be noted that pursuant to NJDOE special education regulations, the substance of mediation is confidential. While Ms. Gilfillan testified as to her recollection of the substance of the mediation, consistent with this requirement, Ms. Tobia did not divulge the substance of what occurred, but indicated that she disagreed with Ms. Gilfillan's characterization of the confidential discussions. (Testimony of Helen Tobia, Pp 33 to 40).

## CHARGE NINE

Charge NINE revolves around a series of emails concerning 504 Plans. This is another charge that involves other supervisors not wanting to make a

decision in an area of their responsibility. This charge alleges that Ms. Tobia directed staff to discontinue use of 504 Plans in the Spring, 2013. At this time, Mr. Freund was the District's 504 Coordinator and Adina Weisz was the Supervisor of Related Services. In Board document (9), there is an initial inquiry by e-mail concerning 504 Plans and a request for guidelines from Mr. Freund and annual reviews of 504 Plans. The process for 504 Plans is outlined by Ms. Tobia in a March 25, 2013 e-mail. In May, 2013, Ms. Weisz indicates to Mr. Freund that there was no doctor's note for a student whose 504 Plan was signed on 1/23/12 and to please advise. Instead of Weisz or Freund making a decision, they inquire to Ms. Tobia on how to proceed. From the dates in the e-mail, the plan is past the annual review date and there is no doctor's note supporting the 504 Plan, so Ms. Tobia responds to throw it out, meaning it's not valid. The proper procedure should be used as outlined in the March 25, 2013 e-mail. During these proceedings, the school district did not name one student who was improperly denied a 504 Plan and to this day, 504 Plans continue to be written in Lakewood. There simply is no wrongdoing on behalf of Ms. Tobia.

## CHARGE TEN

Charge TEN alleges, at various time during the 2013-2014 school year, that Ms. Tobia instructed various staff members to enter into individual agreements for student placement at non-approved yeshivas. First and foremost, during this school year, Mr. Freund was the Supervisor of the Child Study Teams, not Ms. Tobia. Another example of Ms. Tobia being blamed for

someone else's responsibility. However, more importantly, in the NJDOE letter to Laura Winters, Superintendent, dated April 28, 2014 concerning "Review of Corrective Action Plan..." (Board document - 15), the NJDOE found that with regard to item #1, the district was to revise its procedures for placing students in unapproved schools. The district submitted its procedures and they satisfied the OSEP directive. Ms. Tobia denies any wrongdoing and the NJDOE was satisfied with the procedures in place.

CHARGE ELEVEN

Charge ELEVEN deals with a request by Schenck, Price attorney, Alison Kenny, Esq. to have Ms. Tobia sign an affidavit in a case that she was not involved. In or about April and June, 2015, a request was made by, who else, Michael Inzelbuch, Esq., for independent student evaluations. Ms. Kenny was working with Mr. Freund, Supervisor of Child Study Teams on this matter. When the request from Mr. Inzelbuch was sent by fax to a no longer operating fax number, Ms. Kenney wanted Ms. Tobia to sign an affidavit to that effect.

Conveniently Mr. Freund was not available. Ms. Tobia would not sign an affidavit in a case that she was not familiar with. Having been "burnt" in an affidavit drafted by Joanne Butler, Esq, a Schenck, Price attorney, that Ms. Tobia signed 2 years before. ("Trust me, I know what I'm doing), Ms. Tobia would not sign. The affidavit could have been signed by the Supervisor of Technology, as to the inoperative number, but he refused as well. There was nothing preventing Ms. Kenny from submitting an affidavit based on what was told to her or

telecommunicating with Mr. Freund to sign. Simply put, the refusal by Ms. Tobia to sign an affidavit in a case that she was not involved does not amount to unbecoming conduct and does not warrant any discipline.

## CHARGE TWELVE

Charge TWELVE is a non-issue involving a memorandum from 2006 to Ms. Tobia from then Assistant Superintendent William Anderson. The memorandum was not disciplinary in any sense, but rather an outline of job duties. As Ms. Tobia testified her duties had changed over the past 10 years and part of that time, she was an assistant principal.

## CHARGES THIRTEEN THROUGH SEVENTEEN

Charges THIRTEEN THROUGH SEVENTEEN are a regurgitation of regulations and policies that are generic to all. Nowhere in the hearing did the Board produce a verbal or written reprimand citing Ms. Tobia's failure to comply with the policies and/or regulations. Furthermore, the failure to follow policy amounts to inefficiency. There are no negative evaluations or individual corrective action plan for Ms. Tobia to improve her performance and there certainly was no progressive discipline before these charges were filed.

## CHARGE EIGHTEEN

Charge EIGHTEEN is a catch-all. Ms. Tobia denies any wrongdoing, inefficiency or unbecoming conduct which individually or collectively would

warrant her dismissal.

## CONCLUSION

As set forth in the beginning, these charges revolve around the change of the school district's attorneys on or about July 1, 2013; Ms. Tobia's interaction with the "new" attorneys; litigation matters and special education demands by a former board attorney and special education consultant/director; and the "culture of fear" which the State Monitor, Michael Azzara, testified to existing in Lakewood Orthodox staff members, [who] were afraid of repercussion in the Orthodox community, if they made the "wrong" decision. Each of the Charges had been answered in the preceding text. None, whether individually or collectively, warrant Ms. Tobia's removal from her tenured position in Lakewood School District, where she has served honorably for 21 years. Included for the arbitrator's convenience is N.J.A.C 6A:3-5.1 et. seq., the Department of Education regulations concerning Tenure Charges. Of note, with regard to the charges of inefficiency, the regulations require that the evaluation process be followed. Here the process was not followed because the Board did not produce any evaluation instrument. Simply put there are no negative evaluations of Ms. Tobia's job performance and no progressive discipline of any kind.

Also included for convenience is the enabling legislation, referred to as the Teach NJ ACT N.J.S.A. 18A:6-117 et. seq. The Act addresses "corrective action plan", "evaluation" and "individual professional development plan", none of which has been followed in this matter. The only Charge which really refers to

unbecoming conduct is Charge 1, lying under oath. This Charge was addressed (see Response to Charge 1) and even in the Howard matter where Dr. Howard (the case relied upon by the Board) admittedly lied under oath, his penalty was 120 days suspension of pay. Again, in this matter Ms. Tobia did not lie under oath.

For all the foregoing, respondent, Helen Tobia, respectfully requests that the Arbitrator determine that she is not guilty of any wrongdoing, inefficiency or unbecoming conducts which individually or collectively warrant her removal from her tenured positions. Alternatively, if the arbitrator determines that some penalty is warranted, Ms. Tobia requests that the penalty be less than dismissal.

## VI. STATEMENT OF THE CASE

Notice is taken at the outset that the tenure laws of our State were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons. See generally, Viemeister v. Prospect Park Board of Education, 5 N.J. Super, 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See, In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or

reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." As the moving party in this disciplinary matter, the District encumbers the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the unbecoming conduct and other just cause tenure charges by a *preponderance* of the credible evidence. See, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Tenure Hearing of Ziznewski, A-0083-10T1, 2012 WL 1231874 (New Jersey Sup. Ct. App. Div. April 13, 2012) (unreported); see also, State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as the "[g]reater weight of the credible evidence in the case."); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954); see also, In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ. 1996).

Should that be accomplished, the burden of production will shift to Respondent to proffer and establish her affirmative or exculpatory defenses. In that event, the burden will finally return to the District to rebut this showing with substantial, credible evidence. Once a determination has been made of whether the tenure charges have been established, Petitioner is then tasked with the

additional burden of demonstrating that the dismissal of Ms. Tobia for the charged conduct is warranted. In deciding whether to remove Respondent from her tenured administrative position with the Lakewood Township School District, I am required to consider the totality of the circumstances, the nature of the act(s) and the impact on her career. See, In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

In Karins v. Atlantic City, 152 N.J. 532 (1998), the Supreme Court of New Jersey determined the phrase *unbecoming conduct* "is an elastic one that has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" citing, In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App. Div. 1990) (quoting, In re Zeber, 398 Pa. 35, 156 A. 2d. 821, 825 (1959); see also, Laba v. Board of Education, 23 N.J. 364, 129 A.2d 271 (1957); I/M/O The Tenure Hearing of Christopher Molokwu, OAL Docket No. EDU 9650-04 (Jones, ALJ)

Following a comprehensive analysis of all evidence of record, with full consideration given to the respective positions of the parties as well as the case citation, I find that the Petitioner made its prefatory showing which was not rebutted by Respondent, requiring that the instant tenure charges be **SUSTAINED**. The facts of the instant case are both disputed and undisputed, and with respect to the former, the District's version is credited over that of the Respondent. They are found to be the following:

1. Helen Tobia has been employed by the Lakewood Board of Education for the period of a little over 21 years. At all times that are relevant for the purposes of this proceeding, she held the position of a tenured supervisor of Social Studies, Fine Arts and Pupil Personnel Services since October 2012. Ms. Tobia was also previously the supervisor of the Child Study Teams from 2012 – 2013, an assistant principal from 2007 until 2012, and served as a teacher of special education within the District. T6:7-24; T7:1-25 (December 15, 2015).

2. In October of 2011, then-Lakewood Superintendent of Schools Silva had asked Ms. Tobia to assist her with the Child Study Team and other special education issues. These duties were performed along with the assistant principal responsibilities until the supervisor of Child Study Team job was assumed in 2012. During the initial period of time in 2011, Michael Inzelbuch was still Board counsel, later being replaced by the SCHWARTZ, SIMON, EDELSTEIN & CELSO firm in April 2012, with Marc Mucciolo, Esq. assigned to work with the District on special education matters.T8:13-21; T10:21-23; T11:2-5.

3. Regarding out-of-district contracts for special education students, the practice would be that the contracts would be prepared by the receiving school and come into the Pupil Personnel Office, which would review the student's name and placement. At that point, the contracts were sent to the Board counsel as well as the Business Office for review, eventually being placed on the Board agenda for approval. T9:15-25; T10:1-19; T13:2-4.

4. The procedure for the preliminary review of out of district contracts prior to Board adoption was modified somewhat following the replacement of the SCHWARTZ, SIMON firm by SCHENCK, PRICE, SMITH & KING firm which took over on or about July 1, 2013. After initially forwarding the contracts to Marc Zitomer, Esq. and on to Joseph Roselle, Esq., at some point Business Administrator D'Ambola advised Ms. Tobia that he would be reviewing them and would speak to SCHENCK PRICE as need be on the contracts. T13:9-22. See also, Respondent Exhibits 4A – 4F.

5. In or about July 2013, the parents of pre-school Lakewood student M.W. filed a Due Process & Emergent Relief Petition

against the District through their counsel, Michael I. Inzelbuch, Esq. This sought placement of the child at the Special Children's Center ("SCC"), which was not an approved/or accredited special education school, pursuant to M.W.'s April 3, 2013 IEP. T26:3-25; T27:14-24; T28:4-7 (November 23, 2015); August 6, 2015 AFFIDAVIT OF JOANNE L. BUTLER, ESQ, at Joint Exhibit 2, Tab 1.

6. Upon receiving the petition, on July 11, 2015, Schenck, Price Partner Joanne L. Butler, Esq. contacted Ms. Tobia by telephone. They then discussed the facts of the case for approximately thirty-five (35) minutes. During the conversation, Ms. Tobia told Ms. Butler that M.W.'s IEP called for placement at SCC but that Janina Zak-Krasucki, Supervisor of Child Study at the Ocean County Office of the New Jersey Department of Education had verbally advised her that students could not be placed at SCC because it was not approved or accredited and could not satisfy the Naples requirements. Ms. Tobia also indicated that there was a computer based curriculum; that there were very few, if any, certified teachers; and that there were religious symbols, icons, around the building as well as writing in Hebrew on the building. The issue of SCC being a religious school was significant, because even if a school is unapproved but accredited, a student may be placed there if the Naples criteria are satisfied. There is a prohibition against any placement in a religious school, however. T28:18-22; T34:21-25; T35:1-25; T36:1-20; Ibid; see also, NOTES at Petitioner Exhibit 1.

7. The District through Ms. Tobia had discussed with the parents the potential of placing M.W. at either the Lakewood Early Children's Center or the School for Children with Hidden Intelligence ("SCHI"), which were both approved special education schools. Upon being told that the District could no longer honor M.W.'s placement at the SCC and that he would have to be removed, the parents then filed for the emergent relief, seeking to trigger the *stay put* provisions that would not permit any change in the student's placement at that time. T29:22-25; T30:1-25; T31:1-8; Ibid.

8. Upon receiving the M.W. file, Ms. Butler knew nothing about the operation of the SCC or any other of the local schools, and had never personally visited the SCC. As the District was going to oppose the application for emergent relief by arguing that it was legally prevented from maintaining the SCC placement as stay put based upon the verbal directive from the DOE, Ms. Butler

spoke to Ms. Tobia about the need to have an affidavit discussing the facts of the case to present to the court. Included in the same as a defense, was the fact that SCC was a religious school.T32:11-25; T33:1-11; T37:10-21; Ibid.

9. Following the July 11, 2013 call to Ms. Tobia, Ms. Butler prepared an answer, a letter memorandum, and the affidavit on behalf of the Lakewood School District. After reviewing the affidavit, Ms. Tobia sent back handwritten changes in two sets of revisions by e-mail. No changes were made by Ms. Tobia to the references to religious symbols and icons present in and around the building that appear in ¶ 32 at the bottom of page 4 in either version or at page 5 of the July 12, 2013 final document that was executed by Ms. Tobia. T38:5-19; T40:25; T41:1-25; T42:1-25; T43:1-25; Joint Exhibit 2, Id., at Tab 1, Exhibits A, B, C.

10. On July 16, 2013, ALJ Kerins granted the motion for emergent relief on behalf of M.W. and ordered that he be enrolled at the Special Children's Center with all supports and services as specified in his April 3, 2013 IEP. At page 5 of the decision, the ALJ remarked that "[i]t should be noted that respondent has raised an issue whether SCC is sectarian. However, it provided no evidence in that regard and petitioners dispute any such assertion." Id. at Exhibit D; T44:16-22; T45:5-10. Ms. Butler later provided a copy of this decision to Ms. Tobia as well as District Superintendent Winters. At no point subsequent to this period of time, did Ms. Tobia indicate to Ms. Butler that this was not a true statement.T46:5-19.

11. Ms. Tobia later recanted her position that the SCC was a religious school during direct examination by Mr. Inzelbuch in an unrelated L.F. OAL matter, when on March 23, 2015 she denied that SCC was a sectarian placement or that she ever thought that it was, and had no idea why she had signed the affidavit. Joint Exhibit 2, Id., at Tab 5, T268; 271; 275.

12. According to State Monitor Michael Azzara, Ms. Tobia had negative feelings toward the SCC. These included that if it was approved by the State, it would bankrupt the District; her refusal to sign a Needs Assessment in support of the SCC's application to receive State approval. T21:17-19; T17:9-14.

13. Chana Zentman has served as a school social worker/case manager with the Lakewood School District for a period of eleven

(11) years. Her job responsibilities require her to evaluate, develop, plan and implement the IEPs of special needs children and to serve as a resource/liaison between the school and the parents. Ms. Zentman assisted teachers in implementing the IEPs, and made sure they were implemented. She additionally served as a member of the Child Study Team in connection with her school social worker responsibilities. T5:23-25; T6:1-25. [December 1, 2015].

14. In May of 2013, Ms. Tobia assigned Ms. Zentman to serve as the case manager for student D.D., and directed her to hold an eligibility meeting for the student. At that time, the CST was to review the results of D.D.'s evaluations and determine whether the child was eligible for special education and related services. While such a determination must be made collaboratively by the CST, on May 29, 2013 Ms. Tobia copied Ms. Zentman on an e-mail which stated that she was to schedule the eligibility meeting, and that "[t]he student is not eligible. The judge ordered/agreed to certain evaluations. Omy will scan you copies of the evaluations." Ms. Zentman became concerned, because the student had been determined not eligible for special education when she had not yet reviewed the results of his evaluations and did not know what this determination was based on. See, Joint Exhibit 2, Tab 12; T9:16-25; T10:4-10; T11:4-8; T13:24-25; T14.

15. Later in the afternoon of May 29, 2013, Ms. Zentman replied to Ms. Tobia's e-mail, stating "I have some concerns in regard to this. I am in the process of gathering some information and investigating myself. I would like to discuss this with you. Please let me know when you are available to discuss with me." Ms. Tobia responded to Ms. Zentman later that evening, explaining "I am not available to meet until next week. In the meantime, please schedule the meeting. I have the documentation which court orders us to proceed. We will meet to discuss. The student is not eligible and based on the assessments will not be eligible for special ed. and related services. We cannot wait until we meet to send out the meeting notice. Please send it out tomorrow and send me a copy. I must send a copy of the meeting notice to our attorney. Omy will schedule a meeting for next week after you have reviewed the documentation to address your concerns." Id. at Tab 13; T14:19-25; T15:1-15.

16. The eligibility meeting for D.D. was held on June 17, 2013, with the mother; LDTC; special education teacher; school psychologist; regular education teacher; case manager; and

translator signing the attendance sheet. After the meeting, and per the ELIGIBILITY CONFERENCE REPORT ("Report"), D.D. was found not to meet the criteria for special education and related services. The June 14, 2013 date in the lower right hand corner of each page indicates that the Report was generated prior to the actual eligibility meeting. See, Petitioner Exhibit 3; T19:14-25; T20:1-8; T21:1-7.

17. Prior to the eligibility meeting, Ms. Zentman continued to express concern to Ms. Tobia concerning D.D.'s eligibility for special education and related services. On June 6, 2013, Ms. Zentman e-mailed Ms. Tobia after receiving a doctor's report on the child. This stated: "[t]he doctor mentions in #5 that 'the student is appropriate to receive all supporting educational services possible for them to be academically successful. Possible classification under Other Health Impaired or Emotionally Disturbed would be appropriate for [D.D.].' In the summary of his psychological evaluation it states 'they may also want to consider an Other Health Impairment or 504 plan if medical documentation is supportive.' Helen, this seems to be a strong indication to classify which concerns me if we are going to be determining ineligible. Please advise how we should proceed and deal with this information. Thanks for your support." Ms. Zentman also spoke to the Union president, who advised her to follow Ms. Tobia's directive or risk a charge of insubordination. See, Petitioner Exhibit 6; T21:8-25; T22:1-23.

18. Later in the afternoon of June 6th, Ms. Tobia answered Ms. Zentman's e-mail: "Chana, are you implying that you think the student should be classified? RTI? SST? Was the I & RS process ever completed with this student? Has anyone ever raised a concern regarding this child's ability to learn? Please provide me with an extensive list of strategies and interventions, work samples and frequency and duration of each; date, an FBA and documentation to support that interventions were provided to this student. Ms. Zentman replied to Ms. Tobia on June 7th, saying, "Helen, No I was not implying this student should be classified. I just wanted to clarify this point since this is a legal case. I appreciate your guidance and support always." Ibid; T23:1-15.

19. Ms. Zentman also approached the then-supervisor of the Child Study Team Elchanan Freund regarding the situation. Mr. Freund never discussed the situation with Ms. Tobia, but was privy to a discussion Mr. Zentman had with her on speakerphone

at the conclusion of an I & RS meeting, when Ms. Tobia essentially told them both that the child was not eligible. At that time, Ms. Zentman had advised Ms. Tobia that there was something they could go on, but the latter was adamant that the child could not be found eligible. T20:20-25; T21:1-24; T22:1-25. [November 23, 2015].

20. Based upon the lack of eligibility finding, the parents of D.D. then filed for due process. Ms. Zentman testified in that matter, consistent with the testimony presented in the instant case on December 1, 2015. Ms. Tobia also presented testimony on behalf of the Board in the D.D. due process hearing. On cross-examination by Mr. Inzelbuch, Ms. Tobia: admitted the bottom of the ELIGIBILITY CONFERENCE REPORT indicates that it was written June 14, 2013, while the conference was held on June 17, 2013; agreed 100 % that "we do not write up Eligibility Conference Reports ahead of time, because the Child Study Team and the parent determine all of the things that will happen at the meeting and they are then put in; that is apparently what happened in the D.D. case as ineligibility was determined before the meeting; she had spoken to the case manager who did not agree with what Ms. Tobia had said, but that was her interpretation based on the documents; Joint Exhibit 2, Tab 8 at T147:23-25, T148:1-25, T149:1-4.

21. As a result of that litigation, it was determined in January 2014 that D.D. was eligible for special education and related services, classified as Multiply Disabled, and should receive an out-of-District placement. (CZ)T23:23-25; T24:22-25; T25:1-11.

22. Section 504 of the Rehabilitation Act of 1973 mandates that qualifying students with disabilities receive necessary accommodations and modifications to their educational program, to ensure that they have access to education at the same level as their non-disabled peers. These children receive a Section 504 Plan, detailing the confines for the implementation of the accommodations, which are usually related to physical disabilities. By contrast, students with cognitive disabilities are referred to the Child Study Team for possible classification and eligibility for special education and related services. (A.W.)T9:14-22; T10:6-12. [December 14, 2015].

23. Included in Ms. Tobia's job responsibilities as Supervisor of Pupil Personnel Services was oversight of the Section 504 and IEP process during the 2012 – 2013 School Year. In or about

April of 2013, Respondent issued a directive to all staff that the use of new Section 504 Plans in the District should be discontinued as too many students were being provided with them. T8:13-15; T9:2-4; (EF)T60:10-22; (JK)T24:4-7.

24. Supervisor of Related Services Adina Weisz is charged with implementing the occupational, physical and speech therapy programs contained with the Section 504 Plans. On May 17, 2013, Ms. Weisz sent an e-mail to 504 Coordinator Mr. Freund with a copy to Respondent seeking direction concerning occupational therapy services for a student under the 504 Plan. Joint Exhibit 2, Tab 9. Although Ms. Tobia had instructed that the 504 Plans should be discontinued, this 504 Plan had already been signed by the parties, thereby legally requiring the District to implement the same. T13:16-24; T28:25; T29:4.

25. Ms. Weisz e-mailed Mr. Freund again on May 24, 2013, and copied Ms. Tobia. Respondent replied to Ms. Weisz to "throw it out." Ms. Weisz did not discard the 504 Plan, however, based upon Ms. Tobia's e-mail, it was not implemented. In August of 2013, Ms. Weisz e-mailed Ms. Tobia stating "please advise if we will be servicing students for occupational therapy under a 504 Plan for the 2013 – 2014 School Year, as there were some concerns last year." See, Joint Exhibit 2, Tab 9. In an e-mail dated August 26, 2013, Respondent advised Ms. Weisz that rather than implement Section 504 Plans, the staff was to refer all children to the Child Study Team for a determination of whether they were eligible for special education. Ms. Tobia replied "yes," when asked by Ms. Weisz if she meant all new and existing 504 requests. Ibid. On November 20, 2013, a number of the District staff approached Ms. Gilfillan during a training session, and informed her of Respondent's directive not to utilize Section 504 Plans and asking whether the directive was legal. (KAG)T33:16-23; T36:1-4; Joint Exhibit 2, Tab 2 at ¶¶23-24.

26. The Lakewood School District had an affirmative obligation to provide students who do not qualify for special education and related services under IDEA with services, including evaluations, through a 504 Plan. T34:1-4. During the 2012 – 2013 School Year, approximately 36 students were serviced under a 504 Plan, and in the 2013 – 2014 School Year no students received this accommodation. (A.W.)T18:10-18; (JK)T38:18-34. Child Study team Member Jennifer Kaznowski testified that there was "absolutely an increase in CST referrals due to the elimination of Section 504 Plans in the District." T26:9-11.

27. Following the November 20th training session, Counsel Gilfillan met with Ms. Tobia, Mr. Freund and Superintendent Winters to inform them that the District was legally prevented from discontinuing 504 Plans. Joint Exhibit 2, Tab 2, ¶24. Respondent did not issue additional clarification to District staff or retract the prior directive afterwards. Ibid.

28. Commencing in the Spring of 2013, the Lakewood School District received a significant number of records requests concerning students who had been placed in private, unaccredited and/or religious schools, from Michael Inzelbuch, Esq. (EF)T24:1-25; T5. These sought the students' entire file, and often were a precursor to litigation. At this time, Ms. Tobia had the responsibility of overseeing District litigation matters related to special education students. T11-21; Joint Exhibit 2, Tab 4; AFFIDAVIT of Elchanan Freund, ¶¶5-7.

29. During the time that the records requests were received, Mr. Freund attended a meeting with Ms. Tobia and Ms. Winters, to discuss the requests and potential resulting litigation. T26:2-11. During the meeting, Ms. Tobia instructed Mr. Freund to hold IEP meetings for each student, and to "offer the parents whatever they wanted." T26:13-19. Respondent continued that if the parent sought a placement in an unaccredited, unapproved school, this could be done through the student's IEP. T26:20 – T27:8. Id. at ¶¶5 and 10.

30. Mr. Freund later met with each Child Study Team Member to inform them that per Ms. Tobia, they were to write IEPs for each student and place the child wherever the parents wanted to send the children. T28:20-25. During the summer and fall of 2013, Ms. Tobia also personally met with case managers and directed them to place students in Yeshivas through the use of IEPs. The New Jersey Administrative Code does not permit students to be placed in unaccredited, unapproved schools or religious yeshivas. T29:19-T31:9.

31. In or around September, 2013, Ms. Tobia asked Katherine A. Gilfillan, Esq. of Schenck, Price to review approximately seventy (70) tuition contracts for special education students who had been placed in out-of-District placements. T7:10-25; Exhibit J-2, Tab 2, AFFIDAVIT, ¶3. After reviewing the contracts, Ms. Gilliland was concerned that some of the contracts were being utilized to place children either in unaccredited, unapproved or religious placements. T8:10-17; Id. at ¶4. Therefore, in a

correspondence dated September 25, 2013, Ms. Gilfillan advised Ms. Tobia that the contracts governing the placement of students in yeshivas could not be approved, and that without State approval the Board would legally not be able to enter into those agreements. T9:20-23; Id. at Exhibit 1 attached to AFFIDAVIT.

32. In or about January 2014, a complaint was filed with the New Jersey Department of Education, Office of Special Education Programs ("OSEP") by Mr. Inzelbuch. This related to the District's placing of students in yeshivas, in particular the decision to place student Y.T. in Yeshiva Tiferes Torah ("YTT") for the 2013 – 2014 School Year. Id. at Tab 14.

33. Y.T. attended the approved and accredited SCHI during the 2012 – 2013 School Year. (GN)T8:22-T9:2. In or around January 2013, Case Manager Gila Nussbaum began reevaluating the student for the coming 2013 – 2014 School Year. The student's father advised Ms. Nusssbaum that he wanted Y.T. to attend YTT as a public school student through an IEP, and also told her he had spoken with Ms. Tobia and that they had already reached an agreement to place Y.T. in YTT as a public school student during the 2013 – 2014 School Year. T11:7-18; T8:14-17; T14:2-7. Ms. Nussbaum and the CST then arranged for Y.T. to attend YTT under an IEP, with Ms. Nussbaum sending a letter to the parents on April 8, 2013, confirming that Y.T. was to attend YTT full-time as a public school student, "per the Director of Pupil Personnel Services." Ms. Tobia e-mailed Ms. Nussbaum on April 6, 2013, verifying that Y.T. was to be a public school student while attending YTT, and that the District would enter into a parent agreement with the parents under which they would be reimbursed for costs related to the education. No Naples application was generated and State approval was not approved to place the student there. T20:10-14; T14:22; T15:4; T21:1-11; Petitioner Exhibit 4; Respondent Exhibit 1.

34. OSEP substantiated the Inzelbuch complaint in or around March 2014, and placed the Lakewood School District on a Corrective Action Plan ("CAP"), which required the District to submit a list of all students who were being educated in unapproved placements, with any supporting documentation demonstrating the approval of any of the placements by either an ALJ or the State. See, Joint Exhibit 2 at Tab 14. This found inter alia that Ms. Tobia had issued a directive to the IEP Team that it should write an IEP placing the student at YTT, which was an

unapproved, unaccredited yeshiva. Id. at ¶7. A further finding was made that the District had failed to follow procedures in placing the student in an unapproved placement. Id., at ¶¶8, 10; Tab 15.

35. Ms. Gilfillan addressed the initial CAP on behalf of the District, and asked that Ms. Tobia provide her with any approval forms for the placements. Some documentation was initially provided by Respondent, however, ultimately Ms. Tobia was unable to provide evidence supporting the out-of-District placements. T15:4-16; T16:5; Joint Exhibit 2, Id., at Tab 2, ¶¶10,11.

36. A supplemental CAP was issued by OSEP in August 2014, requiring the District to hold IEP meetings for those students who had been placed in yeshivas or other unapproved, unaccredited schools, and to rewrite the same to offer an approved placement for them. T16:25; T17:4; Id. at ¶12.

37. Once the IEP meetings were held, many if not all of the parents of the affected children filed for due process or requested mediation, seeking to maintain the students' placement in the yeshivas. Id., at ¶13. Due to these factors, a large number of work hours and administrative time was expended to respond to the CAP, as well as hold the IEP meetings. The District's State special education funding was also placed at risk. T13:9-21; (EF)T45:14-T46:7; Ibid.

38. In compliance with OSEP's directive to hold IEP meetings for students who had previously been placed into unapproved yeshivas, a meeting was convened on September 15, 2014 for student Y.S. At the conclusion of the meeting, the CST recommended that the student be removed from the yeshiva and placed in the District's Clifton Avenue Elementary School. Ms. Tobia along with Mr. Freund then met with the student's parents and their educational advocate, Rabbi Eisemann. (EF)T50:25; T51:3-21-25; T52:3-9.

39. During the meeting, Ms. Tobia advised Rabbi Eisemann and the family to file for mediation or due process, in order to permit the student to continue in his yeshiva placement under the IDEA's "stay put" provision. T53:24-54:5.

40. In October of 2014, the parents filed a request for mediation for Y.S. as well as a separate one for his brother S.S. The mediations were never held, however, and the DOE closed the

files for both students. Because of this fact, new proposed placements for these students returning them to the District should have gone into effect. (KAG)T17:5-9; T18:12-16; (EF)T55:3-21; T56:1-4. In an e-mail dated November 11, 2014, Ms. Gilfillan informed Ms. Tobia of the mediations being closed, that stay put no longer applied, and that the students should be transitioned into their new placements. See, Joint Exhibit 2, Tab 2, Exhibit 6. Respondent failed to implement the new placements for either student, and the District continued to pay the cost of the placement of Y.S. and S.S. in their yeshivas. This inaction was in violation of the OSEP CAP. (KAG)T20:1-2; 3-7; (E.F.)T56:15-19.

41. A similar IEP meeting was convened in October of 2014 with the parents of student M.W., who also had been attending a yeshiva. The Child Study Team concluded at the end of the meeting that the student could be placed at the District's Clifton Avenue School. Ms. Tobia and Mr. Freund later attended a meeting with the child's family and Rabbi Eisemann. At that time, Ms. Tobia advised the family advocate to file for mediation or due process, to maintain the student's placement in the yeshiva. Subsequent to the meeting, a request for mediation was filed, which legally required the District to continue to pay for the placement under stay put. (EF)T57:8-15; T58:2-11, 21; T59:9-14.

42. On December 29, 2014, Ms. Tobia attended mediation sessions for students M.W. and Y.S. along with Alison Kenny, Esq. of Schenck, Price, as representatives of the District. At the start of the mediation, Ms. Tobia informed the parents and the State mediator that the placements proposed by the CST for the students were "completely inappropriate," and agreed to continue the students in their sectarian placements. This action was contrary to the CAP, taken without input from the CST, and Respondent lacked the authority to make such an offer. (ALK)T8:14-17, 23 – T9:4; T9:11-18; AFFIDAVIT, at Joint Exhibit 2, Tab 4, at ¶2-3.

43. The mediator was unable to memorialize Respondent's agreements with the parents in writing, because they were continuations of an illegal placement. T11:9-22.

44. On January 2, 2015, Ms. Gilfillan e-mailed Ms. Tobia to advise her that the agreements concerning Y.S. and M.W. were improper, stating that "[t]hese agreements could be seen as having circumvented the State's directive that these students be

placed in approved and accredited placements." See, Joint Exhibit 2, Tab 2, Exhibit 7.

45. On or about March 9, 2015, Ms. Gilfillan and Ms. Tobia attended a mediation for student S.S. Respondent informed counsel that the program proposed for S.S. was wholly inappropriate for him. (KAG)T24:3-12. They then spoke with the case manager, Shana Shiffrin, who stated that the proposed placement was appropriate, and that the student had been accepted into the program. T25:6-17. Id., at ¶20. Rabbi Eisemann requested that the child be permitted to remain in the yeshiva, and Ms. Gilfillan responded that such a placement was improper and that the District could not legally continue the placement. T26:6-9, 16-17. The parents replied that Ms. Tobia had already agreed to continue the placement for Y.S., the brother of S.S., and were surprised and angry that the same agreement could not be reached for S.S. T27:4-12.

46. The mediator then suggested that he, Ms. Tobia and Ms. Gilfillan leave the room, so that the mother of S.S. could speak with the advocate. Respondent refused to do so, and when the mediator again requested that Ms. Gilfillan ask Ms. Tobia to leave the room and "get control of her client," Ms. Tobia shut the door in the attorney's face. Respondent then took part in a conversation with the parents and Rabbi Eisemann for roughly ten (10) minutes before permitting the mediator and Ms. Gilfillan to return to the room. Ms. Gilfillan recorded her concerns about Ms. Tobia's actions during the mediation session in a March 10, 2015 e-mail to State Monitor Michael Azarra, Id., at ¶ 21; Exhibit 9; T28:22-25; T29:8-13.

47. On June 1, 2015, Ms. Kenny e-mailed Ms. Tobia to inquire about the students' placement and advised her that IEPs must be developed to offer an approved, non-sectarian, accredited school, stating "the District cannot begin the 2015 – 2016 School Year with the students in the current sectarian placements." Ms. Tobia replied on June 2, 2015 that the students remained in their current, sectarian placements. The DOE later contacted Mr. Azzara to express disapproval that the Lakewood District was continuing to allow students to remain in yeshivas rather than placing them in approved placements as required by the CAP. (MA)T64:22-25; Id., at Exhibit 8.

48. In May of 2013, the CST held an eligibility meeting for R.M., determining that an out-of-District placement was no longer

required, and that an in-District resource program would be appropriate. The student, however needed a climate controlled environment, which Lakewood could not accommodate. School Social Worker Jennifer Kaznowski according made an inquiry as to whether other public school districts had this capability. The child's mother raised the issue of R.M. attending Orchos Chaim, an unapproved and unaccredited yeshiva and advised the school social worker that she would prefer he attend there rather than a public school. (JK)T 7:10-16; T8:19-21; T9:2-7; T10:8-15, 16-T11:3.

49. Based upon her understanding that Ms. Tobia had discussions with Rabbi Mandelbaum, the head Rabbi at the school, Ms. Kaznowski e-mailed Respondent concerning placing the student in the school, informing her that a Naples approval from DOE had not been received. Ms. Tobia responded that an acceptance letter from the school was required, but directed Ms. Kaznowski not to hold up the meeting, and submitted that if the Naples process was not completed by the school a parent agreement would be done providing reimbursement for tuition on a monthly basis. See, Joint Exhibit 2, Tab 10; T11:15-17.

50. In a June 6th follow-up e-mail, Ms. Kaznowski again sought direction from Ms. Tobia regarding student R.M., based upon the fact that he was leaving SCHI prior to the 2013 – 2014 School Year. Respondent replied that "[a]ll IEPs must state an approved placement as recommended by the IEP Team. For existing students who were already placed in other programs, the parents will most probably reject placement. At that point I will meet with the parents to reach an agreement." R.M.'s mother told Ms. Kaznowski that she met with Ms. Tobia on August 6, 2013 to do the parent agreement placing the child at Orchos Chaim. Id, at Tab 11; T20:14-15.

51. Alison Kenny, Esq. was assigned to represent the Lakewood Board of Education in a special education matter involving student J.Q. in April of 2015. After receiving documentation from the parents' attorney in May purporting to show that a request for pre-classification evaluations was sent to Ms. Tobia on April 15, 2015, Ms. Kenny called Respondent on June 1st. Ms. Tobia stated that she had been out of the office that date, but would check with her staff. When no response was received, a follow-up e-mail was sent on June 9th. It was later determined that the request had been sent to an unused facsimile machine and therefore was not received by the District. (ALK) T13:14-18;

T14:1-4; Joint Exhibit 2, Tab 3 at Exhibit 2.

52. The District decided to file for due process to challenge the request for evaluations, with the petition needing to be filed within fifteen (15) days of the date of receipt of the request. It was therefore absolutely essential for a certification to be provided by Ms. Tobia indicating that the parents' fax had not been received, and Ms. Kenny provided the same to her for review on June 16, 2015. Respondent replied to Ms. Kenny and said that she would not certify to the facts in the certification, as she was not familiar with the facts concerning the parents' initial request for evaluations. A revised certification was later forwarded to Ms. Tobia by Ms. Kenny, which was narrowly tailored to focus on whether the initial request for evaluation was received. Respondent did not return the revised certification, or respond to Ms. Kenny, resulting in the District's inability to file the petition seeking to deny the evaluations and accordingly became legally obligated to pay for the same. T16:3-23; T21:1-5, 8-17; T21:23 – T22:9; Board Exhibit 7; Joint Exhibit 2, Id. at Tab. 3.

53. By virtue of her job description, Ms. Tobia was aware of the duties and responsibilities of her position, and due to her education, training and experience, was or should have been aware of the operative State statutes and regulations, and Board policies which were violated by the established unbecoming conduct.

The District's *prima facie* showing of unbecoming conduct was easily accomplished based upon the voluminous evidence relied upon by the Petitioner in bringing the tenure charges, coupled with the credible testimony of its witnesses. Tenure Charge One pertains to the Due Process & Emergent Relief petition filed by the parents of M.W., which was designed to trigger the *stay put* provision of the IDEA, thereby permitting the child to remain in the SCC as the out-of-District placement. Ms. Butler provided credible testimony on the District's case-in-chief in this regard. Generally, this recalled that as Schenck, Price had just taken over as Board counsel, the M.W. file was the first one she received.

As such, she was unfamiliar with the SCC (as well as the other schools) and had never been there. She accordingly relied upon the information provided to her by Ms. Tobia, which included inter alia, that this was a religious school with icons and symbols, as well as Hebrew writing on the building. That information was significant, as one of the Naples criteria that prohibits DOE approval of a student placement in an otherwise accredited though unapproved school is that it cannot be a religious school.

This information was later incorporated into an affidavit executed by Ms. Tobia in opposition to M.W.'s application before ALJ Kerins. The ALJ in fact referenced the same in her DECISION, which granted the petition and ordered that M.W. remain at the SCC. However, as the Petitioner has emphasized, although she knew that this assertion was untrue Respondent took no steps to inform the District. Subsequent to this in another unrelated OAL proceeding involving student L.F. two years later, Ms. Tobia recanted her prior position in very damaging testimony that was elicited by Mr. Inzelbuch. In doing so, she: initially denied that SCC was sectarian or that she had ever believed it was; when confronted with her affidavit, agreed that she had read it before signing it; denied that it was her position at the time that SCC was sectarian; denied that she had ever seen any religious symbols or icons on the walls and was there several times; given these facts, was unable to explain why she had signed the affidavit; while denying the statement was false, agreed it was definitely a mistake; agreed that she had reviewed Judge Kerins decision, but did not ever tell her lawyers

there was a mistake in her affidavit. See, Joint Exhibit 2, Tab 5.

Given these facts, it is clear that Ms. Tobia submitted an affidavit that she knew or should have known contained false information. The Petitioner's argument is therefore credited that both ALJs and the Commissioner of Education have found that engaging in such a dishonest action constitutes unbecoming conduct. See generally, I/M/O Tenure Hearing of John Howard, OAL Docket No. EDU 7442-01; 2005 N.J. Agen. Lexis 46 (Cmm'r, 2005). In that case, there were two (2) consecutive sets of tenure charges filed by the Board. The Commissioner affirmed the initial ALJ decision sustaining the termination in Howard I. A second hearing then ensued in Howard II, related to the charge of conduct unbecoming charging Dr. Howard had lied under oath during a deposition conducted in anticipation of the Howard I litigation. In finding that the Board properly imposed a second 120 day period of suspension, ALJ Mancini La Fiandra opined:

> [a]s I noted in the Initial Decision in **Howard I**, the Commissioner has repeatedly and consistently affirmed the importance of holding teaching staff members to a high standard of honesty, integrity and judgment. The Board cites *In re* **Tenure Hearing** of Ortiz, 86 *S.L.D., aff'd,* Comm'r of Ed., 86 *S.L.D.* 1004, *aff'd*, St. Bd., 86 *S.L.D.* 1008, where the Commissioner of Education found that a **tenured** teacher's falsification of an employment application constituted unbecoming conduct as to warrant dismissal and in *In the Matter of Vitacco, 97 N.J.A.R. 2d (EDU) 449, aff'd*, Comm'r of Ed., 97 N.J.A.R. 2d (EDU) 454 where the Commissioner referred to the position of a school superintendent as a person in whom the public is required to place considerable reliance with respect to, among other things, his honesty and integrity. In lying during his deposition, Dr. **Howard** violated fundamental principles underlying our system of justice in circumstances which, as the Board points out, directly related to his employment. There is no greater breach

> of the public trust. I **FIND**, therefore, the conduct in which Respondent **Howard** engaged was deceptive and dishonest.
>
> There is no question that this conduct warrants the imposition of the most severe sanction available. Since dismissal cannot be ordered and, as the Board notes, the only penalty available is forfeiture of the 120 days' pay withheld at the time this suspension was imposed, I **CONCLUDE** that is the penalty to be imposed in this matter. Further, I **CONCLUDE** this matter should be referred to the State Board for consideration of revoking Respondent's certificates.
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> * * *

[*Emphasis supplied in original*]; see also, I/M/O The Teaching Certificate of Robert Crawford, OAL Docket No. EDE 8665-98 (Cambell, ALJ 1999); I/M/O The Certificates of Deborah Cantz, OAL Docket No. EDE 4520-12 (Miller, ALJ).

Tenure Charge Two alleges that in her capacity as supervisor of Pupil Personnel Services, Ms. Tobia indicated via e-mail to School Social Worker/Case Manager Chana Zentman that she should schedule an eligibility meeting for student D.D., while directing her that the child should nevertheless be found ineligible for special education and related services.

Ms. Zentman testified credibly to her significant concerns regarding this predetermination decision and multiple attempts to level the playing field by calling Ms. Tobia's attention to comments made in reports by D.D's evaluating doctors, which appeared to weigh in favor of classifying the student. These efforts are memorialized in e-mails as previously discussed, and Mr. Freund testified that he was present when Ms. Zentman called Ms. Tobia and the call was placed on speaker. Respondent then reiterated her prior instructions in no uncertain terms.

Following the perfunctory finding of ineligibility at the June 17, 2013 eligibility meeting with the parent and myriad team members, D.D.'s parents filed for due process. At that time, Ms. Zentman provided testimony consistent with that given before me at the December 1, 2015 hearing with regard to her concerns. For her part Ms. Tobia acknowledged on cross that the ELIGIBILITY CONFERENCE REPORT dated June 14, 2013 amounted to a predetermination of the eligibility status; explained that this is not done before hand, as the parent and the CST determine all the things that will happen at the meeting; and that the case manager had disagreed with her assessment, but allowed that was her assessment based on the documentation. Ultimately, D.D. was found eligible for special education and related services and Ms. Tobia's admissions were recorded in the transcript of the proceeding. See, Joint Exhibit 2, Tab 8.

These facts support the District's posture that Ms. Tobia's actions inter alia, violated numerous State laws, regulations and directives, and most importantly negatively affected the quality of the education provided to a Lakewood student. N.J.A.C. 6A:14-2.3(k) provides in relevant part, that a meeting to determine a student's eligibility and develop an IEP shall include the parent, a teacher, the student, one (1) CST member, the case manager, and other appropriate individuals. N.J.A.C. 6A:14-2.3(i) requires that the determination as to a student's eligibility shall be made only after the meeting takes place. See also, N.J.A.C. 6A:14-3,5 ("Eligibility shall be determined collaboratively by the participants described in N.J.A.C. 6A:14-2.3(k)1."). N.J.A.C. 6A:14-3.5(a) further states that

"[w]hen an initial evaluation is completed for a student age three through 21, a meeting ... shall be convened to determine whether the student is eligible for special education and related services. Thereafter, if the student is determined to be eligible, the student's educational program and placement are set forth in the IEP, per N.J.A.C. 6A:14-3.7.

Tenure Charge Nine also pertains to Respondent's failure to comply with a statutory mandate. Section 504 of the Rehabilitation Act of 1973 requires that eligible students with disabilities not necessarily eligible for special education and related services receive necessary accommodations or modifications to their educational programs, so that they receive the same level of education as their non-disabled peers. Notwithstanding this clear mandate, as testified to by Ms. Weisz, Mr. Freund, and Ms. Kaznowski, in or about April of 2013, Ms. Tobia issued a directive that no new 504 Plans would be written or provided to students.

Instead, all students would now be referred to the Child Study Team for a special education evaluation. I recognize that the Respondent has objected to the admission of the hearsay statement by Ms. Kaznowski that staff members were talking about Respondent's 504 Plan directive. However, as Petitioner has countered, and my bench ruling found, hearsay evidence is admissible in this forum, subject to the *residuum rule*. See e.g., I/M/O The Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988 at p. 8) citing, Weston v. State, 60 N.J. 36 (1972) (the ultimate finding of fact must be supported by a residuum of

competent evidence.).

When asked by Supervisor of Related Services Adina Weisz in an e-mail if this meant that students should not be provided an evaluation or therapy under a 504 Plan, Respondent confirmed that was the case. See, Joint Exhibit 2, Tab 9. Furthermore, when Ms. Weisz inquired on May 17, 2013 as to whether a particular student's 504 Plan should be implemented because it had been signed by the child's parents legally requiring the District to follow it, Ms. Tobia told Ms. Weisz to "throw it out."

The end result was that the District did not implement or adhere to any 504 Plans during the 2013 – 2014 School Year, resulting in a significant number of referrals to the Child Study Teams notwithstanding the fact that the children may have needed an accommodation rather than a classification. And following a number of staff approaching Ms. Gilfillan during a November 20, 2013 training session, inquiring as to the discontinuance of the 504 Plans, the attorney held a meeting with Mr. Freund, Ms. Tobia and Superintendent Winters. At that time, Ms. Gilfillan advised them that they could not legally discontinue 504 Plans. Despite this guidance, Ms. Tobia never rescinded her earlier directive or issued a clarification. These actions contravened the clear and unambiguous language of Section 504, 34 C.F.R. 104 and constitute unbecoming conduct under the operative case law.

Tenure Counts Three, Four and Ten generally chronicle Ms. Tobia's

further directives that classified students be placed at unapproved and sometimes unaccredited private schools, including yeshivas. The *Naples Act*, N.J.S.A. 18A:46-14 allows the CST to place a classified student in an unapproved out-of-District school if a suitable special education program cannot be provided elsewhere. Pursuant to N.J.A.C. 6A:14-6.5, the placement must be approved by the Commissioner of Education and only when inter alia, (1) the school is accredited; (2) the school is the most appropriate placement for the student; (3) the requirements of the student's IEP are met; (4) the school provides services which are nonsectarian. Id. at (b). See also, H.W. and J.W. o/b/o A.W. v. Greater Brunswick Charter School and Highland Park Bd. Of Education, OAL Docket No. EDS 905-00 (August 28, 2001).

The evidence of record as buttressed by the credible testimony of Ms. Nussbaum and Mr. Freund underpins the District's position that Ms. Tobia entered into numerous agreements with parents and approved the placement of students at yeshivas without proper *Naples* approval being received or even sought. As a practical matter, due to the sectarian nature of the yeshivas, they would be eliminated from consideration under any circumstances.

Nevertheless, Ms. Tobia repeatedly attempted to pull an "end-run" around the State special education regulations by writing the illegal placements into the IEPs, and entering into private contracts with the parents that provided for direct reimbursement. In response to numerous record requests from the District's nemesis Mr. Inzelbuch in the Spring of 2013, which would eventually trigger

litigation, Respondent went so far as to direct Mr. Freund to hold IEP meetings and "give the parents anything they wanted." This message was then passed along to the Child Study Team members.

Mr. Inzelbuch initiated a complaint with OSEP with regard to one of these placements, Y.T. Following an investigation, a CAP was issued and included within the FINDINGS OF FACT was that Respondent had issued a directive to the IEP Team that it should write an IEP placing the student at the unapproved, unaccredited yeshiva. Among the provisions of the CAP was that the District was to hold IEP meetings for all of the students in the unaccredited, unapproved private schools, with an approved placement offered. Ms. Tobia, however, did not adhere to this requirement and did not transfer any of the students to new placements, as Ms. Gilfillan remarked during her testimony. See, Joint Exhibit 2, Tab 14.

Were these transgressions not enough, the District has also established to my satisfaction that Respondent acted in a grossly insubordinate way, which also constitutes unbecoming conduct. See generally, I/M/O The Certificates of Jennifer Turner, DOE Docket No. 0405-257 (2005). A consistent theme throughout the charges is Ms. Tobia's concerted attempts to adopt positions in meetings with parents and others that were diametrically opposed to the best interests of the Lakewood School District and contrary to Board counsel's legitimate and legal positions that were being advanced. As detailed in Tenure Charges Five and Six, this took place with regard to students S.S., Y.S. and

M.W. More particularly, this was evident at the mediation sessions that provided the basis for Tenure Charges Seven and Eight, where Respondent's behavior may only be characterized as outrageous, when she refused to leave the room at the mediator's request and then slammed the door in Ms. Gilfillan's face. Tenure Charge Eleven also bears stark testimony to Ms. Tobia's obstinate nature, when she refused to even reply to Ms. Kenny and sign an affidavit that had been narrowly tailored to only confirm the fact that she had not received the parent's request for evaluations by fax. The cumulative result of Respondent's actions was that she incurred countless additional and needless financial expenses for the Lakewood Board of Education, and meaningfully compromised the educational entitlements of a fragile special education population that she was immutably obligated to assist. In doing so, she violated numerous State statutes and regulations, as well as the Board policies cited by the District and engaged in repetitive unbecoming conduct within the contemplation of Karins and its progeny. See also, I/M/O Margaret Sidbery, OAL Docket No. EDU 0952-97S (Harned, ALJ); I/M/O Certificates of Oberwanowicz, Docket No. 0910-218 (2014).

The District's *prima facie showing* having been accomplished, the burdens of production and persuasion shift to the Respondent. My attention is initially directed to the uniqueness of the Lakewood School District, coupled with the composition of its School Board. The record indicates that as Mr. Azarra testified and Respondent underlined, there are approximately 6,400 children enrolled in the Lakewood public schools, with roughly another 25,000 attending sectarian

schools, primarily Orthodox yeshivas. The Board of Education is primarily comprised of Orthodox Jews. On these bases, Respondent concludes that the operation of the public schools is controlled by members of the Orthodox community.

Respondent has seized upon the testimony of the state monitor that upon his arrival in Lakewood his impression was that a "culture of fear" existed among Orthodox staff members, who feared reprisal from the Orthodox community for any decisions viewed as contrary. Mr. Azarra's testimony that Senator Singer had advised him to fire Ms. Tobia, is also amplified. These contentions are all supported by the evidence. As the involvement of politics, sectarian and non-sectarian alike, is not unusual in school districts around our state, the operative question becomes whether this consideration was a motivating factor in whole or in part for the personnel decision made.

The totality of the evidence convinces me that it was not. Instead, Mr. Azarra's testimony was credible and at times incredibly candid. The testimony of the Schenck, Price attorneys was likewise straight forward, reliable and credible. The same may be said of the lay witnesses who testified for the District, some who courageously did so under subpoena. These findings require the conclusion that not an ounce of proof has been provided by Respondent in support of her further position that as a result of the pervasive culture, Orthodox staff members were reluctant to make hard decisions on issues related to the special education and related services of Lakewood children and went to Ms. Tobia instead

because she was not Orthodox. Nor do I believe that Mr. Azarra was assigned to Lakewood by the State Department of Education merely to address the courtesy busing issue, as he plainly testified that was one of the issues as well as out-of-District special education costs. The latter of course is partially related to the instant tenure charges.

Any suggestion that Ms. Tobia was somehow "set-up as the fall guy" by the inaction of her colleagues is not supported by the evidentiary record, as it is abundantly clear to me that Respondent was at all times, "driving the bus." Mr. Freund in fact, testified to the general reluctance of staff members to question the directives of Ms. Tobia. Respondent's testimony was inconsistent, self-serving and at times incredible. In Abbott Northwestern Hospital, 94 LA 621, 630-631 (Berquist, 1990), Arbitrator Berquist provides a useful balancing test for analyzing the credibility of witnesses, which includes consideration of the following:

1. interest or lack of interest in the outcome of the case;
2. their relationship to the parties;
3. ability and opportunity to know, remember, and relate the facts;
4. their manner and appearance;
5. their age and experience;
6. their frankness and sincerity or lack thereof;
7. the reasonableness or unreasonableness of their testimony in light of all the other evidence in the case;
8. any impeachment of their testimony;
9. any other factors that bear on believability and weight.

See also, I/M/O Tenure Hearing of William Thomas, School District of the City of Plainfield, Union County, OAL Docket No. EDU 01763-08 (Solomon, ALJ 2008 at p. 6 "[c]redibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it 'hangs together' with the other evidence." Citing, Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963)).

Many of the tenure charges at hand concern children from the Lakewood School District whose parents were represented by Michael Inzelbuch, Esq., who for many years was Lakewood Board counsel, while concurrently serving as its special education attorney/director/consultant. Respondent has noted that during this time period, Ms. Tobia was hired as supervisor of Pupil Personnel Services and worked under his supervision. And while his fingerprints are on many of the cases that form the basis for the subject charges, generally speaking his purported influence operates as a *red herring* from my perspective.

In defense of Charge One, related to the Due Process/Emergent Relief petition of M.W, Respondent attempts to be portrayed as being led down the garden path by the very experienced special education counsel Ms. Butler. The record discloses however, that this was the first case the attorney had handled after her firm took over as Board counsel, and was totally unaware of any of the facts attendant to the SCC. She therefore relied upon the information provided by Ms. Tobia.

Parenthetically, Ms. Butler's contemporaneous notes at Petitioner Exhibit 1 establish that Ms. Tobia broached the issue of there being religious icons and symbols in the building, as well as Hebrew writing on it. There is similarly no

support for the premise that this falsehood was placed into the affidavit by Ms. Butler and merely obligingly signed by Ms. Tobia. Instead, as shown by Exhibits A, B, C of Joint Exhibit 2, Tab 1, Respondent corresponded with Ms. Butler by e-mail and made a number of corrections to the affidavit that was ultimately submitted, with counsel incorporating the same each time.

These considerations undercut Respondent's testimony upon cross-examination at the December 15, 2015 hearing. This asserted that the affidavit provided in the M.W. case was true and accurate; that paragraph 32 related to religious symbols and icons was a true statement that she and Ms. Butler had devised for the affidavit; that she never asserted they were religious, but that was the statement that came out of Ms. Butler; and that anyone in the District who knows her knows that there is no religious connotation with SCC, and never has been. Significantly, Ms. Tobia allowed that Ms. Butler had not encouraged her to sign an affidavit that was not true.

As the District has underlined, noticeably absent was any modification to the religious icons/symbols language that appears in paragraph 32. Ibid. The testimony of Mr. Azzara also touched upon the animus that Ms. Tobia apparently had toward the Special Children's Center. This provides a motive for the false swearing and included: that Respondent did not approve of the SCC; felt that if the school was approved it would bankrupt the district; had intense animosity toward SCC and refused to sign a needs assessment in support of the SCC's application to receive State approval.

In defense of Charge Two, Respondent attempts to deflect blame onto succeeding Board counsel. The argument is advanced that prior to Schenck, Price coming on, Marc Mucciolo, Esq. of the predecessor Schwartz Simon firm reached an agreement to have D.D. be assessed by the Monmouth-Ocean Education Services Commission. And while there was eventually an agreement on the placement as well, this was never implemented as apparently Mr. Inzelbuch made additional demands upon Schenck Price, causing the matter to be litigated. This leads to the conclusion that this is another situation when someone else had the responsibility (Mr. Freund, who was the supervisor of Child Study Teams in July of 2013) but the matter is being put on Ms. Tobia. Finally, Respondent rhetorically asks why two years passed within incident before this issue was raised.

Preliminarily, the record does not disclose why the D.D. issue was never previously addressed with Ms. Tobia, or any action taken by the Board. Given that there were a number of Board counsel it may have fallen through the cracks, and while the one person who could shed some light on that topic, State Monitor Azzara, was asked a few questions on D.D. during cross, that issue was not broached. Under the circumstances, I therefore do not believe that this charge is so remote in time or stale that Ms. Tobia has been prejudiced by its inclusion.

Respondent addressed D.D. during her testimony, and recalled that in April 2013, Mr. Mucciolo of Schwartz Simon with the assistance of Nathanya Simon, Esq., reached an agreement with Mr. Inzelbuch. This provided that three (3)

independent evaluations would be conducted by the Monmouth Ocean Educational Services Commission and not the Lakewood Child Study Team. According to the testimony, these were performed and Ms. Zentman briefly touched upon these as well during her testimony. Who conducted the evaluations however is of no moment in these proceedings, and unless there was also an agreement as to placement (which there was not), the normal procedural safeguards control.

Respondent later categorically denied that she had made any independent predetermination of ineligibility for D.D., and that position is at odds with her sworn testimony contained in the transcript of the D.D. OAL hearing, which appears at Joint Exhibit 2, Tab 8. It is also at variance with the e-mail evidence in the record and the credible testimony of Ms. Zentman in this regard. There is likewise no evidence that this job was tasked to Mr. Freund, who apparently took over as the supervisor of the CST in July 2013. It is worth remembering, however, that the chain of events was set in motion by Ms. Tobia in her May 29, 2013 e-mail to Ms. Zentman and later, when a decision of ineligibility was made by Respondent when she was in charge.

I similarly do not believe that the proverbial 504 Plan buck was passed to Ms. Tobia to make a hard decision, as she implies in her affirmative defense to Charge Nine. Several District witnesses credibly testified that they themselves had been directed by Respondent to cease utilization of the same, and when a number of staff approached Ms. Gilfillan during a November 20, 2013 training

session to inquire as to the legality of Ms. Tobia's action, a meeting was held with Mr. Freund, Ms. Winters and Ms. Tobia.

At that time they were all unequivocally told that Lakewood could not legally discontinue the utilization of 504 Plans. Despite this fact, there were NO 504 Plans written during the 2013 – 2014 School Year, and Ms. Tobia never retracted or clarified her prior instruction. [*Emphasis supplied*]. I recognize that in the instance of the one student cited, there was a 504 Plan signed on January 23, 2012 with no doctor's note included. This may have rendered the plan invalid, requiring that it be updated or revisited during an annual review, as detailed in the "504 Process Memo" sent out by Ms. Tobia on March 25, 2013. See, Joint Exhibit 2, Tab 9. Clearly, however, "throw it out," would not appear to be a valid response under the circumstances.

Nor do I believe that the District was required to establish that "one" student was improperly denied a 504 Plan. Instead, there was unrebutted testimony from the District that there were no plans completed during 2013 – 2014. During her testimony, Ms. Tobia denied that she had told Ms. Weisz not to implement the 504 Plans, and contended that there were in fact 504 Plans written and implemented during the 2013 – 2014 School Year, with monthly reports provided to Superintendent Winters. These positions run counter to the record evidence and no documentation has been provided by Respondent in support of these claims. The testimony has accordingly been discounted.

Respondent's defense to Charges Three and Four may be combined for the purposes of this discussion. With respect to the former, Ms. Tobia insists that all contracts were reviewed by past Board counsel, and approved by the Orthodox majority Board of Education, with the schools paid. In support of this proposition, reliance is placed upon Respondent Exhibit 3 and 4, which are a series of memos. Respondent Exhibit 3(a) is a July 17, 2012 Memo from Ro Frazer to Nathanya Simon, Esq. and Marc Muccio, Esq. of the Schwartz Simon firm, then-Board counsel. This merely states "[p]lease confirm that you have received the packet of contract for nursing services, Commission of the Blind and several tuition contracts for students placed in non-public schools. Thank you." Mr. Mucciolo later responds "[y]es, we got it yesterday and are in the process of reviewing the contracts." Respondent Exhibit 3(b) is an undated Memo from Ms. Frazer to Mr. Mucciolo, which indicates: "I understand you will be here next Friday. Can you please bring the following contracts:

* * *

A.B. – Yeshiva Orchos Chaim;

* * *

S.G. – Bnos Yaakov Ruchama Wenger – Bais Rivka Rochel"

Respondent Exhibit 4(a) – (f) is a series of e-mails and memos related to counsel approval of certain out-of-District placement contracts. There is no dispute that all contracts had to be reviewed by counsel in conjunction with the Business Office prior to official Board action. The mere mention of Hebrew names in isolation, however, does not justify the actions of Respondent, and

short of identifying the documents this area was not explored on direct examination.

Rather, based upon Ms. Tobia's education, experience and training first as a special education teacher and later as director of the Child Study Team, she knew or should have known that the actions taken and directives given were in direct violation of the controlling State statutes and regulations governing special education. The District's witnesses who testified with no apparent bias toward Respondent, were acutely aware that such was the case. Therefore, absent evidence that prior or current Board counsel had actual or constructive notice of or directed the same, Ms. Tobia's actions constitute additional unbecoming conduct. Accordingly, viewed simply in burden of proof terms, this affirmative defense has not been established.

Charge Four is the allegation tied to the OSEP CAP. I credit Respondent's position that this was a CAP imposed upon the Lakewood School District and not Ms. Tobia personally, but do not share the view that the charge against Ms. Tobia was never proven. Moreover, Issue # 1 of the COMPLAINT INVESTIGATION REPORT posed the question "[w]hether the district board of education followed appropriate procedures to develop an IEP for a student with disabilities?"

FINDINGS OF FACT numbers 6, 7 & 8 then detail the circumstances of Y.T.'s transition from SCHI to YTT, including the fact that the Director of Special

Services met with the student's parents to discuss the parents' request to have their child attend YTT the following year. Number 7, in particular, states that "[f]ollowing the meeting, the Director of Special Services issued a directive to the IEP team that the team should write an IEP placing the student at YTT." This finding is on "all fours" with the testimony of Ms. Nussbaum on this topic, and further evidence of Respondent's unbecoming conduct.

Tenure charges Five through Eight pertain to the conduct of Ms. Tobia at a series of mediation sessions involving a variety of students. Admittedly, Respondent's position that the substance of mediations is confidential has surface appeal. That said, adoption of such a premise would require me to endorse an unduly myopic reading of N.J.A.C. 6A:14-2.6(d)(6) which provides that "[d]iscussions that occur during the mediation process shall be confidential and shall not be used as evidence in any subsequent due process hearings or civil proceedings."

Instead, this language is intended to encourage the free flow of information and respective positions during the mediation process that per N.J.A.C. 6A:14 may only takes place between a school district and the child's parents, in keeping with the prior offer of compromise rule. I do not read the same to prohibit a board from attempting to discipline a staff member, as here, for what it perceives to be *ultra vires* conduct. Accordingly, Ms. Tobia's actions are fair game.

In keeping with her prior position, Respondent attempts to parry Charge

Ten by resort to the "burned by the affidavit" defense. The record instead establishes that the certification drafted by Ms. Kenny simply reflected that the fax was not received by Mr. Tobia on April 15, 2015, without resort to any facts of the case. It is true that a number of other individuals could have been asked to complete the certification, but as the District's agent Ms. Kenny reasonably asked Ms. Tobia to do so. Respondent was therefore under an affirmative obligation to execute it or provide a legitimate explanation why she would not. She did neither.

Finally, in response to Charges Twelve through Seventeen, Respondent properly identifies that *inefficiency* charges have not been filed against Ms. Tobia and that she has had no negative evaluations or CAP. I do not subscribe to the proposition, however, that allegations related to violations of District policies are exclusively filed on inefficiency grounds.

Because the District has established the subject unbecoming conduct tenure charges by a preponderance of the credible evidence, the remaining issue becomes the appropriate penalty. The In re Fulcomer balancing test requires that I consider the totality of the circumstances, the nature of Ms. Tobia's acts, and the impact the discipline will have upon her career. 93 N.J. Super., supra at 421. Respondent has properly argued that she has an unblemished record with the Lakewood School District throughout her roughly 21 years of service.

Reduced to its lowest terms, the question becomes whether the spirit and the letter of N.J.S.A. 18A:6-10 may be harmonized by returning Ms. Tobia to her

position as supervisor of Social Studies, Fine Arts and Pupil Personnel Services with less than a termination. In my considered opinion, that question must be answered in the negative as the aggravating factors abundantly outweigh the mitigating. Charge One comes the closest to being a *cardinal* violation as the District posits, which standing alone warrants Ms. Tobia's removal. It is axiomatic that even in the absence of progressive discipline, as here, one serious flagrant event may warrant termination. See generally, Redcay v. State Bd. Of Educ., 130 N.J.L. 369, 370 (Bodine, 1943). Respondent has attempted to minimize the reach of Howard upon which the District relies, by arguing that Dr. Howard in fact received only a 120 day suspension for his perjury.

A careful reading of the ALJ's *dicta* in Howard II, as cited above, however, reveals that she would have upheld a termination if that was before her. Because she was limited to the issue of a 120 suspension, that was the extent of her ruling. Even assuming without deciding this charge would not have been sufficient standing alone, the record is replete with other acts of unbecoming conduct committed by Ms. Tobia which palpably and materially comprised the educational opportunities of the Lakewood special needs population.

Pursuant to Charge 2, ineligibility for special education and related services for student D.D. was predetermined prior to the June 17, 2013 conference with the parent and other team members with the report generated June 14th. And when the case manager repeatedly attempted to call Ms. Tobia's attention to the comments made by doctors in various evaluation reports that would suggest the

child may be classified, the supervisor shut her down on numerous occasions ultimately adopting a heavy-handed tone in her June 6th e-mail, while demanding that voluminous documentation be provided to support even the mere implication that there was eligibility for special education. Per Charge Nine, Ms. Tobia determined *willy nilly* that the Lakewood School District would no longer issue §504 Plans under the Rehabilitation Act of 1973. Illegal yeshiva placements were effectuated by merely writing them into IEPs. These actions evidence an outrageous disregard for the very statutes and regulations that Ms. Tobia was charged with ensuring compliance with under her job description, further ignored the Corrective Action Plan put in place by the DOE, and constituted a startling display of poor judgment.

I am fully cognizant of the crushing effect the loss of Respondent's Lakewood position will have upon her both personally and professionally. In balancing the equities, however, I remain unconvinced that returning her to the same position would modify her behavior as she took no responsibility whatsoever for her actions at hearing and showed no remorse. Doing so would therefore continue to place the special needs community in jeopardy. Based upon the foregoing findings, I therefore determine that the tenure charges are **SUSTAINED**, with Respondent removed from her supervisory position.

## VI. CONCLUSION

Petitioner Lakewood Township Board of Education has established the tenure charges of unbecoming conduct under N.J.S.A. 18A:6-10 by a preponderance of the credible evidence.

## AWARD

THE TENURE CHARGES BROUGHT BY THE LAKEWOOD TOWNSHIP SCHOOL DISTRICT ARE SUSTAINED, WITH RESPONDENT TERMINATED FROM HER TENURED POSITION AS SUPERVISOR OF SOCIAL STUDIES, FINE ARTS, AND PUPIL PERSONNEL SERVICES. IT IS SO ORDERED.

Dated: February 4, 2016
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 4TH DAY OF FEBRUARY, 2016, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

CRISTINA JIMENEZ
Notary Public of New Jersey
ID. No. 2416114
My Commission Expires 8/12/2017

63-16

**Pursuant to Referral By the Commissioner of Education**
**State of New Jersey**
**Before Timothy J. Brown, Esquire**

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**In the matter of:**

| | | |
|---|---|---|
| **The Tenure Hearing of Moriamo Okundaye** | : | |
| | : | **Agency Docket No. 335-10/15** |
| **State Operated School District of The City of Newark, Essex County** | : | |

## Decision

**Appearances:**

**On behalf of the State Operated School District of The City of Newark:**
Robert M. Tosti, Esquire
Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC
One Pluckemin Way
Crossroads Business Center
P.O. Box 754
Bedminster, NJ 07003

**On behalf of Moriamo Okundaye:**
Joseph Fusella, Esquire
55 Washington, Street
P.O. Box 1432
Bloomfield, NJ 07003

## Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Moriamo Okundaye, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) and a November 23, 2015 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2012, c. 26* as amended by P.L. 2015, c. 109.

The hearing in this matter was conducted on January 7, 2016 in Newark, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Moriamo Okundaye was present for the entire hearing and testified on her own behalf. At the close of the hearing on January 4, 2016, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on January 25, 2016 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

**Issues**

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

**The Tenure Charge**

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of The City of Newark Christopher Cerf October 27, 2015. The Notice of Tenure Charges provides in its entirety:

**NOTICE OF TENURE CHARGES**

> I, Larry Ramkissoon, being of full age and duly sworn according to law, depose and say:

1. I am employed by the State Operated School District of The City of Newark (the "District") as Principal of Newark Vocational High School – Westside Campus. As principal, I oversee the students, staff and curriculum at Newark Vocational High School, including but not limited to the supervision of staff performance and other employee-related matters.
2. I hereby file charges based upon unbecoming conduct pursuant to N.J.S.A. 18A:6-10 and N.J.A.C. 6A:3-5.1 against the Respondent, a tenured teacher employed by the District. The charges stated herein are based upon my personal knowledge, information and belief derived from personnel and other files and records maintained by the District, and information imparted to me by and from staff members.

CHARGE ONE – UNBECOMING CONDUCT

3. Moriamo Okundaye, (hereinafter "Okundaye"), a tenured teacher employed by the District, engaged in conduct unbecoming a teacher by using inappropriate and abusive language toward a student and a student's parent on January 15, 2015. Okundaye engaged in conduct unbecoming a teacher as follows:
   a. Okundaye, a special education math teacher used profanity toward a student about a student's parent during the course of the school day. (See incident report dated January 16, 2015 attached hereto as Exhibit A).
   b. The inappropriate and abusive language uttered by Okundaye is documented in a video taken by a student on his cell phone. (See video attached as Exhibit B).
   c. Okundaye refused to cooperate with the investigation of this matter and has made no effort to explain her behavior.
   d. Okundaye's unbecoming and inappropriate conduct threatened the health, safety and welfare of students at the Newark Vocational High School Westside Campus and caused disruption to the educational program and overall operation of the building and supervision of students.
   e. Okundaye's unbecoming and inappropriate conduct created a condition under which the proper operation of the school was adversely affected and therefor, consistent with law and District policy, Petitioner hereby files these charges against Okundaye.

## District Evidence

### Testimony of Larry Ramkissoon

Larry Ramkissoon is Principal of the Newark Vocational High School (West Side Campus) and held that position during the 2014 – 2015 school year. He testified that Respondent was a math teacher at the school and that the class involved in this matter was a special needs math class. He recalled that on January 15, 2015 while at a meeting with school administrators he was informed by school Vice Principal Ogele that the mother of student DB had shown him a video of Respondent using inappropriate language in the classroom. According to Ramkissoon he thereafter asked DB to show him the video – which the student did – and received permission from DB's mother to take possession of the phone so that a copy of the video and a transcript of the words spoken in the video could be made Ramkissoon explained that after viewing the video he "was appalled" and communicated to his supervisor and requested direction on how to proceed.

Because he was concerned about the video being viewed by the public, Ramkissoon further testified, he received assurance form DB that the student would not post the video on social media and received assurance from the student's mother that she would make sure the video was deleted. The principal testified that DB stated he had taken the video, and further testified that he did not know DB's qualifications relating to video recording, did not know if the video had recorded all of the incident, did not know if the video had been altered and did not know when the video had been taken.[1] He did not make any effort to identify the students speaking on the video, Ramkissoon testified.

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[1] According to Ramkissoon, DB was suspended for violating the school's rule against having cell phones in the building.

Nor did he attempt to interview students about the incident individually. However, he further testified, he did speak with the class as a group and at least one student (Murphy) approached him after the meeting and expressed the view that Ramkissoon was making too big a deal out of the matter and that such talk has always been done in the classroom.

After seeing the video on January 15, 2015 Ramkissoon reported the matter to the Institutional Abuse Investigation Unit at the Department of Children and Families (DCF)[2] and requested that Respondent meet with him about the matter. At the resulting meeting that same day Respondent was accompanied by her union representative. According to Ramkissoon, the union representative stated that she had advised Respondent not to say anything and Ramkissoon then said what the allegations were, that they would be investigated and that Respondent was to report to the Media Center rather than her classroom.

According to Ramkissoon the entire investigation into the matter consisted of his review of the video, the decline of Respondent to offer any information on the matter and the principal's meeting with Respondent's math class. Ramkissoon provided a report of the incident to District Administration on January 16, 2015. That report provides in relevant part:

> **Description of Incident:**
>
> At the end of the day, yesterday – 1/15/15, I was advised by Vice-Principal Henry Ogele, that Ms. [VB], parent of a 10th grade male student, [DB], reported that her son had shared with her a video of his teacher making inappropriate comments to students. At the time, Ms. [VB] gave her son permission to share a copy of the video that he had made on his phone with

[2] DCF declined to proceed on the basis of insufficient evidence. According to Ramkissoon the school was informed by DCF that it should contact the police and determine what, if anything, could be done by that authority. Ramkissoon testified that the school's Pubic Safety Officer thereafter reviewed the video and opined that there was not enough evidence to pursue a criminal charge.

Vice-Principal Ogele. In the video the teacher is sitting at her desk and the following conversation is overheard:

Student: *Don't call my mother again...*
Teacher: *Excuse me I just called dumb ass bitch*
Student: *you really ugly as shit*
Teacher: *basically your mother is a dumb ass bitch*
Student: *she no dumb ass bitch, you is a fat ass bitch*
Teacher: *tell that dumb ass bitch to come in here*
Student: *I'm gonna smack the shit out of you, you gonna be mad as hell*
Teacher: *you gonna smack the shit out of me...(the teacher got up out of her desk and approached the students...the video clip ended)*

**Administrative Action:**
I informed the Asst. Superintendent of the incident
I contacted Labor Relations and spoke with Janelle Francios
I advised the teacher in the presence of the NTU representative of the allegations and of the following actions that would be taken:

- The teacher was asked to remain in the media center while an investigation was conducted
- The teacher was asked to avoid all interaction with students until she has been officially notified
- A copy of this incident and the video will be shared with Labor Relations

Ramkissoon submitted the tenure charges. He explained that he has been a teacher for 29 years and that as a parent he was appalled that a teacher would use such language in an urban district and found it totally inappropriate for the classroom. Teachers should be role models, Ramkissoon testified.

## Respondent Evidence

### Testimony of Respondent

Respondent has taught Math in the Newark School District since 2001, initially as a long-term substitute and eventually as a full-time teacher since 2007. Prior to the incident at issue herein, Respondent received no discipline. She is certified in Math and Statistics and holds a temporary Special Needs certification.

Respondent testified that one of the students during the 2014-2015 school year (referred to herein as "TW") was a special needs student and in her words; "a troublesome child." She explained that TW's I-E-P stated that the student needed to be in a small class with one-on-one help. In contrast, she explained, her class began the year with over thirty students, a number eventually reduced to about 12 students and TW had no one-on-one help. She explained that TW was always late to class, would cause a disruption when eventually entering class, would grab and rip up her notes and would just get up in the middle of class and shut off Respondent's computer. Respondent recalled one incident when TW threw paper balls at Respondent while she had her backed turned as she was writing on a white-board, and two incidents when TW swiped at and hit Respondent with a yard-stick ruler. According to Respondent, she made three disciplinary referrals to the school's administration about TW's conduct, including two oral referrals and one written referral. She explained that the oral referrals occurred before the District instituted an October 2014 electronic discipline referral system.

In any event, Respondent testified, she received no long-term relief from her referrals. (She did on one occasion have the school's safety officer remove TW for the remainder of a class period but the student returned the next scheduled class session.) According to Respondent, she eventually had a conversation with the Vice Principal about TW and the Vice Principal responded to her complaints by saying the only thing Respondent could do was file a police report and have the student locked up. Respondent testified that she rejected the Vice Principal's advice as she is a mother of three and TW is a special needs student who needs a one-on-one environment and should not have to

suffer so. According to Respondent, she received no other advice from school administration.

After rejecting the have-him-locked-up advice from the administration, Respondent decided to try to take some action of her own. She explained that she had attended District workshops on "Restorative Practices" in 2012 and 2013 and used the materials she received in the workshops, and the demonstrations made during the workshops, to help her develop a plan.[3]

That plan, Respondent testified, involved a roll-playing exercise where TW could observe others behaving as he behaved and the impact of such conduct on them. On October 27, 2014 Respondent spoke to her class and explained her plan to the class when TW was not present. According to Respondent, student CC had agreed to help Respondent engage in a roll-play interaction designed to mimic TW's conduct and the other students agreed to play along with the act. Student DB was present and was the student who watched out for TW and announced he was approaching. When TW entered the classroom, KC and Respondent began their exchange, an exchange that Respondent estimated lasted about three minutes. Student (DB) video recorded a potion of the exchange on his cell phone.

According to Respondent, after the roll-play she spoke with TW and asked him how they could help him and discussed why the students acted that way he did. Thereafter, Respondent testified, TW changed his behavior and he was no longer an issue

[3] Respondent admitted that she did not know if the written Restorative Practices materials provided to teachers says a teacher may use abusive language in applying restorative practices, but stated that participants in a demonstration given during the workshop used abusive language.

in the classroom. Respondent admitted that she had not informed any administrator of her plan beforehand and that her restorative plan was not included in her lesson plans.

Respondent further testified the words she used in the roll-play were not said out of anger or hatred; that she was trying to make TW think the incident was real. She further testified that in the normal course students were not permitted to use "street language" in her classroom and that when students did so she would correct them.

As for her interaction with DB, Respondent explained, unlike TW, DB was not a special needs student. She testified that she met with DB's mother about report cards in December 2013 and that during that meeting Respondent explained that she had an issue with DB walking out of the classroom during class. According to Respondent, DB's mother responded by asking the teacher to call her the next time such happened. On January 12, 2015, DB walked out of class but had a permission slip. On January 14, 2015 the student walked out without permission and as suggested, Respondent testified, she telephoned DB's mother and made an appointment for January 15. Meanwhile, Respondent testified, DB came back to her classroom and learned of Respondent contacting his mother. According to Respondent, DB was angry and began texting his mother and told Respondent she was going to lose her job.

According to Respondent, the next day, January 15, 2015, DB's mother came directly to Respondent's classroom while class was going on. Respondent explained to the parent that she did not have another teacher to cover the class at that time and asked the parent to wait in the Vice Principal's office. When she thereafter went to the office to meet with CB's mother, Respondent testified, the parent was no longer there and the Vice

Principal informed Respondent that he had sent the parent home and that the parent would be coming back the next day.

Respondent further testified that when she arrived in her classroom the next morning, the morning of January 16, 2015, there was another teacher in her classroom and Respondent was instructed to go to the Media Center. Respondent reported to the Media Center as instructed and was eventually called to a meeting in the principal's office. Present, Respondent recalled, were five or six administrators and a representative of the teachers' union. According to Respondent the Principal then asked her; "what happened in you classroom yesterday?" Respondent testified that she responded by looking bewildered because nothing had happened in her classroom the day before. Respondent admitted she did not say anything based upon advice she received from her union rep.

According to Respondent, she reported to the Superintendent's office for the remainder of the school year.

**Testimony of Shaquan Murphy**

Murphy is 20 years old and a graduate of the West Side school. He was in Respondent's math class during the events at issue during the 2014-2015 school year. Murphy testified that TW was disruptive in class and would arrive for the 2:00 pm math class at 2:20 or 2:30 pm, late arrivals resulting from what Murphy believed were efforts by TW to hide from the school's discipline team. Murphy testified that TW would strike Respondent with a ruler and would do it often until Respondent said she would call security. He recalled that on one occasion TW struck Respondent with the yard stick and

Respondent grabbed the stick and immediate typed up an incident report and called security. Murphy testified that Respondent tried her best with TW and he recalled that on one occasion when Respondent gave the student a pass to take a walk, something Respondent did to allow TW to calm down, while TW was out of the classroom Respondent told the class that the next day they were going to do a play on TW. Respondent explained that she and a female student CC were going to do a play to show TW what he does to Respondent. At the hearing, Murphy viewed the video and testified that the video was of the October 2014 play between Respondent and CC. The students were all laughing on the video because, Murphy testified, "we all knew what was going on."

As for DB, Murphy testified, because he was always sneaking out of class without permission, Respondent had moved him to a desk right next to the teacher's. According to Murphy, he knew DB was recording the play because Murphy saw that he was doing so. Also, Murphy continued, DB knew it was roll-playing because he was in on it.

Murphy confirmed that he spoke to Principal Ramkissoon when the principal came down and spoke to the class. Finally, according to Murphy, the play-acting effort worked as TW's behavior improved after the event.

**Testimony of Alayah Valentine**

Alayah Valentine is also a recent graduate of the school and testified that she was in Respondent's math class when she was in 12th grade during the 2014-2015 school year. She recalled that the math class eventually had about 12 students and that Respondent and TW had an "iffy" relationship. Valentine testified that TW was always coming in

late, disrupting the lesson, going around class picking on everyone and going to Respondent and cursing her. Valentine recalled that when she arrived in class one day there was no objective on the board and Respondent told the students that that day they were going to have a lesson for TW. Valentine recalled that Respondent explained that maybe if TW realizes how he speaks to her he would realize his impact on her. Valentine confirmed that the video in evidence was of the lesson for TW. She testified that hers is the voice saying; "Oh shit!" on the video.

Valentine testified that TW really changed after the lesson; it really helped him and that TW's relationship with Respondent improved.

**The Video**

The video of the incident offered into evidence and relied upon by the District as the primary evidence to support its conclusions in this matter is about 25 to 30 seconds long. The video reflects that the dialog transcribed by the District is substantially accurate. However, the transcript does not reflect the general laughter of students and the teacher throughout the dialog. The video is taken from a low angle from five to ten feet away from Respondent and is primarily focused on Respondent sitting at her desk. The video ends with the dialog reflected in the transcript and Respondent standing.

**Position of the School District**

The District argued that the video is admissible and reliable evidence and asserts that the evidence supports its tenure charges. The District has relied upon the video throughout the course of this tenure case and at no time has Respondent herself denied that the video depicted what occurred in her classroom. The video establishes that

Respondent participated in and permitted conduct that Principal Ramkissoon reasonably concluded could not be tolerated; that he could not permit such poor teacher modeling in a school building under his control. The video shows that Grievant engaged in misconduct and, the District asserted, serious consequences are called for.

As for Respondent's claim that she was engaged in an exercise of Restoration Justice, such should be discredited, the District argued. In this regard, the District explained, in her initial sworn response to the tenure charges Respondent did not identify TW as the reason for the exercise but rather, identified an entirely different student; CC. Second, the District continued, the conduct shown in the video is inconsistent with the Restorative Practices technique taught by the District. In this regard, the Restorative Practices related manual provided Respondent by the District specifically provides that adults should respect children by "holding them to a higher standard of behavior" and by "giving them the support they need to become more responsible." Yet the evidence establishes that Respondent did not hold her students to a higher standard but rather allowed her students to use street language. Respondent's alleged lesson did not conform to the Restorative Practice methods she was taught, was not contained in her lesson plans and was not reviewed by a supervisor prior to Respondent engaging in the risky, double-messaged endeavor shown in the video.

Nor should the testimony of former students be considered persuasive, the District argued, as the two students offered little, and Respondent may not claim that she was not given the opportunity to present her story when the matter was under investigation as she was given the opportunity and refused to offer her statement.

Importantly, the District asserted, much of the explanation Respondent offered at the hearing to support her defense was focused upon her relationship with student DB, her claim that the video was taken in October 2014 and her further claim that DB showed the video in retaliation for Respondent's contacting DB's mother much later in January 2015. Yet, inexplicably, in her original sworn response to the charges Respondent said noting of DB and did not make a claim that the video was taken some months before.

Considering the serious and offensive nature of Grievant's conduct, the District exercised its managerial judgment and concluded that discharge was warranted. Having exercised reasonable managerial judgment, such judgment may not be second guessed by the arbitrator as there has been no showing that the decision by the District was arbitrary, capricious, discriminatory or otherwise violative of fundamental notions of fairness and/or due process. Under the circumstances, considering the nature of the misconduct of Respondent and the total lack of cooperation of Respondent during the investigation, the District has shown that a very severe penalty is warranted and the arbitrator should sustain the tenure charges.

**Position of Respondent**

Respondent maintained that the tenure charges should be dismissed. The video relied upon by the District should not be considered by the arbitrator. First, the Respondent argued, the video was taken by DB and in taking the video DB violated the rules of the school; the video is the product of nefarious conduct by DB. Second, the record establishes that the video was surely edited by DB or someone else as the testimonial evidence offered by Respondent and two former students – the only evidence of the actual lesson subject to cross examination offered at the hearing – establishes that

the lesson was approximately three minutes long, yet the video is only about 30 seconds in duration. Third, the Respondent continued, the motivation of DB in disclosing the video when he did so should be considered. In this regard, the record establishes that DB was angry at Respondent for calling the student's mother about the student's misbehavior in class and deftly deflected the negative consequences he was surely to receive onto Respondent. Thus, the "abridged" video has not appropriately been authenticated; the student who reportedly took the video was not presented to answer questions about how, where and when the video was taken or the context of the video or whether the video has been altered. Nor was the student presented for examination as to the student's motivation for taking the video. The video is not competent evidence and should not be considered by the Arbitrator.

The record also reflects that other than have an unidentified staff member transcribe the video; the District did virtually nothing to investigate this matter. Nor did the District present any competent evidence to support its tenure charges at the arbitration. Instead the District simply offered the video. In contrast, Respondent offered her own un-contradicted testimony about the timing of the video, the reason for the lesson partially captured by the video and the reasons for the timing of student DB disclosing the video. Importantly, two other witnesses who were present during the Restorative lesson corroborated Respondent's truthful testimony. Respondent's conduct did not amount to misconduct and does not support discipline.

Respondent has been a full-time teacher for the District since 2007 and has never been the subject of disciplinary action; she had been consistently rated Proficient and has received numerous positive comments in her annual evaluations and observations. Her

evaluations, disciplinary history and observations of her supervisors do not support a finding that Respondent inappropriately used the language that is attributable to her.

The District has failed to show that Respondent engaged in conduct unbecoming through admissible and competent evidence and the charges should be dismissed.

## Discussion

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has failed to establish the truth of its unbecoming conduct charge against Respondent, or that Respondent engaged in conduct that otherwise warrants her termination, suspension or reduction in salary.

### Admissibility and Relevance of the Video

The undersigned cannot determine whether the District had sufficient basis upon which to file its tenure charges without considering what the District relied upon in making those charges. Here, the District primarily relied upon its 25 to 30-second video of an exchange between Respondent and students in her class; the video was, plain and simply, the motivating reason for the tenure charges. As a result, the undersigned admitted the video into evidence because notwithstanding other potential objections to its source, authenticity and reliability, it is the primary evidence upon which the District based its decision to certify tenure charges against Respondent. However, having admitted the video into the record under such circumstances does not mean the video must be, as a matter of course, given any more weight than it otherwise should be given.

**Findings**

Having considered the record as a whole, I find that the District's evidence does not establish the truth of its tenure charges. In reaching such conclusion I rely upon the following considerations:

1. The video relied upon by the District is without any non-hearsay evidence of provenance and is only a partial recording of an event;
2. The District failed to establish when the video was taken;
3. Respondent offered un-rebutted testimony (evidence I credit) that the video was taken months before it was presented to school administration;
4. Respondent offered un-rebutted testimony (evidence I credit) that the behavior depicted in the video was play acting and designed with a legitimately purpose of correcting conduct of a disruptive student;[4]
5. Respondent offered un-rebutted testimony (evidence I credit) that the video was incomplete and showed only a portion of the restorative effort;

[4] As pointed out by the District, in her initial sworn written response to the tenure charges, Respondent stated that student C.C. was the focus of the lesson. Although Respondent's testimony at the hearing was that the lesson was motivated by a desire to change the behavior of TW, all witnesses to the exchanged identified CC as the student primarily engaged in the exchange with Respondent. Under such circumstances, notwithstanding that Respondent's sworn response and testimony are not identical, I find that such inconsistency is not sufficient basis upon which to discredit the testimony of Respondent and other witnesses that the recorded exchange was part of a pre-planned lesson to modify student behavior.

6. Although Respondent may not have received prior, specific permission to implement a restorative practices lesson in the circumstances, the District gave implicit encouragement of such efforts by Respondent by providing her two years of training on the process and by failing to otherwise assist Respondent in managing disruptive students;

7. Respondent offered un-contradicted testimony (testimony I credit) that examples of lessons presented during her restorative practices course included scenarios where language of a nature similar to that shown in the video was used;

8. It is true that the words used by the teacher and students in the video are inappropriate for the classroom under normal circumstances. However, based upon the video itself, it is manifest that: (a) the conversation being recorded was not a bona fide altercation between teacher and student; (b) the words used were not being spoken in anger or with bad intent and (c) some sort of play-acting was going on. All witnesses who were present during the incident confirmed such conclusions. As a result of these conclusions and my finding that the roll-play was a good faith effort by Respondent to apply restorative practices with a legitimate goal of improving student classroom behavior, I find the use of the words by Respondent under the circumstances did not constitute unbecoming conduct;

9. The District's witness testified, and the Tenure Charges confirm, that "a" motivation in recommending termination of Respondent was Respondent's failure to offer a statement during the investigation. Although in this regard it is true that Respondent did not offer a response when Principal Ramkissoon asked her what had happened in her classroom the day before because of advice received from her Union representative and because she did not know to what the principal was referring, the District offered no evidence to support a conclusion that an employee's failure to give a statement during an investigation is contrary to any District rule or norm or otherwise constitutes unbecoming conduct.

## Conclusions

The District has failed to establish the truth of its conduct unbecoming charge against Respondent or to otherwise support the termination, suspension or other disciplining of Respondent. Under such circumstances, the District's pursing tenure charges against Respondent is contrary to fundamental notions of fairness.

## Order

The subject tenure charges against Respondent Moriamo Okundaye are dismissed.

As remedy, the District is ORDERED to:

1. Promptly offer Respondent reinstatement to her former position.

2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her discharge from the date of her discharge to the date of her reinstatement by the District.

3. Expunge all record of her dismissal from the District's files.

Dated: February 9, 2016

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket case No. 335-10/15 relating to tenure charges against Moriamo Okundaye on Tuesday, February 9, 2016.

Timothy J Brown

64-16

*In the Matter of Tenure Hearing of*

**Davis Hannah,**
**State-Operated School District**
**of the City of Newark, Essex County**

Agency Docket No. 279-9/15

**Ruling on Respondent's Motion to Dismiss**

**Tia Schneider Denenberg**, *Arbitrator*

**APPEARANCES**

FOR THE PETITIONER:

Theresa L. Moore, *Attorney*
Riker, Danzig, Scherer, Hyland & Perretti, LLP

FOR THE RESPONDENT:

Genevieve Murphy-Bradacs, *Attorney*
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

**BACKGROUND**

This matter is before the arbitrator for a decision on the motion to dismiss filed by Davis Hannah (Respondent) on December 2, 2015, along with a letter memorandum in support of the motion. On December 18, 2015, the State-Operated School District of the City of Newark (District) filed a letter memorandum in opposition to the motion to dismiss. On January 4, 2016, the Respondent filed a reply brief. On January 8, 2016, the District submitted a recent arbitration decision in support of its opposition to the motion to dismiss.

## I. Statement of Facts

The Respondent is a tenured art teacher who has been employed by the District since the 1998-1999 school year. He holds a New Jersey instructional certification with an endorsement to teach art. For the 2013-2014 and 2014-2015 school years, Mr. Hannah taught art at the elementary grade level at BRICK Peshine Academy.

The Respondent was rated "Partially Effective" in his 2013-2014 annual summative evaluation (Statement of Evidence, Exhibit 6). During the 2013-2014 school year, he received two unannounced, formal classroom observations—one of 25 minutes on November 18, 2013, and the other of 22 minutes two weeks later, on December 2, 2013 (Statement of Evidence, Exhibits 3 and 4). Also, administrators conducted informal "Learning Walks" in the Respondent's classroom on December 21, 2013; January 27, 2014; February 4, 2014; and March 4, 2014 (Statement of Evidence, Exhibit 15).[1] The Respondent's 2013-2014 annual summative evaluation described him as

> very open to improving his practice during the Midyear Review. We discussed having weekly coaching sessions. A plan was put in place. Immediat[el]y, Mr., Hannah began to implement the strategies and suggestions given to him during the coaching sessions. Unfortunately, Mr. Hannah became ill and was hospitalized. Upon his return, NJASK testing took place and after that, the Arts teachers began planning for the Grease Production.
>
> Since these ratings took place in that order, it was difficult for us to continue our coaching sessions. Out of fairness to Mr. Hannah, he should still be eligible for his increment even though his annual rating is Partially Effective.
>
> Mr. Hannah has agreed to continue to be open to the feedback given for the 2014-2015 school year. He is a valuable team player and a great asset. Mr. Hannah is a hard worker and dedicated to becoming a Highly Effective teacher.
>
> Statement of Evidence, Exhibit 6.

The Respondent was rated "Ineffective" in his 2014-2015 annual summative evaluation (Statement of Evidence, Exhibit 14). During the 2014-2015 school year, he received four formal classroom observations on October 6, 2014; January 6, 2015; March 19, 2015; and March 24, 2015 (Statement of Evidence, Exhibits 7, 9, 11, and 12). Administrators also conducted informal "Learning Walks" in his classroom on October 21, 2014; December

[1] The District contends that an informal "Learning Walk" also was conducted in the Respondent's classroom on October 21, 2013, but the record does not verify that incident (see Statement of Evidence, Exhibit 15).

16, 2014; January 6, 2015; and January 8, 2015 (Statement of Evidence, Exhibit 15). The summary portion of the Respondent's 2014-2015 annual summative evaluation was left blank (Statement of Evidence, Exhibit 14).

On August 20, 2015, the District filed tenure charges against the Respondent with the Commissioner of Education, pursuant to Section 25 of the TEACHNJ Act, N.J.S.A. 18A:6-17.3 (Certification, Exhibit A). On November 14, 2015, the Commissioner of Education forwarded the charges to arbitration, stating that he "is unable to determine that the evaluation process has not been followed" (Opposition at 1).

## II. Contentions of the Parties

### The Respondent Contends:

The Respondent maintains that the tenure charges should be dismissed because the District failed to adhere to the evaluation procedures prescribed by Section 25 of TEACHNJ. New Jersey statute and regulation require that allegations of inefficiency be rejected if the evaluation process has not been followed. In support of his contention, the Respondent cites arbitral decisions, dismissing tenure charges because a school district failed to conduct a proper evaluation.

More specifically, the Respondent cites N.J.A.C. 6A:10-4.4(c) as setting forth the following mandatory evaluation procedures:

> **Each teacher shall be observed** as described in this section, **at least three times during each school year but not less than once during each semester**. For all teachers, **at least one of the required observations shall be announced and preceded by a pre-conference**, and at least one of the required observations shall be unannounced....
>
> N.J.A.C. 6A:10-4.4(c) (emphasis supplied by the Respondent).

The District's own evaluation guide, titled "Framework for Effective Teaching," similarly requires a minimum of three observations annually, including at least one announced observation, and dictates that "[a]ll teachers must be observed at least once in each semester" (Certification, Exhibit E).

According to the Respondent, the 2013-2014 annual summative evaluation is flawed and, as a matter of law, may not form the basis of the instant charges because, during that

school year, he: (1) did not receive at least three observations, the minimum number required by law (Certification, Exhibit B ¶¶3-6); (2) did not receive at least one announced observation, preceded by a pre-conference, as required by law (Certification, Exhibit C at 1); and (3) was not observed at least once each semester, as required by law (Certification, Exhibit D at 1). The District does not dispute these facts, as is apparent from the Statement of Evidence that it filed.

The Respondent asserts that each of these procedural violations, standing alone, constitutes a serious failure to adhere to the evaluation process, since they undermine the integrity of his 2013-2014 summative evaluation. When the violations are viewed together, it becomes clear that the District completely disregarded its obligation to observe and evaluate the Respondent fairly and in accordance with the uniform regulatory requirements applicable to all teachers. Such an egregiously defective evaluation warrants the immediate dismissal of the charges, the Respondent argues.

Further, answering arguments presented in the District's opposition, the Respondent asserts that the arbitrator has jurisdiction to consider and resolve the motion to dismiss at the pre-hearing stage. In support, the Respondent cites arbitral decisions holding that motions to dismiss premised upon a district's failure to comply with statutory and regulatory procedural requirements are properly within the jurisdiction of the arbitrator. In addition, the Respondent contends that the Commissioner's statement—that he is unable to determine that the evaluation process has not been followed—is not dispositive and does not preclude an arbitrator from addressing a district's compliance with required statutory procedures.

The Respondent also disputes the District's claim that its failure to formally observe him in accordance with the requirements of N.J.A.C. 6A:10-4.4(c) is mitigated by its conduct of "learning walks" throughout the year. According to the Respondent, there is no statutory or regulatory authority that permits a school district to substitute such informal evaluation methods for the formal classroom observations required by law.

Finally, the Respondent disputes the District's contention that a tenure charge cannot be dismissed absent a determination that the District's failure to follow the evaluation process "materially affected the outcome of the evaluation" in the relevant school year. N.J.A.C. 6A:3-5.1(c) does not contain such a requirement and plainly dictates that any failure to abide by the evaluation procedures prohibits the tenure charges from being moved to the next stage of the filing process, including to an arbitration proceeding. The language quoted by the District is in Section 23 of the TEACHNJ Act (N.J.S.A. 18A:6-

17.2), titled "Considerations for arbitrator in rendering decision." According to the Respondent, that section, which limits the issues that an arbitrator can consider and the defenses an employee can raise at an arbitration hearing, applies only to decisions on the substantive merits of a tenure charge after an arbitration hearing has concluded.

In sum, the Respondent contends that N.J.S.A. 18A:6-17.2 has no bearing on the pre-hearing motion to dismiss, which essentially seeks a ruling on a procedural arbitrability issue. The instant motion seeks dismissal of the tenure charges on the ground that the procedural conditions leading to arbitration—namely, that the District must comply with the evaluation procedures required by law—have not been met. In the absence of any factual dispute regarding the District's failure to evaluate the teacher in the manner required by law, the motion to dismiss must be granted, according to the Respondent.

**The District Contends**:

As an initial matter, the District challenges the Respondent's argument that the charge is defective on its face by noting that the Commissioner stated that he was "unable to determine that the evaluation process has not been followed" (Opposition at 1). The District contends that if the charge were clearly defective, the Commissioner would have dismissed the charge outright.

Secondly, the District asserts that the claims made in the motion should be weighed after a hearing. The motion alleges, in essence, that the District did not follow its teacher performance evaluation process in the 2013-14 school year. According to the District, whether a teacher's evaluation adhered substantially to the evaluation process is one of four defenses that TEACHNJ permits respondents to raise in response to a tenure charge of inefficiency. N.J.S.A. 18A:6-17.2(a)(1). That issue implicates findings of fact that can be made only after a hearing. Where, as here, the facts are in dispute, summary decision cannot be entered.

Third, the District contends, it is unclear on what authority the Respondent seeks summary decision. Citing an arbitral decision, the District asserts that the rules of the American Arbitration Association (AAA) which apply to tenure charges of inefficiency—see N.J.S.A. 18A: 6-17.1(c)—do not provide for entry of summary decision. The only authority cited in the Respondent's Notice of Motion is N.J.A.C. 6A:3-5.3(a)1, which addresses filing a motion to dismiss "in lieu of an answer to the charges." Since the Respondent has filed an answer, that rule is inapposite here.

As to the merits of the motion to dismiss, the District asserts that when considering a district's failure to comply substantially with its teacher evaluation process, an arbitrator must perform a two-step analysis pursuant to N.J.S.A. 18A:6-17.2(b):

1. Determine whether or not the employee's evaluation failed to adhere substantially to the evaluation process; and, if so,
2. Determine if that fact materially affected the outcome of the evaluation.

The District emphasizes that the tenure charges are based on two years of summative evaluations of the Respondent's performance. The District acknowledges that in 2013-2014 the Respondent did not receive one formal observation to which he was entitled. However, the District asserts that this failure, in the context of the many formal and informal observations which occurred in a period of two years, cannot be said to have materially affected the outcome of his evaluation. After 2013-2014, he acquired a corrective action plan to improve his performance (Statement of Evidence, Exhibit 8), following two formal and multiple informal observations, plus a mid-year evaluation (Statement of Evidence, Exhibit 5). The same analysis, according to the District, holds true for the Respondent's claim that an announced observation was omitted in 2013-2014, and he was not observed at least once in each semester, as called for in N.J.A.C. 6A:10-4.4(c).

Further, the District contends that the arbitral awards dismissing tenure charges are unavailing because, unlike here, those dismissals were issued after disputed facts were resolved at arbitration hearings. The District also contests the Respondent's reliance on another arbitration award, in which the arbitrator addressed a pre-hearing motion for summary decision as a matter of discretion, given the importance and relative novelty of the legal principles involved. Here, the District contends, there is nothing novel about the issue presented by the motion. The disputed facts as to whether the District adhered substantially to the evaluation process present the fundamental issue on which a hearing should be based, and this issue should not be determined on a motion for summary decision.

For the foregoing reasons, the District argues that the Respondent's motion for summary decision should be held in abeyance, pending a hearing on the charge. Alternatively, if the arbitrator decides the motion on its merits, it should be denied because the District adhered substantially to the evaluation process in 2013-2014 and 2014-2015, and any procedural flaw did not materially affect the outcome of the Respondent's evaluation.

**DISCUSSION**

The threshold issue is whether the arbitrator has the authority to rule on the Respondent's motion to dismiss charges at this early stage of the proceeding. The arbitrator relies here on her decision on January 30, 2015, in another Newark case, involving a teacher's motion to dismiss tenure charges before the arbitration hearing.

In *Marie Ebert, State-Operated School District of the City of Newark, Essex County*, Agency Docket No. 267-9/14 (*Ebert*), a respondent teacher filed a pre-hearing motion to dismiss tenure charges on the ground that the District did not make timely disclosure to her of evidence due before the scheduled hearing. The District put forward there, as it does here, arguments based on procedural arbitrability. It claimed that the arbitrator could not consider the motion because the Commissioner had already determined that the charges could be brought to arbitration and because any ruling on a motion to dismiss had to be based on a full evidentiary hearing.

Both claims were rejected by the arbitrator in *Ebert*:

> Consideration of the relevant statutory provisions leads to the conclusion that the Respondent's motion to dismiss is properly before the Arbitrator.
>
> It is clear from the provisions of TEACHNJ, and is undisputed by the parties, that a chief purpose of the legislation was to expedite the processing of teacher tenure cases. To this end, N.J.S.A. 18A:6-17.3 states that upon receipt of a charge of teacher inefficiency, the Commissioner shall examine the charge, and the teacher shall have 10 days to submit a written response. Within five days from the deadline for a written response, the Commissioner must refer the case to an arbitrator, unless he or she determines that the evaluation process has not been followed. Thus, the Commissioner's determination must be made within a brief period.
>
> The term "evaluation" is defined in N.J.S.A. 18A:6-119 as a process
>
> > based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate, or supervisor certificate.
>
> The Legislature also defined the factors that an arbitrator may consider in analyzing the "evaluation process." Under N.J.S.A. 18A:6-17.2a.1, the arbitrator shall consider whether "the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." If the employee is able to demonstrate

> such a failure, the arbitrator must determine if it materially affected the outcome. If it did not, the arbitrator renders a decision in favor of the board, and the employee is dismissed. N.J.S.A 18A:6-17.2b.
>
> Thus, the Legislature created distinctive roles for both the Commissioner and an arbitrator in reviewing the evaluation process. The Legislature clearly intended the Commissioner to decide within five days whether a District had taken the requisite steps for completing an evaluation, whereas the arbitrator was asked to determine whether those steps were carried out correctly and in accordance with the prescribed standards. This construction of the legislation gives meaningful purpose and effect to both its language and intent.
>
> The Respondent's motion to dismiss presents several arguments challenging the way her evaluation was conducted, which is the domain of the arbitrator. . . . [The] arguments submitted in the motion are properly before the Arbitrator and will be addressed to the extent necessary.
>
> ***
>
> Contrary to the [District's] argument, holding a full evidentiary hearing is not a prerequisite to considering the motion to dismiss. Nothing in the relevant statutory provisions limits an arbitrator's ability to resolve motions before holding a hearing. Indeed, demanding a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, ignoring the expressed desire of the Legislature to expedite them.
>
> [*Ebert* at 7-8 (footnotes omitted) and 18.]

The same reasoning and conclusions are warranted here with respect to both of the District's procedural arguments. First, the Commissioner's statement—that he was unable to determine that the District had not followed the evaluation process—does not preclude the arbitrator from determining whether each step of the process was carried out correctly and in accordance with the prescribed standards. Second, nothing in the relevant statutory provisions limits an arbitrator's ability to rule on motions before holding a hearing. Similarly, nothing in the AAA rules cited by the District precludes an arbitrator from resolving dispositive motions prior to a hearing in appropriate circumstances. As stated in *Ebert*, requiring a full evidentiary hearing before ruling on potentially dispositive motions could unnecessarily prolong tenure disputes, thwarting the expressed desire of the Legislature to expedite their resolution.

The District contends that there are disputed facts in this case which require a hearing before acting on the motion. The District's Statement of Evidence concedes, however, that in 2013-2014 the Respondent was denied several entitlements: one formal observation, one announced observation, and at least one observation in each semester, as N.J.A.C. 6A:10-4.4(c) requires. The District's opposition to the motion is, therefore, premised not on disputed facts but on an argument of law—that the District's observations of the Respondent over the two-year period under review satisfied the statutory requirements. This statutory claim can be considered without a hearing.

Having found that the motion to dismiss may be submitted at this stage of the proceeding, the arbitrator turns to the merits of the motion. In enacting TEACHNJ, the legislature stated with clarity and precision the minimum requirements for evaluating a teacher:

> Each teacher shall be observed as described in this section, at least three times during each school year but not less than once during each semester. For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference, and at least one of the required observations shall be unannounced....
>
> N.J.A.C. 6A:10-4.4(c).

These minimum requirements are reiterated in the District's own evaluation guide, titled "Framework for Effective Teaching," which also requires a minimum of three observations annually, including at least one announced observation, and mandates at least one observation in each semester.

The Respondent's 2013-2014 annual summative evaluation fell short of the statutory requirements in three distinct respects. First, he was observed only twice, not three times—the minimum allowed by law. Second, he was not observed during both semesters, as required by law.[2] Third, he was not provided with an observation that was announced and preceded by a pre-conference.

The requirements set forth in N.J.A.C. 6A:10-4.4(c) are not ambiguous, complex, or onerous.[3] They are plainly intended to establish a sufficient basis for judging a teacher's performance during a school year and to assure the teacher due process by specifying how he or she will be evaluated. In this instance, the District clearly did not carry out the obligatory steps prescribed by law. At no point during the evaluation process or subsequently has it offered any justification for its failure to do so.

As noted above, *Ebert* stated:

---

[2] His two observations during the 2013-2014 school year occurred within two weeks of each other, during the first semester of the school year.

[3] The Legislature was as forthright in this respect as it was in a related provision (N.J.S.A. 18A:6-17.1b3), requiring districts to provide teachers with all evidence upon referral of tenure charges to arbitration. The comment in *Ebert* about that provision applies with equal force here: "The Legislature could not have more lucidly articulated the District's obligation" [*Ebert* at 16].

> The Legislature also defined the factors that an arbitrator may consider in analyzing the "evaluation process." Under N.J.S.A. 18A:6-17.2a.1, the arbitrator shall consider whether "the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan." If the employee is able to demonstrate such a failure, the arbitrator must determine if it materially affected the outcome.
>
> [*Ebert* at 8.]

There can be no doubt that the District's evaluation of the Respondent in 2013-2014 failed to adhere substantially to the evaluation process and that this unexplained error materially affected the outcome of his evaluation. Although there was no contention that the 2014-2015 process was defective, ignoring the minimum statutory requirements in 2013-2014 deprived the Respondent of due process protections explicitly set forth in the Legislature's enactment of TEACHNJ. In these circumstances, the motion to dismiss the tenure charges must be granted.[4]

Tia Schneider Denenberg
*Arbitrator*

[4] Both the District and the Respondent cite other arbitrators' decisions in support of their respective positions. Those decisions are not dispositive here but have been given due consideration. As *Ebert* observed:

> The awards are informative, but the controlling consideration is the Legislature's intent, as evidenced in the statutory provisions. Since the TEACHNJ Act established a permanent panel of 25 [recently enlarged by the Legislature to 50] arbitrators to hear tenure charges, it is to be expected that awards may reach contradictory interpretations of the legislation. The awards are subject to judicial review, which may ultimately resolve conflicts among them. Until then, the awards ought not to be regarded as final for purposes of collateral estoppel.
>
> [*Ebert* at 7 n.4.]

*In the Matter of Tenure Hearing of*

**Davis Hannah,**
**State-Operated School District**
**of the City of Newark, Essex County, NJ**

Agency Docket No. 279-9/15

## Ruling of Arbitrator

*The undersigned arbitrator, having been appointed pursuant to P.L 2012, c 26, rules as follows:*

Respondent's motion to dismiss the tenure charges is granted. Davis Hannah shall be reinstated as a teacher with full back pay and benefits.

**Tia Schneider Denenberg**
*Arbitrator*

**Dated:** February 6, 2016

*State of New York*
*County of Columbia*

*On this 6th day of February, 2016, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.*

**Kristy Lee Brailey**
*Notary Public State of New York*
*No. 01BR6326865*
*Qualified in Columbia County*
*Commission Expires June 29, 2019*

65-16

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

...IS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

February 10, 2016

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, New Jersey 08625

*Re: Request for Docketing of Judgment*

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the February 10, 2016 Order of the Commissioner of Education finding that Alexandra Hill is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *A.H., on behalf of minor child, B.H.G. v. Board of Education of the Township of West Orange, Essex County.*[1] By copy of this letter, I am advising Ms. Hill, as well as counsel for the West Orange Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/JKH

Enclosure

c: Alexandra Hill
Stephen J. Christiano, Esq.
State Law Library

[1] Please note that, although the case caption reflects only Ms. Hill's initials, her full name is included within the body of the Commissioner's Order.

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE TEACHING CERTIFICATE | : | COMMISSIONER OF EDUCATION |
| OF ANDREW SILVER, SCHOOL DISTRICT | : | DECISION |
| OF THE BOROUGH OF GLEN ROCK, | : | |
| BERGEN COUNTY. | : | |

## SYNOPSIS

In November 2015, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:28-8 for resigning his position without giving the notice required for tenured employees by *N.J.S.A.* 18A:28-8. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

FEBRUARY 10, 2016

66-16

AGENCY DKT. NO. 355-11/15

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE TEACHING CERTIFICATE | : | COMMISSIONER OF EDUCATION |
| OF ANDREW SILVER, SCHOOL DISTRICT | : | DECISION |
| OF THE BOROUGH OF GLEN ROCK, | : | |
| BERGEN COUNTY. | : | |

For Petitioner, Rodney T. Hara, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on November 25, 2015, by way of an Order to Show Cause served by petitioner (School District of the Borough of Glen Rock) upon respondent (Andrew Silver), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:28-8 for resigning without giving the notice required for tenured employees by *N.J.S.A.* 18A:28-8. By notice dated November 25, 2015, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on December 17, 2015, the Bureau sent respondent a second notice, via regular and certified mail, directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The notice sent by certified mail was returned by the postal service as

unclaimed; however, the notice sent by regular mail was not returned, and no answer to the Order to Show Cause has been filed as of this date.

The verified complaint submitted by the petitioner in this matter states that: the respondent has been employed by petitioner as a full-time teaching staff member since September 1, 2001, and subsequently acquired tenure in the district; the respondent was expected to report on September 1, 2015 for the start of the 2015-2016 school year; and on August 31, 2015, the respondent submitted his resignation to the district, providing only a one day notice prior to the start of the school year. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/10/16

Date of Mailing: 2/11/16

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

6 7-16

OAL DKT. NO. EDU 08694-15
AGENCY DKT. NO. 115-5/15

| | | |
|---|---|---|
| M.Z. AND M.M., ON BEHALF OF MINOR CHILD, J.H., | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

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

Upon review – and to the extent that the settlement terms fall within the jurisdiction of the Commissioner[1] – the Commissioner approves the settlement, and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/10/16
Date of Mailing: 2/10/16

[1] Aspects of the settlement concern special education, which is outside of the Commissioner's jurisdiction. *N.J.S.A.*18A:6-9.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 08694-15

AGENCY DKT. NO. 115-5/15

**M.Z. AND M.M. ON BEHALF OF MINOR CHILD J.H.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK AND BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK,**

Respondents.

---

**Paul N. Barger**, Esq., for petitioners (Barger & Gaines, attorneys)

**George F. Hendricks**, Esq., for respondent Board of Education of the City of New Brunswick (Hendricks & Hendricks, attorneys)

**Marc G. Mucciolo**, Esq., for respondent Board of Education of the Township of North Brunswick (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: January 6, 2016 Decided: January 8, 2016

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

On or about May 26, 2015, petitioners M.Z. and M.M. on behalf of J.H. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Board of Education of the City of New Brunswick. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on June 15, 2015, for determination as a contested case. Subsequently, petitioners filed an Amended Petition of Appeal to include the Board of Education of the Township of North Brunswick. At the parties' request, the hearing, originally scheduled for September 3, 2015, was rescheduled for December 18, 2015. Prior to the scheduled hearing, the parties reached an amicable resolution of the matter. Under letter dated January 5, 2016, counsel for respondent Board of Education of the Township of North Brunswick forwarded the attached Settlement Agreement and Release, indicating the terms of agreement between the parties, and the attached Resolutions of the North Brunswick and New Brunswick Boards of Education approving the settlement.

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

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

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

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

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

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

January 8, 2016
DATE

Margaret M Monaco
**MARGARET M. MONACO**, ALJ

Date Received at Agency: 1-12-16

Date Mailed to Parties: JAN 12 2016

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

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SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001
Attorneys for North Brunswick Township Board of Education

| | |
|---|---|
| **M.M. and M.Z. o/b/o J.H.,** | **STATE OF NEW JERSEY OFFICE OF SPECIAL EDUCATION** |
| Petitioners, | |
| v. | **SETTLEMENT AGREEMENT AND RELEASE** |
| **New Brunswick Township Board of Education AND North Brunswick Township Board of Education** | **Agency Ref. No.: 115-5/15 OAL Docket No. EDU 08694 – 2015N** |
| Respondents. | |

**WHEREAS**, M.M., a resident of New Brunswick, and M.Z., a resident of North Brunswick, are the legal guardians and maternal grandmother and mother, respectively, of J.H.; and

**WHEREAS**, J.H. has been classified as eligible for special education and related services by the New Brunswick Township Board of Education; and

**WHEREAS**, the New Brunswick Township Board of Education ("New Brunswick") was the local educational agency with the responsibility for providing J.H. with a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE"); and

**WHEREAS**, through his most recent New Brunswick IEP, J.H. attends Center School, a approved private school for the education of students with disabilities; and

**WHEREAS**, a dispute arose between Petitioners and New Brunswick during the 2014-2015 school year relative to J.H.'s residency in that District; and

DEC 21 2015

**WHEREAS**, on May 5, 2015 a Residency Hearing was held before the New Brunswick Board, wherein the Board determined that J.H. was not a resident of that District, and in fact lived with his mother, M.Z., in North Brunswick; and

**WHEREAS**, a Petition of Appeal was filed by M.M. and M.Z. on behalf of J.H. against New Brunswick, on August 12, 2015, challenging the residency determination; and

**WHEREAS**, through a Consent Order, an Amended Petition of Appeal was filed on August 26, 2015, naming North Brunswick Township Board of Education ("North Brunswick") as a Respondent; and

**WHEREAS**, the parties have negotiated in good faith concerning this matter, and have a desire to settle this matter in an amicable way, without the need for further litigation, the parties enter into this Agreement in order to reach a compromise in the interests of the parties;

**NOW THEREFORE**, in consideration of the covenants contained herein and for good and valuable consideration, the sufficiency of which is hereby acknowledged, it is hereby agreed by and between the parties as follows:

1. It is hereby agreed that M.Z.'s residence in North Brunswick is the primary residence of J.H. As a result, for the remainder of the 2015-2016 School Year moving forward, J.H. is determined a resident of North Brunswick. North Brunswick will be the local educational agency responsible for providing J.H. a free appropriate public education in the least restrictive environment for that time period. North Brunswick is therefore responsible for J.H.'s program and placement at Center School for the 2015-2016 school year. North Brunswick agrees to pay all educational costs (including related services) as well as transportation costs relative to J.H.'s attendance at Center School for the remainder of the 2015-2016 school year. It is also agreed that North Brunswick will officially commence its' duties as the LEA responsible for J.H. as of January 4, 2016.

2. Any monies due and owing to Center School from January 4, 2016 through the remainder of the 2015-2016 school year for J.H.'s placement will be paid directly to Center School by North Brunswick, upon formal Board approval of a contract between that Board and Center School for the remainder of the 2015-2016 school year. Any monies already paid to Center School by New Brunswick for the 2015-2016 school year, from July 1, 2015 through January 1, 2016, will be reimbursed within sixty (60) days of receipt of proof of payment by New Brunswick and formal Board approval by North Brunswick of reimbursement.

3. The parties agree to meet on or before June 1, 2016 to assess J.H.'s continued attendance at Center School. At the June 2016 meeting, North Brunswick will develop and offer J.H. an IEP for the 2016-2017 school year. If the Petitioners disagree with the IEP offered for the 2016-2017 school year, and if a legal dispute arises regarding J.H.'s programming/placement for that school year, then Center School shall be considered the student's "stay put" programming/placement during the pendency of any dispute regarding the student's placement for the 2016-2017 school year.

4. Any and all other costs and expenses, of whatsoever nature, including, but not limited to medical expenses, personal expenses, attorneys' fees incurred by the Petitioners regarding the filing of any and all due process petitions against either District, or any private educational expenses, associated with this matter and not specifically addressed herein, are and shall remain the sole responsibility of the Petitioners. The financial and other terms of this Agreement are specifically contingent upon M.Z.'s continued domicile in North Brunswick Township. If M.Z. moves from North Brunswick Township, she agrees to notify the Board immediately and all future payments of tuition and transportation to the out-of-district placement shall cease. Any remaining unpaid payments contemplated under this Agreement will be reduced on a pro rata basis, should this circumstance arise.

5. The foregoing shall constitute full and complete settlement regarding any and all claims of whatever nature the Petitioners and/or J.H. have or may have against either New Brunswick or North Brunswick through June 30, 2016, including settlement with prejudice of the instant

August 26, 2015 Amended Petition of Appeal. As a material part of this Agreement, the Petitioners, individually and on behalf of J.H., specifically release and waive all rights and claims of whatsoever nature relating to J.H.'s education, including but not limited to any claim for reimbursement for educational services unilaterally provided to date; reimbursement of any and all incurred attorneys' fees or expert costs; their procedural rights; and their right to receive educational services for J.H. from either New Brunswick or North Brunswick, for the effective dates of this Agreement.

6. The foregoing shall also constitute full and complete settlement regarding any and all claims of whatever nature New Brunswick has or may have against North Brunswick for any tuition, fees and costs associated with J.H.'s program and placement, prior to the 2015-2016 school year. New Brunswick hereby specifically waives and releases all rights and claims of whatsoever nature as against North Brunswick relating to costs associated with J.H.'s education prior to the 2015-2016 school year, including but not limited to reimbursement for tuition, transportation, related services, expert fees and attorney fees and costs, for the effective dates of this Agreement.

7. The foregoing shall also constitute full and complete settlement regarding any and all claims of whatever nature that New Brunswick has or may have against Petitioners for any tuition, fees and costs associated with J.H.'s program and placement through the date of execution of this agreement. The parties agree that Petitioners are in no way responsible for any tuition or transportation fees and costs associated with J.H.'s educational program and placement.

8. This Agreement is made without any admissions of liability or responsibility by any party hereto and shall not be construed as an admission by either New Brunswick or North Brunswick that it did not offer J.H. a FAPE in the LRE for the 2013-2014, 2014-2015, or 2015-2016 school years.

9. This Agreement represents the entire understanding between the parties and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement executed by both of the parties.

10. This Agreement shall not be effective as to either New Brunswick or North Brunswick without the specific approval of those Boards of Education at a public meeting. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

11. The parent agrees to enroll J.H. in the North Brunswick School District prior to approval of this Agreement by the North Brunswick Board of Education. The parent will also provide to North Brunswick a transfer card from New Brunswick that evidences J.H.'s disenrollment from that District, as soon as possible.

12. Upon full execution and approval by the Boards of Education, the herein Agreement shall be submitted to the Office of Administrative Law's Newark vicinage for approval and incorporation into a Final Decision and Order by the Honorable Margaret M. Monaco, A.L.J., the administrative law judge assigned to this matter.

13. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each party's choosing and option. The Petitioners did consult with counsel, Paul Barger, Esq., of Barger & Gaines; New Brunswick did consult with George F. Hendricks, Esq., of Hendricks & Hendricks; and North Brunswick did consult with Marc G. Mucciolo, Esq. of Schwartz Simon Edelstein & Celso, LLC.

14. The parties acknowledge that they were represented by competent counsel, that they understood the contents of this Settlement Agreement and Release, and that each party hereto will be responsible for bearing the costs of their own attorneys' fees and costs, and any other costs pursuant to 20 U.S.C.A. §1415 or any other Federal or State Statutes. It is further agreed that neither party is considered a "prevailing party" for any purposes. This Agreement

shall be governed by the laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

15. Petitioners agree to keep the terms of this Settlement Agreement confidential to the maximum extent permitted by law.

**PETITIONERS**

**Date:** _____ _____
**Maria Merced, Individually and o/b/o J.H.**

**Date:** _____ _____
**Maria Zelaya, Individually and o/b/o J.H.**

**NEW BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** _____ _____
**Kathy Antoine-Smith, Assistant Superintendent**

**Date:** _____ _____
**Richard Jannarone, School Business Administrator**

**NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** _____ _____
**Dr. Frances Stromsland, Interim Director**

Date: 12/17/15

**Dr. Brian Zychowski, Superintendent**

STATE OF NEW JERSEY )
SS:
COUNTY OF MIDDLESEX )

I CERTIFY that on , 2015, Maria Merced, Individually and o/b/o J.H., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

STATE OF NEW JERSEY )
SS:
COUNTY OF MIDDLESEX )

I CERTIFY that on , 2015, Maria Zelaya, Individually and o/b/o J.H., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

shall be governed by the laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

15. Petitioners agree to keep the terms of this Settlement Agreement confidential to the maximum extent permitted by law.

**PETITIONERS**

**Date:** _____ _____

**Maria Merced, Individually and o/b/o J.H.**

**Date:** _____ _____

**Maria Zelaya, Individually and o/b/o J.H.**

**NEW BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** _____ _____

**Kathy Antoine-Smith, Assistant Superintendent**

**Date:** _____ _____

**Richard Jannarone, School Business Administrator**

**NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** 12/19/15 Frances C. Stromsland, Ed.D

**Dr. Frances Stromsland, Interim Director**

15. Petitioners agree to keep the terms of this Settlement Agreement confidential to the maximum extent permitted by law.

**PETITIONERS**

**Date:** 12-15-15 Maria Merced

**Maria Merced, Individually and o/b/o J.H.**

**Date:** 12/15/15 Maria Zelaya

**Maria Zelaya, Individually and o/b/o J.H.**

**NEW BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** _____

**Kathy Antoine-Smith, Assistant Superintendent**

**Date:** _____

**Richard Jannarone, School Business Administrator**

**NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION**

**Date:** _____

**Dr. Frances Stromsland, Interim Director**

**Date:** _____

**Dr. Brian Zychowski, Superintendent**

STATE OF NEW JERSEY )
SS:
COUNTY OF MIDDLESEX )

I CERTIFY that on December 15, 2015, Maria Merced, Individually and o/b/o J.H., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

STATE OF NEW JERSEY )
SS:
COUNTY OF MIDDLESEX )

I CERTIFY that on December 15, 2015, Maria Zelaya, Individually and o/b/o J.H., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

l) **BE IT RESOLVED**, that the North Brunswick Township Board of Education hereby accepts and approves the negotiated settlement of the litigation pending before the Office of Administrative Law, relative to Student #1840216 OAL Docket No.: EDU 08694-2015N, Agency Ref. No.: 115-5/15; and

**BE IT FURTHER RESOLVED,** that the Interim Director and Superintendent are authorized and directed to execute the Settlement Agreement on behalf of the Board.

I CERTIFY THAT THIS RESOLUTION
WAS ADOPTED BY THE NORTH BRUNSWICK
BOARD OF EDUCATION AT ITS Regular
MEETING HELD ON December 16, 2015
SECRETARY.
Acting

**RESOLUTION**

**WHEREAS**, a settlement has been reached between the parties in the matter of M.Z. and M.M. o/b/o minor child, J.H. v. Board of Education of the City New Brunswick, Middlesex County, and Board of Education of the Township of North Brunswick, Middlesex County, Agency Docket No.: 115-5/15, OAL Docket No.: EDU 08694-2015 N, whereby the Board of Education of the Township North Brunswick shall officially take responsibility of student, J.H., beginning on January 4, 2016, remitting direct payment of all educational and transportation costs on behalf of said student from that date forward to the appropriate providers. The Board of Education of the Township of North Brunswick will further reimburse the New Brunswick Board of Education for all educational and transportation expenses paid on behalf of student, J.H., from July 1, 2015 through January 3, 2016 within sixty (60) of proof of payment receipt from the New Brunswick Board of Education.

**NOW, THEREFORE, BE IT RESOLVED** that the New Brunswick Board of Education hereby approves the settlement entered into between the parties in the matter of M.Z. and M.M. o/b/o minor child, J.H. v. Board of Education of the City New Brunswick, Middlesex County, and Board of Education of the Township of North Brunswick, Middlesex County, Agency Docket No.: 115-5/15, OAL Docket No.: EDU 08694-2015 N, authorizing its Asst. Superintendent of Pupil Personnel Services, Kathy Antoine-Smith, and its Business Administrator, Richard D. Jannarone, to execute a formal Settlement Agreement between the parties memorializing the settlement terms; and

**BE IT FURTHER RESOLVED** that the New Brunswick Board of Education will immediately take the appropriate actions necessary to fully comply with the terms of settlement reached between the parties, upon receipt of a counterpart of the parties' fully executed Settlement Agreement.

Patricia Sadowski

PATRICIA SADOWSKI
Board President

RICHARD D. JANNARONE
Business Administrator/Board Secretary

**ADOPTED:** 12-15-15

68-16LM

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

February 9, 2016

Brenda C. Liss, Esq.
Riker Danzig Hyland Perretti, LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, New Jersey 08608

Re: *Felicia Pugliese v. State Operated School District of the City of Newark, Essex County. OAL Dkt. No. EDU 14409-15, Agency Dkt. No. 194-7/15.*

Dear Counsel:

I have reviewed the submissions filed in connection with the respondent's motion for leave to file exceptions out of time, along with the respondent's proposed exceptions, in the above-captioned matter. The petitioner has taken no position with respect to this motion.

Accordingly, the respondent's motion to file exceptions out of time is hereby granted. Within seven days after the receipt of this letter, the petitioner may file reply exceptions.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

**VIA FACSIMILIE AND REGULAR DELIVERY**

Mailed 2/11/16

OAL DKT. NO. EDU 00023-16
AGENCY DKT. NO. 375-12/15

| | | |
|---|---|---|
| TRACEY PITTS, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Specifically, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate that she will suffer irreparable harm absent emergent relief. As petitioner must demonstrate all four *Crowe* factors in order to warrant emergent relief, the Commissioner need not make a determination on the remaining three factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/16

Date of Mailing: 2/11/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 00023-16
AGENCY DKT. NO. 375-12/15

**TRACEY PITTS,**
Petitioner,
v.
**STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,**
Respondent.

---

**Barbara Ann Johnson-Stokes**, Esq., for petitioner (Michael A. Armstrong & Associates, Inc., attorneys)

**Joseph G. Antinori**, Esq., for respondent (Brown & Connery, attorneys)

BEFORE **ROBERT BINGHAM II**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Tracey Pitts requests an emergent order compelling respondent, the State-Operated School District of the City of Camden, Camden County, (the District) to reinstate her to her employment as a tenured teacher. On December 29, 2015, petitioner filed a petition of appeal with the Commissioner of Education, along with an

application for emergent relief.[1] The entire matter, including Pitts' motion for emergent relief, was transmitted to the Office of Administrative Law, where it was filed on December 31, 2015, and scheduled for an emergent oral argument on January 14, 2016. The parties filed written briefs with proposed exhibits, and a telephone conference was held on January 13, 2016, when oral argument was rescheduled at respondent's request with petitioner's consent. On January 19, 2016, oral argument was heard and the record for petitioner's emergent-relief application was closed.

## FACTUAL DISCUSSION

From 1988 through October 31, 2015, Pitts was employed by the District, and during that time she attained tenure as a special-education teacher. (Petition of Appeal, ¶ 1; Motion for Emergent Relief, ¶ 19; Answer to Petition of Appeal, ¶ 1.) On August 21, 2015, the District served her with tenure charges, seeking to remove her from her teaching position for reasons of inefficiency. (Petition of Appeal, ¶ 2; P-2.) On September 9, 2015, Pitts communicated through her attorney that she wished to retire before the District sent the tenure charges to the Commissioner of Education for certification. (Id. at ¶ 3.) On October 15, 2015, Pitts communicated that she would resign rather than retire, effective October 31, 2015, and asked the District for a drafted settlement agreement. (Ibid; Motion for Emergent Relief, P-4.) According to a drafted "Settlement Agreement and Release," "Pitts shall provide the District . . . with an irrevocable letter of intent to resign on October 31, 2015," and "[t]he District agrees not to pursue tenure charges against Pitts in consideration for her submission of the irrevocable letter of intent to resign." (Motion for Emergent Relief, P-2, at 1.) That draft further provides that "[t]his Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof," and that "[n]o other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement." (Id. at 3.) The

[1] Pitts' petition of appeal requests that the Commissioner issue an order finding that the District "violated her due process and tenure rights when it terminated her" and her motion for emergent relief requests an order "compelling [the District] to reinstate her as a teacher with the Camden School District and proceed with the tenure charge, pursuant to the Tenure Employee Hearing Law, N.J.S.A. 18A:6-10 et seq."

document also states that "during the **seven (7) day** period following execution of the Settlement Agreement and the Release, [Pitts] may revoke her acceptance of this Agreement . . . [which] shall not become effective or enforceable until after the revocation period has expired." (Ibid.) However, on October 26, 2015, Pitts' attorney advised the District's attorney that Pitts would not sign the agreement and that she wished to defend against the tenure charges.

On November 5, 2015, the District filed a complaint in Superior Court seeking to enforce the parties' agreement. (R-1.) According to the complaint, "the District sent [Pitts' counsel] a settlement agreement on October 19, 2015, which reflected the agreement for Pitts to resign and for the District to forego certification and filing of the tenure charges against her with the Department of Education." (Id. at ¶ 6.) The District further avers in the complaint that "an agreement had been formed regardless of whether Pitts signed it." (Id. at ¶ 9.) On January 8, 2016, the Honorable Anthony Pugliese, J.S.C., issued an order granting the District's motion to proceed summarily with its complaint, and that matter is pending in Superior Court. (R-3.) To date, the District has not filed tenure charges against Pitts with the Commissioner of Education.

I **FIND** as **FACT** all of the above, which is undisputed.

In Pitts' application for emergent relief, she asserts that: (1) she will suffer irreparable harm if the requested relief is not granted because her "statutory right to defend against the tenure charge has been wrongfully taken away by the District through its wrongful designation of her as a terminated employee, in the guise of enforcing a settlement agreement that she did not sign" and "the right to defend against the tenure charges . . . is the type of situation that '[c]annot be redressed adequately by monetary damages'"; (2) "[t]he law is clear that, as a tenured employee, Pitts can only be terminated through the filing of tenure charges" and "[t]herefore, the legal right underlying her claim is settled and she will clearly prevail on the underlying claim"; (3) Pitts "will suffer greater harm [than the District if the requested relief is not granted] because she will not have the opportunity to defend against the tenure charge of inefficiency."

In opposition, the District contends that: (1) "the only harm Petitioner will suffer without a preliminary injunction is merely a delay in obtaining her relief"; (2) Pitts was not terminated, but resigned, and is therefore not entitled to a tenure hearing and, if the Superior Court judge "decides that a settlement is reached, Ms. Pitts can no longer contend that her tenure rights were violated" and "[s]he simply cannot demonstrate a likelihood of success."

## LEGAL ANALYSIS AND CONCLUSION

According to N.J.A.C. 6A:3-1.6, an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b); Crowe v. DeGoia, 90 N.J. 126 (1982).]

(1) Irreparable harm if the requested relief is not granted

Petitioner has failed to show that she will suffer irreparable harm if the requested relief is not granted. As the Court has explained, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132–33. Further "[p]ecuniary damages may be inadequate because of the nature of the injury or of the right affected." Id. at 133 (citations omitted). Pitts has failed to explain how "the right to defend against the tenure charges" is the type of situation that "[c]annot be redressed adequately by monetary damages." Even if the District violated her tenure rights by failing to reinstate her and file tenure charges against her after she declined to sign the settlement agreement, Pitts has failed to show

that any loss in salary and benefits cannot be redressed adequately by a monetary award. If Pitts ultimately succeeds on the merits of her underlying claim, the District would have to reinstate her and compensate her with back pay and emoluments. It is thus unclear how a delay in an order compelling the District to pursue tenure charges against her represents "some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." Id. at 132 (citations omitted).

The emergent-relief standards under N.J.A.C. 6A:3-1.6(b) are listed in the conjunctive and must all be met in order for Pitts to be entitled to emergent relief. As such, Pitts' failure to satisfy the first standard for emergent relief compels the denial of her application irrespective of her ability to satisfy any of the other three standards. Nonetheless, for the sake of thoroughness, the following discussion addresses whether Pitts has satisfied the second, third, and fourth standards for emergent relief.

(2) Settled legal right underlying petitioner's claim

The legal right underlying Pitts' claim is settled because, under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1, "[n]o person shall be dismissed . . . if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing." N.J.S.A. 18A:6-10. Thus, it is settled that a tenured teacher cannot be removed from her position except for inefficiency and then only in accordance with the procedures required by the Tenure Employees Hearing Law.

(3) Likelihood of prevailing on the merits of the underlying claim.

Under the third emergent-relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)). This typically "'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents." Brown v. City of

Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)). Petitioner thus need not prove success to any degree of certainty.

Here, the initial proofs show that Pitts has a reasonable probability of ultimate success on the merits of her underlying claim that the District has, in effect, removed her from her teaching position in violation of the Tenure Employees Hearing Law because she did not sign the settlement agreement and instead announced her intention to remain in her position and defend against any tenure charges the District determined to pursue. In support of her application for emergent relief, Pitts submitted a draft copy of the Settlement Agreement and Release, which states that "Pitts shall provide the District . . . with an irrevocable letter of intent to resign on October 31, 2015," and "[t]he District agrees not to pursue tenure charges against Pitts in consideration for her submission of the irrevocable letter of intent to resign." That document further provides that "[t]his Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof" and that "[n]o other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement." Finally, the document states that "during the seven (7) day period following execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement . . . [which] shall not become effective or enforceable until after the revocation period has expired." In light of these contemplated terms and the fact that Pitts did not sign the document, Pitts has made a preliminary showing of a reasonable probability of ultimate success on the merits.

While mindful of both the pending action filed by the District in Superior Court "seeking a declaration that the settlement agreement is valid and to enforce it" and the District's argument that "the Commissioner cannot decide whether Ms. Pitts's tenure rights were violated until the Superior Court decides whether the settlement agreement was valid," District's Brief in Opposition to Pitts' Application for Emergent Relief, p. 3, the initial proofs nonetheless lead to the conclusion that Pitts would likely prevail on the merits of her underlying claim that the District violated her tenure rights when, after she

declined to sign the written settlement agreement, the District failed to reinstate her to her teaching position and proceed with the tenure charges against her.

(4) The greater harm, considering a balancing of the equities and interests of the parties

In terms of the greater harm if the relief sought is not granted, at this point, Pitts has lost her employment and primary means of support, including her salary and benefits.[2] The District, on the other hand, has perhaps only temporarily forgone the processing of tenure charges. Accordingly, a balance of the equities and interests of the parties does indicate that petitioner would suffer the greater harm if the requested relief is not granted.

Under N.J.A.C. 6A:3-1.6(b) and Crowe, all four criteria for emergent relief must be sustained. Based upon all of the above, I **CONCLUDE** that petitioner has not met all four of the applicable criteria for emergent relief, because she has not shown that she will suffer irreparable harm.

## ORDER

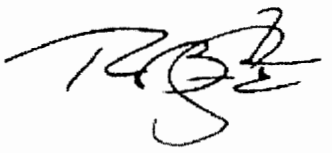
Therefore, it is hereby **ORDERED** the petitioner's request for emergent relief is **DENIED**.

This Order disposes of only the issues raised in petitioner's application for emergent relief.

The matter will be scheduled for a telephone prehearing in the near future regarding the plenary hearing. Notices will be sent to the parties under separate cover.

[2] Notably, under N.J.S.A. 18A:6-14, "[u]pon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay."

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



January 22, 2015
DATE

**ROBERT BINGHAM II**, ALJ

/lam

## APPENDIX

## LIST OF EXHIBITS

**For Petitioner:**

P-1 Letter, notice of tenure charges, dated August 21, 2015 (1 pg.)

P-2 Settlement Agreement, unsigned and undated (5 pgs.)

P-3 Letter, dated November 24, 2015 (1 pg.)

P-4 Letter, dated October 29, 2015 (2 pgs.)

P-5 Verified Complaint, dated November 5, 2015 (5 pgs.)

P-6 Letter, dated October 29, 2015 (2 pgs.)

**For Respondent:**

R-1 Civil Service Information Statement and Verified Complaint, dated November 5, 2015 (7 pgs.)

R-2 Notice of Motion, Memorandum of Law, and Certification, dated November 16, 2015; Letter Brief, dated January 5, 2015 [sic]

R-3 Order, dated January 8, 2016 (2 pgs.)

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|---|---|---|
| LAURIE WARD, | : | |
| PETITIONER | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

In this case on remand, petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a certificate of eligibility (CE) for the position of Teacher of Preschool through Grade Three. Specifically, the SBE disqualified twelve liberal arts credits out of 125 credit hours which petitioner completed at Baptist Bible College, leaving her short of the 60 liberal arts credits required for the CE she desires. Petitioner holds a Bachelor of Science degree from the college, where she majored in Bible. The parties mutually agreed to proceed without a hearing, and the SBE filed a motion for summary decision. The ALJ issued an Initial Decision in April 2015 in which she denied the SBE's motion, reversed the SBE's determination that petitioner had not met the requirements for the CE she had applied for, and granted summary decision in favor of petitioner. Upon review, the Commissioner remanded the matter back to the OAL, finding that he was unable to determine whether the SBE's decision was consistent with applicable statutory and regulatory provisions since the ALJ made no findings of fact as to which course credits the SBE rejected – or which were counted – toward the 60 semester-hour liberal arts credits required under *N.J.A.C.* 6A:9B-10.1(a)(3).

On remand, the ALJ indicated that she "made no further independent fact finding but recited the undisputed facts as conveyed by the parties," and incorporated the legal analysis and conclusions of her April 2015 Initial Decision into her Initial Decision on remand, dated December 31, 2015.

Upon comprehensive review, the Commissioner found that the Initial Decision on remand did not address the Commissioner's concerns set forth in his June 2015 decision, which remanded the matter to the OAL; the ALJ's acknowledgement that she simply recited the facts as found in her April 2015 Initial Decision and conducted no further fact finding is in direct contravention of the Commissioner's instructions; the Initial Decision on remand does not make factual findings as to which course credits were accepted by the SBE toward the 60 semester-hour credit requirement in liberal arts under *N.J.A.C.* 6A:9B-10.1(a)(3), nor which credits were rejected by the SBE; and such factual findings are necessary for the Commissioner to determine whether the SBE acted consistently with applicable statutory and regulatory provisions when it denied the petitioner's application for a CE. Accordingly, the Commissioner remanded the matter to the OAL for further action and development of the record consistent with the instant decision and the Commissioner's June 2015 decision.

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

February 16, 2016

OAL DKT. NO. EDU 15958-15
(EDU 13688-14 ON REMAND)
AGENCY DKT. NO. 234-8/14

| | | |
|---|---|---|
| LAURIE WARD, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the Initial Decision issued April 28, 2015 by the Office of Administrative Law ("OAL"), and the subsequent Initial Decision issued December 31, 2015 (in response to the Commissioner's June 12, 2015 remand) have been reviewed. The exceptions filed by respondent, State Board of Examiners ("Board") – pursuant to *N.J.A.C.* 1:1-18.4 – were also considered. For the reasons stated herein, the Commissioner is constrained to remand the matter to the OAL for further proceedings and for development of a factual record.

In this action, petitioner disputes the Board's May 22, 2014 decision denying her application for issuance of a Teacher of Preschool through Grade Three Certificate of Eligibility. The Board denied her application because she was 12 credits short of the 60 semester-hour credits required under *N.J.A.C.* 6A:9B-10.1(a)(3).[1] Specifically, the Board found that certain courses petitioner took in theology and bible do not qualify as liberal arts courses because they "are not intended to provide general knowledge, rather, in depth study of a particular discipline" and "do not suffice as providing a one-to-one correspondence between the licensure deficiency, i.e., 12 liberal arts credits, and what [petitioner] proffered." (Board Decision at 2-3).

[1] *N.J.A.C.* 6A:9B-10.1(a)(3) requires that candidates seeking a Preschool through Grade Three Certificate of Eligibility "complete a liberal arts, science, dual content or interdisciplinary academic major or a minimum of 60 semester hour credits in liberal arts and/or science." The regulation was cited as *N.J.A.C.* 6A:9-11.1(a)(3) prior to the amendments which took effect on July 7, 2014.

Petitioner appealed the Board's determination. Respondent filed a motion for summary decision, and the parties agreed to proceed without a hearing. In her April 28, 2015 decision, the Administrative Law Judge ("ALJ") denied respondent's motion, reversed the Board's determination, and granted summary decision in favor of petitioner.

Upon review, in his June 12, 2015 decision, the Commissioner found that "no findings of fact were made by the ALJ as to which course credits the Board had rejected, or which course credits the Board counted toward the 60 semester-hour liberal arts credits requirement under *N.J.A.C.* 6A:9B-10.1(a)(3)." *Ward v. Board of Examiners*, Commissioner Decision No. 198-15, decided June 12, 2015, at 2-3. The Commissioner further found that the Initial Decision lacked citations to the record and the requisite listing of exhibits admitted into evidence. *Id.* at 3. Finally, the Commissioner remanded the matter to the OAL because "[a]bsent specific factual findings as to which course credits were accepted by the Board in satisfaction of the 60 semester-hour liberal arts credits requirement under *N.J.A.C.* 6A:9B-10.1(a)(3), which course credits were rejected by the Board, and which course descriptions were evaluated by the Board in connection with petitioner's subsequent request for a credentials review," he was unable to determine whether the Board's decision was consistent with applicable statutory and regulatory provisions. *Ibid.*

On remand, the ALJ indicated in the December 31, 2015 Initial Decision that she "made no further independent fact finding but recited the undisputed facts as conveyed by the parties." (Initial Decision at 3). The ALJ then incorporated the legal analysis and conclusions of the Initial Decision issued April 28, 2015. (*Ibid.*)

In its exceptions to the December 31, 2015 Initial Decision, respondent asserts that the matter must be remanded because it fails to address the deficiencies identified in the Commissioner's June 12, 2015 remand decision. (Respondent's Exceptions at 2-4). Specifically, respondent contends that the parties did not have the opportunity to address the issues raised in the Commissioner's remand decision because they did not receive a Notice of Hearing, pre-hearing conference notice, or a request for supplemental briefing from the ALJ. (*Id.* at 3). Instead, respondent argues, "the ALJ issued a second

Initial Decision elaborating on the facts from the parties' original moving papers, ignoring the specific issues identified in the Commissioner's decision[.]" (*Ibid.*).

Upon a comprehensive review of the record in this matter, the Commissioner agrees with respondent that the Initial Decision did not address the Commissioner's concerns set forth in the June 12, 2015 remand decision. The ALJ acknowledged that she simply recited the facts as found in her April 28, 2015 decision and conducted no further fact finding, in direct contravention of the Commissioner's instructions. Indeed, the Initial Decision does not make factual findings as to which course credits were accepted by the Board toward the 60 semester-hour credit requirement in liberal arts under *N.J.A.C.* 6A:9B-10.1(a)(3) and which credits were rejected by the Board. Such factual findings are necessary for the Commissioner to determine whether the Board acted consistently with applicable statutory and regulatory provisions when it denied petitioner's application.

Accordingly, the Commissioner hereby remands this matter to the OAL, pursuant to *N.J.A.C.* 1:1-18.7, for further action and development of the record consistent with this decision and the Commissioner's decision issued June 12, 2015.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/16/16

Date of Mailing: 2/16/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 15958-15
AGENCY DKT. NO. 234-8/14

**LAURIE WARD,**

Petitioner,

v.

**NEW JERSEY STATE BOARD OF EXAMINERS,**

Respondent.

---

**Laurie L. Ward**, petitioner, pro se

**Laura M. Console**, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Decided: December 31, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

This matter was initially decided on April 28, 2015, at OAL DKT. NO. EDU 13688-14. By way of decision issued June 12, 2015[1], the Commissioner of the Department of Education (Commissioner) remanded the matter to the Office of Administrative Law (OAL) based on a finding that the original Initial Decision failed to make factual findings as to which course credits the State Board of Examiners had rejected or counted toward the 60 semester hour liberal arts credit requirement, and

[1] While the decision is dated June 2015, this matter was not received to this ALJ's chambers until October 2015.

which course descriptions were evaluated by the Board under N.J.A.C. 6A:9B-10.1(a)(3), in consideration of the petitioner's request for credentials review. The decision also requested a list of exhibits admitted into evidence.

The initial decision dated April 28, 2015, at OAL DKT. NO. EDU 13688-14, is hereby incorporated herein. The first paragraph of that decision noted the following facts were found as undisputed facts:

> The facts in this matter are undisputed and are **FOUND** as **FACT**. The petitioner applied for her Certificate of Eligibility for a Teacher of Preschool through Grade Three. Her application was denied by the Board on May 22, 2014, and the petitioner appealed requesting a credentials review. On April 4, 2014, the Board heard the application for the credentials review and ultimately determined that the petitioner was short twelve credits of liberal arts classes; therefore, was not eligible for the requested certificate. The Board has specifically disqualified petitioner's twelve liberal arts credits from 125 credit hours completed at Baptist Bible College. Petitioner appealed and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. During a telephone status conference, the parties mutually agreed to proceed without a hearing, opting to resolve the case by motion instead. By way of motion, the Board requested summary decision in its favor, upholding the denial of the petitioner's application for the Preschool through Grade Three Certificate.

As an initial matter, the Board's decision that formed the jurisdiction of this appeal stated on page 2, that "Ms. Ward was evaluated for completion of the 60 semester-hour credits in liberal arts and/or science and was found to be lacking 12 liberal arts credits." The Board's decision at pages 2-3 further stated, "A listing of courses provided by Mr. Dreyer and Ms. Ward's request of the Board to review the course descriptions do not suffice as providing a one-to-one correspondence between

the licensure deficiency, i.e. 12 liberal arts credits, and what she proffered." In the first paragraph of the decision, the Board noted that Ms. Ward requested that the Board consider her Theology and Bible courses taken at Baptist Bible College and Seminary in Summit, PA between 1990-1994, in fulfillment of the 12 liberal art credit requirement. One of the underlying facts referenced in the Board's decision was disputed by the parties, and were specifically referenced in the statement of facts in the State's briefs. The parties did not want a contested hearing to determine the propriety of any of these underlying facts and the State brought a motion for summary decision. The parties mutually agreed to resolve the matter by summary decision based on the same underlying facts that had been the underpinning of the Board's decision.

Accordingly, this Court found made no further independent fact finding but recited and relied upon the undisputed facts. Further, the matter was decided as a matter of law and the legal analysis and conclusions of the Initial Decision dated April 28, 2015, are incorporated herein.

By way of further clarification, the last page of the exhibit list had not been transmitted with the Initial Decision dated April 28, 2015. That was a clerical error which is corrected by its inclusion to this Initial Decision. The exhibits relied upon in this decision were submitted by the parties as the undisputed record.[2]

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

[2] Several additional exhibits were submitted in the briefs but were omitted because they were copies of transmittals to the OAL or briefs filed by the parties, which are not evidence.

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

December 31, 2015
DATE

Tiffany M Williams
**TIFFANY M. WILLIAMS**, ALJ

Date Received at Agency: December 31, 2015

Date Mailed to Parties: JAN 6 - 2016

Laura Sanders
~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

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## APPENDIX

Joint Exhibits

J-1 New Jersey Department of Education State Board of Examiners Decision

J-2 Transcript and course description

71-16

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|---|---|---|
| ASSADOUR CHOUNGOURIAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner appealed determination of the respondent – the State Board of Examiners (SBE) – that he had not met the requirements for issuance of a School Psychologist certificate. Petitioner was notified of the SBE's determination by letter mailed on October 29, 2014, and initially submitted his *pro se* appeal on January 16, 2015; however, his appeal was not perfected until April 2015, despite notifications that the petition was incomplete. The SBE subsequently filed a motion for summary decision based on petitioner's failure to adhere to the 90-day time frame for the submission of appeals set forth in *N.J.A.C.* 6A:3-1.3.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.3(i), a petitioner must file a petition of appeal no later than the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the individual or agency that is the subject of the requested contested case hearing; a petitioner must also file proof of service on each respondent pursuant to *N.J.A.C.* 6A:3-1.3(a) and (h); the Commissioner may relax certain rules regarding controversies and disputes if "strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice," *N.J.A.C.* 6A:3-1.16; it is clear from the applicable regulations that the filing of a petition is not complete until the required service has been made upon the parties to the action, and in the case of the SBE, the Division of Law must be served as well, *N.J.A.C.* 6A:3-1.3(j); in the instant matter, petitioner failed to perfect the required service until months beyond the 90-day time frame despite communications which specifically set forth the requirement; and petitioner has set forth no compelling reason or explanation for his failure to complete such service. The ALJ concluded that the petitioner's appeal is time-barred. Accordingly, the SBE's motion to dismiss was granted and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

Februaru 16, 2016

OAL DKT. NO. EDU 8546-15
AGENCY DKT. NO. 81-4/15

| | | |
|---|---|---|
| ASSADOUR CHOUNGOURIAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/16/16
Date of Mailing: 2/17/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**GRANTING MOTION TO DISMISS**
OAL DKT. NO. EDU 8546-15
AGENCY DKT. NO. 81-4/15

**ASSADOUR CHOUNGOURIAN,**
Petitioner,
v.
**NEW JERSEY STATE BOARD OF EXAMINERS,**
Respondent.

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**Assadour Choungourian**, petitioner, pro se

**Laura M. Console,** Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: December 23, 2015 Decided: January 13, 2016

BEFORE **PATRICIA M. KERINS,** ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Assadour Choungourian (Choungourian) appeals the denial of his application for issuance of a School Psychologist certificate by respondent New Jersey State Board of Examiners (Board). On June 11, 2015, his appeal was transmitted to the

Office of Administrative Law (OAL) by the Bureau of Controversies and Disputes (Bureau) of the Department of Education for a hearing as a contested case. Subsequent to that transmittal, respondent filed a Motion to Dismiss the petition based on petitioner's failure to fulfill the requirements of the "90-day" filing rule since service was not made upon the Division of Law within that time frame.

## FACTUAL DISCUSSION

At its September 19, 2014 meeting, the Board considered Choungourian's application for a School Psychologist certificate. Its written decision denying his application was mailed to petitioner on October 29, 2014. Choungourian, pro se, then filed his petition appealing the denial with the Bureau on January 16, 2015. However, he did not serve a copy of his petition on the Division of Law (Division) of the Department of Law and Public Safety as set forth in N.J.A.C. 6A:3-1.3(j). By letter dated January 20, 2015, Choungourian was advised by the Bureau of the requirements necessary for the complete and proper filing of a petition under the applicable regulations. Included in that letter was the requirement that service be made upon the Division.

In response to letters from petitioner dated February 24 and March 17, 2015, the Bureau responded by letter of March 24, 2015, advising petitioner that the filing of his petition was incomplete since he had not served it upon the Division. On April 7, 2015, petitioner mailed the petition to the Division, and on April 16, 2015, the Division acknowledged receipt by letter. On June 9, 2015, the Bureau transmitted the petition to the OAL for hearing as a contested case. Respondent then moved for dismissal of the petition based on petitioner's failure to serve the Division within the 90-day time frame set forth in N.J.A.C. 6A:3-1.3.

## LEGAL DISCUSSION AND ANALYSIS

The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. To initiate a contested case for the Commissioner's determination of a controversy or dispute

arising under the school laws, a petitioner shall prepare a petition of appeal meeting certain requirements and serve such petition upon each respondent. N.J.A.C. 6A:3-1.3(a). A petition of appeal must include the contact information of the respondent; state the allegations and facts giving rise to the appeal; state the specific relief sought; and include a notarized statement of certification. N.J.A.C. 6A:3-1.4(a). A petitioner must also file proof of service on each respondent. N.J.A.C. 6A:3-1.3(a) and (h). The petitioner must file a petition of appeal no later than the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the individual or agency that is the subject of the requested contested case hearing (90-day rule). N.J.A.C. 6A:3-1.3(i). The Commissioner may relax certain rules regarding controversies and disputes if "strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16.

In this matter, the Board argues that its motion to dismiss should be granted because Choungourian failed to file his petition of appeal within the 90-day period required under N.J.A.C. 6A:3-1.3(i). While petitioner submitted his appeal within the 90-day time frame encompassed by the regulation, the Bureau informed him by letter of January 20, 2015 of the requirements necessary for a complete filing of an appeal. Although that letter clearly sets forth the requirement that service be made upon the Division, it was not until April, and receipt of a second letter from the Board citing the requirement, that petitioner completed the service requirement upon the Division. Respondent argues that Choungourian has presented no valid reason why he did not fulfill the service until months after the 90-day period had run and that his petition should be dismissed.

It is clear from the applicable regulation that the filing of a petition of appeal is not complete until the required service has been made upon the parties to the action, and in the case of the Board of Examiners, the Division of Law as well. N.J.A.C. 6A:3-1.3(j). In this matter, petitioner failed to perfect such service until months beyond the 90-day time frame despite communication from the Bureau setting forth the requirement. Additionally, petitioner has set forth no compelling reason or explanation for his failure to complete such service.

For the reasons stated above, I **CONCLUDE** that Choungourian's petition of appeal is time-barred under the 90-day rule because the 90-day rule is strictly applied and there is no compelling reason to relax the rule.

## DECISION AND ORDER

Based on the foregoing, respondent's motion to dismiss petitioner's petition of appeal as time-barred under the 90-day rule pursuant to N.J.A.C. 6A:3-1.10 is **GRANTED**, and petitioner's petition is hereby **DISMISSED**.

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

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

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

January 13, 2016
DATE

Patricia M. Kerins
**PATRICIA M. KERINS**, ALJ

Date Received at Agency: January 13, 2016

Date Mailed to Parties: 1/19/16

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72-16AL


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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*


February 16, 2016

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Lauren A. Jensen, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *In the Matter of the Certificates of Gail Wunsch, Commissioner Appeal Dkt. No.* 1-2/16A
*Board of Examiners Docket No. 1112-190, OAL Dkt. No. EDE 9560-12*

Dear Counsel:

I have reviewed the materials filed in connection with the respondent Gail Wunsch's motion for leave to appeal the State Board of Examiners' (Board) denial of respondent's motion for interlocutory review in the above-captioned matter.

Upon review of the submissions, I find that respondent's motion for leave to appeal the Board's denial of respondent's motion for interlocutory review should be granted pursuant to *N.J.A.C.* 6A:4-3.4. The Secretary of the Board of Examiners is, therefore, requested to certify the record and submit it to the Commissioner – together with a statement of items comprising the record – within fifteen (15) days of receipt of this decision.

Respondent shall have (10) days from receipt of this decision to submit any additional arguments she may wish to make on the merits. Any response by the Board will be due (5) days after receipt of respondent's brief.

Sincerely,

David C. Hespe
Commissioner

c: Robert R. Higgins, Secretary, State Board of Examiners
Leslie Z. Celentano, ALJ
Clerk, Office of Administrative Law
State Law Library

DCH/MKD/BON

73-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

---X

In the Matter of the TENURE Charges Against

TONI LENZ,

Agency Dkt. No.
372-10/15

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

---X

Before **MELISSA H. BIREN, Esq.,** Impartial Arbitrator

**ORDER APPROVING SETTLEMENT OF TENURE CHARGES**

The State District Superintendent of the State Operated School District of the City of Newark, Essex County (the "District") certified tenure charges against Toni Lenz ("Respondent" or "Lenz"), a tenured teacher in the District. The District's counsel, Brenda Liss, Esq. (Riker Danzig Scherer Hyland & Perretti LLP), filed the tenure charges, alleging conduct unbecoming and other just cause, with the Commissioner of Education of the State of New Jersey; the Commissioner received the charges on October 26, 2015. Respondent, by her counsel, Nancy Oxfeld, Esq. (Oxfeld Cohen, PC) filed an answer with the Commissioner, received on November 5, 2015, denying the allegations and asserting various defenses. The Commissioner of Education, having reviewed the charges and the Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on November 16, 2015 pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time was granted.

The parties reached a mutually acceptable settlement of the tenure charges at a hearing on December 21, 2015. The settlement terms were thereafter set forth in a written Stipulation of Settlement ("Stipulation"). On February 10, 2016, the Stipulation, signed by the parties and counsel, was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-5.6, the settlement of the tenure

charges pursuant to the terms of the Stipulation is hereby approved; the standards for settlement have been satisfied as set forth below.

1. A copy of the Stipulation, as well as the Tenure Charges and the Answer are annexed to this Order.
2. The settlement of the tenure charges is warranted as it resolves the charges without additional cost to the State or to the parties. The settlement also removes the uncertainty of litigation for both the District and the Respondent.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Stipulation. Lenz signed the Stipulation indicating her voluntary agreement to its terms on February 1, 2016. The State District Superintendent signed the Stipulation indicating his voluntary agreement to its terms on February 9, 2016. Counsel for both parties likewise signed the Stipulation. In addition, counsel for the District, Brenda Liss, Esq. (Riker Danzig Scherer Hyland & Perretti LLP), signed a Certification of Consent to Settlement Terms Pursuant to N.J.A.C. 6A:3-5.6(b) on February 9, 2016.
4. Respondent confirmed to the arbitrator at the hearing and in the Stipulation that she fully understands the settlement terms and that she voluntarily entered into the settlement with a full understanding of her rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. By the settlement, the District avoids the uncertainty of the outcome of the arbitration, the time and expense associated with litigation and any disruption to the District resulting from school personnel's participation in the hearing.
6. Respondent, who under the Stipulation's terms will be on an unpaid leave of absence until the start of the 2016-2017 school year, has not lost her

position in the District as a result of this settlement. She will be eligible for reinstatement in the 2016-2017 school year to any position to which she is entitled by virtue of her tenure and seniority in the District in accordance with the Stipulation's terms.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Toni Lenz, pursuant to the terms set forth in the Stipulation, is approved.

Dated: February 15, 2016

Melissa H. Biren, Esq., Arbitrator

State of New Jersey)

County of Essex )

On this 15th day of February 2016, before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree
Notary Public

**ROBERT D AGREE**
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018

**SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, with an address at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and TONI LENZ, residing at 114 Adelphi Street, Apt. D, Roselle, New Jersey 07203 ("Employee") (collectively, the "Parties").

**WHEREAS** Employee is a tenured teaching staff member employed by the District as a teacher;

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of unbecoming conduct and other just cause to the Commissioner of Education of New Jersey, captioned *In the Matter of Toni Lenz, State-operated School District of the City of Newark, Essex County* ("Tenure Charges"), and such charges were assigned Docket No. 327-10/15; and Employee filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Employee's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to arbitration and assigned Arbitrator Melissa Biren ("Arbitrator") to conduct a hearing;

**WHEREAS** the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE,** subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon execution of this Agreement and approval by the Arbitrator, Employee will be placed on unpaid leave of absence, and such unpaid leave will extend until the first day on which teaching staff members are required to report to work for the 2016-2017 school year. Employee acknowledges and agrees that she will not be entitled to any compensation or benefits during the leave of absence, and she agrees not to exercise her preferred eligibility rights, if any, to the position of Teacher of Graphic Design (vocational) prior to the 2016-2017 school year.

2. In the 2016-2017 school year and thereafter, Employee shall be entitled to reinstatement to any position to which she is entitled by virtue of her tenure and seniority in the School District. Employee shall have no right to employment with the School District, in the 2016-2017 school year or at any time thereafter, except in any position to which she is entitled by virtue of tenure and seniority.

3. In exchange for Employee's agreement to the terms of paragraphs 1 and 2 above, the School District agrees to withdraw the Tenure Charges, and further agrees not to pursue the Tenure Charges so long as this Agreement remains in effect and is not ruled invalid or void by any court or administrative agency of competent jurisdiction. However, if this Agreement is ruled invalid or void, the School District retains the right to pursue action against Employee, including but not limited to tenure charges and termination of her employment.

4. During the period of leave set forth in paragraph 1 above, Employee shall not enter onto the premises of any school in the School District without express written permission of the principal. If Employee does enter onto the premises of any school in the School District without such permission, all of the School District's obligations under this Agreement shall cease immediately.

5. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Employee hereby waives and releases any and all claims of any nature against the School District, including any claim for attorneys' fees, costs or other monetary relief, and hereby releases and discharges the School District with respect to any and all claims or rights that she has or may have against the School District. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Employee's employment with the School District or separation from employment with the School District. It specifically includes, without limitation, all claims which Employee may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the

New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the School District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Employee agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the School District that are still pending in any and all courts and/or agencies. This Settlement is intended to be the final resolution of all outstanding matters between the District and Employee. Should Employee fail to withdraw any such pending claims or suit, this Agreement will serve as Employee's formal written notice of withdrawal of those pending claims or suits.

6. Notwithstanding the terms of paragraph 5 of this Agreement, Employee does not hereby waive any right she may have to workers compensation benefits or pension benefits. Moreover, notwithstanding the terms of paragraph 5, Employee is not and shall not be prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor or the Equal Employment Opportunity Commission. Should either such agency file a charge, action, complaint or lawsuit against the School District based upon any of the claims in Paragraph 5, Employee agrees not to seek or accept any resulting relief whatsoever.

7. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Employee of the legal requirements of the Act and fully incorporates the legal

requirements by reference into this Agreement. Accordingly, by executing this Agreement, Employee acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Employee understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

8. Upon inquiry from any third party to authorized employees or representatives of the School District, those employees or representatives will provide no information regarding Employee other than to confirm Employee's employment, position, salary and dates of employment.

9. Employee shall keep the terms of this Agreement strictly confidential. In the event of any breach of this confidentiality provision, all of the School District's obligations under this Agreement shall cease immediately.

10. This Agreement shall not constitute a precedent in any matters involving other employees.

11. The Parties each acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

12. Each signatory to this Agreement understands, acknowledges and agrees that this Agreement constitutes the full agreement of the parties and may not be altered, amended,

modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

13. This Agreement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Agreement.

14. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

15. This Agreement or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Agreement jointly prepared this Agreement.

16. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Agreement.

17. If any provision of this Agreement is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

18. This Agreement is subject to approval by the Superintendent and further subject to approval by the arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon

approval by the Superintendent and the arbitrator. Any disapproval by the Superintendent or the arbitrator shall not interfere with the rights of either party to pursue the matter further.

Dated: 2/1/16

TONI LENZ

Dated: 2/8/16

NANCY I. OXFELD, ESQ.
Attorney for Toni Lenz

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

Dated: 2/9/16

By: CHRISTOPHER CERF
State District Superintendent

Dated: 2/9/16

BRENDA C. LISS, ESQ.
Attorney for State-operated School District of the City of Newark

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 2/9/16

Brenda C. Liss, Esq.
Riker Danzig Scherer Hyland & Perretti LLP
Attorneys for State-operated School District of the City of Newark

**APPROVED:**

Dated: 2/15/16

Melissa Biren, Arbitrator

## CERTIFICATION

I, TONI LENZ, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 2/11/16

TONI LENZ

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RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(973) 538-0800
Attorneys for State-operated School District of the City of Newark

| | |
|---|---|
| In the Matter of<br><br>TONI LENZ,<br><br><br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX | **NOTICE OF TENURE CHARGES OF UNBECOMING CONDUCT AND OTHER JUST CAUSE** |

**TO: TONI LENZ**

**PLEASE TAKE NOTICE** that Vanessa Rodriguez, Chief Talent Officer of the State-operated School District of the City of Newark, hereby files charges of unbecoming conduct and other just cause against Toni Lenz ("Respondent"), a tenured teacher employed by the State-operated School District of the City of Newark ("School District"), pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1.

**CHARGE ONE: UNBECOMING CONDUCT**

1. Respondent has engaged in conduct unbecoming a professional teaching staff member. Specifically, Respondent has committed the following acts, each and all of which constitute unbecoming conduct:

2. On December 13, 2014, Respondent was arrested for unlawfully and knowingly possessing marijuana in violation of N.J.S.A. 2C:35-10(A)(4), and using or possessing with the intent to use drug paraphernalia with the purpose to inhale and/or ingest a controlled dangerous

substance, specifically by possessing two metal pipes, in violation of N.J.S.A. 2C:36-2; and Respondent was served with a Summons and Complaint in connection with her arrest;

3. A final disposition of the charges against Respondent was entered by order of the Municipal Court of the Borough of Roselle on February 19, 2015. By such order, Respondent was granted suspended proceedings and placed on conditional discharge for a period of one year pursuant to N.J.S.A. 2C:36A-1.

4. Such disposition indicates that Respondent neither admitted nor denied the charges of unlawfully possessing marijuana and using or possessing with the intent to use drug paraphernalia with the purpose to inhale and/or ingest a controlled dangerous substance, specifically by possessing two metal pipes.

5. By Respondent's failure to deny the criminal charges against her, the School District infers that Respondent in fact engaged in the conduct that led to her arrest.

6. Such conduct violated the law and School District policy, and was conduct unbecoming a professional teaching staff member.

**CHARGE TWO: UNBECOMING CONDUCT**

7. The School District repeats the allegations of Count One as if set forth at length herein.

8. Respondent failed to report her arrest to the Superintendent or any other official of the School District, as required by N.J.A.C. 6A:9B-4.1(c) and School District policy.

9. Respondent failed to notify the Superintendent or any other official of the School District of the disposition of the charges within seven days of disposition of the charge, as required by N.J.A.C. 6A:9B-4.1(c) and School District policy.

10. Such failure violated the law and School District policy, and was conduct unbecoming a professional teaching staff member.

**TENURE CHARGE THREE: OTHER JUST CAUSE**

11. Each and all of the acts and failures to comply with reporting requirements described in paragraphs 2-10 above constitute other just cause for dismissal of a tenured teaching staff member.

**WHEREFORE**, the undersigned hereby requests the following relief:

a. Dismissal of Respondent from the position in which she has tenure in the School District;

b. Suspension of Respondent, without pay, pending review and consideration of these Charges; and

c. Such further relief as may be authorized by law and deemed equitable by the State District Superintendent, the Commissioner of Education, and any assigned arbitrator.

**These charges are supported by the Statement of Evidence annexed hereto.**

Dated: September 4, 2015

Vanessa Rodriguez
VANESSA RODRIGUEZ

Sworn to and subscribed before
me on this 4 day of September, 2015

Bernard Mercurio, Esq.
Attorney at Law of the State of New Jersey

OXFELD COHEN, P.C.
60 Park Pl, 6th Floor
Newark, NJ 07102-5504
973-642-0161
Attorneys for the Respondent

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|---|---|
| **IN THE MATTER OF THE TENURE HEARING OF TONI LENZ, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY** | **BEFORE THE COMMISSIONER OF EDUCATION**<br>**STATE OF NEW JERSEY**<br><br>**AGENCY DOCKET NO.: 327-10/15**<br><br>**ANSWER TO TENURE CHARGES** |

The Respondent, Toni Lenz, by way of response to the Tenure Charge against her, hereby states as follows:

1. Respondent denies the allegations of Paragraph 1 of the Tenure Charges.

2. Respondent admits the allegations of paragraphs 2 and 3 of the Tenure Charges against her.

3. Respondent denies the allegations of paragraphs 4, 5 and 6 of the Tenure Charges against her.

4. In response to paragraph 7 of the Tenure Charges against her, Respondent repeats her responses to paragraphs 1 through 6 of the Tenure Charges against her as though set forth at length herein.

5. Respondent denies the allegations of paragraphs 8, 9, 10 and 11 of the Tenure Charges against her.

**FIRST SEPARATE DEFENSE**

The instant Tenure Charges must be dismissed, for failure of the State District Superintendent to comply with the requirements of N.J.S.A. 18A:6-13.

**SECOND SEPARATE DEFENSE**

The within Tenure Charges must be dismissed based on principles of res judicata and collateral estoppel.

**THIRD SEPARATE DEFENSE**

To the extent the Tenure Charges allege violation of the Administrative Code and/or policies of the Newark Public Schools, such allegations, if true, are not sufficient to merit dismissal or reduction in compensation of the Respondent.

**FOURTH SEPARATE DEFENSE**

The action of the State District Superintendent in seeking to have the Respondent reduced in compensation or dismissed from tenured employment is arbitrary, capricious and unreasonable, in that Respondent is being held to a higher standard of knowledge and conduct as a teacher of Art than the State District Superintendent holds those responsible for knowledge of and enforcement of the State Administrative Code and the Newark Public Schools' policies.

**WHEREFORE,** Respondent hereby requests that:

(a) The Tenure Charges against her be dismissed;

(b) She be reinstated to her position of employment together with all lost pay and benefits of employment.

OXFELD COHEN, P.C.
Attorneys for Respondent

By: _____
NANCY I. OXFELD, ESQ.

Dated: 4/4/15

OXFELD COHEN, P.C.
60 Park Pl, 6th Floor
Newark, NJ 07102-5504
973-642-0161
Attorneys for the Respondent

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|---|---|
| **IN THE MATTER OF THE TENURE HEARING OF TONI LENZ, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY** | **BEFORE THE COMMISSIONER OF EDUCATION**<br>**STATE OF NEW JERSEY**<br><br>**AGENCY DOCKET NO.: 327-10/15**<br><br>**CERTIFICATION OF SERVICE** |

I hereby certify that a copy of the within answer has been served upon counsel for the Petitioner:

Brenda C. Liss, Esq.
Riker Danzig
One Speedwell Avenue
Morristown, New Jersey 07962

NANCY I. OXFELD, ESQ.

Dated: 11/4/15

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74-16

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

February 12, 2016

Randi Donor April, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Eric L. Harrison, Esq.
Methfessel & Werbel
2025 Lincoln Highway, Suite 200
P.O. Box 3012
Edison, New Jersey 08818

Re: *Lori Russo v. Board of Education of the Upper Freehold Regional School District, Monmouth County, Agency Docket No. 378-12/15.*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's purported answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

OAL DKT. NO. EDU 10599-15
(EDU 7290-14 ON REMAND)
AGENCY DKT. NO. 136-5/14

| | | |
|---|---|---|
| J.C., ON BEHALF OF MINOR CHILD, J.C. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY, | : | ORDER |
| RESPONDENT. | : | |

On October 22, 2015, a final agency decision was rendered in this matter, wherein the Commissioner assessed petitioner $20,453.44 in tuition to compensate the Board for her child's period of ineligible attendance in the public schools of the district – during a portion of the 2013-2014 school year and the entire 2014-2015 school year – pursuant to *N.J.S.A.* 18A:38-1, and dismissed petitioner's appeal. The Board subsequently notified the Commissioner that petitioner has failed to comply with his decision and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10.

While petitioner expressed disagreement with the outcome of the underlying proceedings in her letter dated January 30, 2016, she offered no valid reason why the judgment against her should not be recorded. Notably, petitioner does not assert that any error has been made in calculating the amount of judgment sought; moreover, *N.J.A.C.* 6A:3-12.1(b)1 does not permit the non-prevailing party to "dispute the fact that monies are owed or the amount of such monies as reflected in the final order of assessment."

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Jessica Chinn is now subject to entry of a judgment by the court in the amount of $20,453.44, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/17/16

Date of Mailing: 2/22/16

74-16L

74-16

# State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

February 12, 2016

Randi Donor April, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Eric L. Harrison, Esq.
Methfessel & Werbel
2025 Lincoln Highway, Suite 200
P.O. Box 3012
Edison, New Jersey 08818

Re: *Lori Russo v. Board of Education of the Upper Freehold Regional School District, Monmouth County, Agency Docket No. 378-12/15.*

Dear Counsel:

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Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

February 22, 2016

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, NJ 08625

*Re: Request for Docketing of Judgment*

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the February 17, 2016 Order of the Commissioner of Education finding that Jessica Chinn is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *J.C., on behalf of minor child, J.C. v. Board of Education of the City of Linden, Union County.*[1] By copy of this letter, I am advising Ms. Chinn, as well as counsel for the Linden City Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/DCS

Enclosure
c: Jessica Chinn (with copy of Order)
Joy B. Tolliver, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Chinn's initials, her full name is included within the body of the Commissioner's Order.

76-16

| | | |
|---|---|---|
| MELANIE PERKINS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a non-tenured teaching staff member formerly employed by the respondent Board – appealed the non-renewal of her contract following her notification, by letter dated March 31, 2015, that she would not be recommended for renewal for the 2015-2016 school year. Petitioner filed her appeal with the Commissioner on August 10, 2015, challenging her non-renewal as arbitrary, capricious, and without basis in fact or law. The Board filed a motion to dismiss, asserting that the appeal was time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: the petitioner had notice of the Board's decision to non-renew her contract as of March 31, 2015; the time for filing a petition is clearly set forth at *N.J.A.C.* 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed no later than the 90th day from the date of receipt of the notice of a final order or ruling; in this case, the petition should have been filed on or about June 30, 2015; however, petitioner waited almost a full month and a half after that date, and filed on August 10, 2015. The ALJ concluded that the within petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i). Accordingly, the ALJ granted the Board's motion to dismiss in lieu of an answer, and dismissed the petition.

Upon careful review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein, and dismissed the petition.

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

February 22, 2016

OAL DKT. NO. EDU 13750-15
AGENCY DKT. NO. 218-8/15

| | | |
|---|---|---|
| MELANIE PERKINS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter – for the reasons stated therein – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/22/16
Date of Mailing: 2/22/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION GRANTING**
**MOTION TO DISMISS**
OAL DKT. NO. EDU 13750-15
AGENCY DKT. NO. 218-8/15

**MELANIE PERKINS,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,**
Respondent.

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**Christopher M. Manganello**, Esq., for petitioner

**Robert A. Muccilli**, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: December 22, 2015 Decided: January 15, 2015

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

Petitioner, Melanie Perkins filed a petition claiming that the Board's decision not to renew her employment contract for the 2015-2016 school year was arbitrary, capricious and without basis in law. The respondent Board of Education of the Township of Gloucester (Board) has moved to dismiss the appeal in lieu of an answer

for failure to timely file her petition within ninety days as required by N.J.A.C. 6A:3-1.3(i).

## PROCEDURAL HISTORY AND SUMMARY OF FACTS

Petitioner was a non-tenured teaching staff member under contract with Gloucester Township Public Schools for the 2014-2015 school year. By letter dated March 31, 2015, Kim R. Capone, the Supervisor of Human Resources for Gloucester, notified petitioner that she would not be recommended for a renewal of her contract for the upcoming 2015-2016 school year. This notice advised petitioner of her right to request, in writing, a statement of the reasons for such non-reemployment. The notice further advised that, within ten days of receiving the Board's statement of reasons, the petitioner may request in writing an informal appearance before the Board.

Angel McDermott, on petitioner's behalf, requested an informal appearance before the Board otherwise known as a Donaldson hearing. Petitioner's Donaldson hearing was held on May 11, 2015. The Board decided not to offer re-employment for the 2015-2016 school year. By letter dated May 12, 2015, the petitioner was notified of the outcome of this hearing. More specifically, the notice informed petitioner that the Board had affirmed the superintendent's non-renewal and additionally advised petitioner that her employment would terminate at the close of business on June 30, 2015.

On August 10, 2015, petitioner filed the present petition with the Commissioner of Education, challenging her non-renewal as arbitrary, capricious and without basis in fact or law. Daniel Long, Esq. filed an answer on respondent's behalf on September 1, 2015, but later confirmed that he filed it in error as he was not representing the Board in the present case. The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 8, 2015. On September 17, 2015, pursuant to an extension, the Board filed a Motion to Dismiss the Petition of Appeal in Lieu of an Answer. Also, pursuant to an extension, Christopher Manganello, Esq. filed opposition to the motion to dismiss on December 23, 2015. The Board filed a reply on December 22, 2015.

## LEGAL DISCUSSION

After an individual files a petition of appeal with the Department of Education initiating a contested case pursuant to N.J.A.C. 6A:3-1.3, a respondent is required to serve an answer upon the petitioner within twenty days after receipt of the petition. N.J.A.C. 6A:3-1.5(a). In lieu of an answer, the respondent may file a motion to dismiss the petition. N.J.A.C. 6A:3-1.5(g).

Should a motion to dismiss be filed in lieu of an answer, the Commissioner may, prior to the transmittal of the pleadings to the OAL, "dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.10. "[W]here the Commissioner does not determine to dismiss the matter pursuant to N.J.A.C. 6A:3-1.10, the Commissioner may . . . transmit the matter for hearing before the OAL . . . , [which] shall be conducted in accordance with the rules of the OAL." N.J.A.C. 6A:3-1.11. In the present case, the Board filed a motion to dismiss in lieu of an answer, which the Commissioner transmitted to the OAL.

In pertinent part, N.J.A.C. 6A:3-1.3(i) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The ninety-day rule is a mandatory rule, set forth by regulation and uniformly enforced. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572 (1993). Although this provision does not address what circumstances constitute "adequate notice," the New Jersey Supreme Court has offered guidance. The ninety-day period for filing a petition begins when a party learns of facts that would enable the filing of a timely claim. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 588 (1993). "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Id. "The ninety days

begins to run when notified of an adverse action regardless of whether the action is proper, and when petitioner learns of facts that would enable her to file a timely claim." Id. at 588.

In non-renewal of a non-tenured teaching staff member, the ninety-day period begins to run on the date the teaching staff member is notified of the non-renewal decision. In Nissman v. Bd. of Educ., 272 N.J. Super. 373, 381-382 (App. Div. 1994), Nissman received notice of the non-renewal of her contract on April 27, 1990, and continued to work in her position until August 31, 1990, the last day of her contract. On August 31, 1990, she faxed correspondence to the Board alleging that, as she had served three consecutive years in her position, and she had acquired tenure, pursuant to N.J.S.A. 18A:28-5(a). The Board replied on the same day, stating that the Board had taken formal action at its April 23, 1990, meeting, to terminate petitioner's contract and that petitioner had been duly notified of such action.

Nissman filed an appeal on September 21, 1990, alleging that the Board's August 31, 1990 correspondence constituted Board action in an effort to deny her tenure rights and, since her petition was filed within ninety days of August 31, it was timely filed. The court held that, for purposes of the ninety-day rule, the relevant date is the date that the petitioner received the non-renewal notice from the superintendent., In that regard, the appeal is not from a denial of tenure, but rather from the non-renewal, an action clearly contrary to Nissman's interests, and clearly known to her as of April 27, 1990. Thus, the court determined that the ninety-day period must be measured from that action.

Additionally, in Clark v. Winslow Twp. Bd. of Educ., 2011 U.S Dist. Ct. (February 9, 2011), the Court dismissed the plaintiff's race discrimination claims as time barred. The Court held that Clark's claims began running when she was notified via hand delivery on May 2, 2008, that she would be deemed non-renewed as of May 5, 2008. Clark alleged that her non-renewal did not occur until her June 25, 2008, Donaldson hearing before the Board of Education. However, the Court stated:

> Clark's assertion that the non-renewal did not occur until the Board of Education hearing on June 25, 2008 is belied by her own complaint. She alleges that the purpose of the hearing was to "convince the BOE to offer re-employment" and that, at the hearing, "the BOE affirmed its decision to terminate Plaintiff's employment." Indeed, New Jersey law is clear. Clark's non-renewal must have occurred prior to the Board of Education hearing because the hearing must take place after a statement of reasons for non-renewal is provided.
>
> Id. at 9.

Here, the petitioner violated the statute of limitations by filing the petition beyond the ninety-day limitation period. Petitioner was specifically informed on March 31, 2015, that the superintendent would not recommend renewal of her employment contract in the following school year. At that point, she had notice of an adverse action and facts that would enable her to file an appeal. Petitioner acknowledged in her own petition that she had notice of the adverse employment action against her as early as March 31, 2015. She admitted that she was "advised that she would not be recommended for renewal for the 2015-16 school year" on March 31, 2015. Petition, August 12, 2015, ¶3. This action was clearly contrary to her interest, and gave her notice of facts that would enable her to file an appeal. Therefore, March 31, 2015, is the relevant date for calculating the ninety-day limitation period.

Additionally, as discussed in Clark v. Winslow Twp. Bd. of Educ., supra, the assertion that the decision of non-renewal occurred after the Donaldson hearing, which took place on May 11, 2015, is belied by the petitioner's own allegations. The hearing could not have taken place before petitioner was notified of the non-renewal decision. The petitioner had notice of the Board's decision before the Donaldson hearing. Therefore, the relevant date for the ninety-day limitation period is not the date of the Donaldson hearing, but the date the petitioner was notified of the non-renewal decision, which in this case is March 31, 2015. In order to have been timely filed, the petition must have been filed within ninety days of this notification, on or about June 30, 2015. However, petitioner waited almost a full month and a half after June 30, 2015, and filed on August 10, 2015. Therefore, the petitioner did not file the petition in a timely manner as prescribed by N.J.A.C. 6A:3-1.3(i).

## CONCLUSION

Petitioner had notice of the Board's decision of non-renewal of her contract as of March 31, 2015. In order to have been timely filed, the petition must have been filed within ninety days of this notification, on or about June 30, 2015. However, petitioner waited almost a full month and a half after June 30, 2015, and filed on August 10, 2015. Therefore, I **CONCLUDE** that petitioner failed to file the appeal within the ninety-day limitation period as required by N.J.A.C. 6A:3-1.3(i).

## ORDER

I hereby **ORDER** that respondent's motion to dismiss in lieu of answer is **GRANTED** and the petition **DISMISSED**.

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

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

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

January 15, 2016
DATE

**LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 1/15/16

Date Mailed to Parties: 1/15/16

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OAL DKT. NO. EDU 12736-14
AGENCY DKT. NO. 202-8/14

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement, respondent agreed to pay petitioner the sum of $3,385.80 – simultaneously with the execution of the parties' Agreement – in full and final settlement of all claims set forth in the petition. To the extent that said payment might have already occurred, the parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed settlement terms.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the parties' Agreement.

IT IS SO ORDERED.

Dault

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/16

Date of Mailing: 2/19/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 12736-14

AGENCY DKT. NO. 202-8/14

**BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWN OF KEARNY HUDSON COUNTY,**

Respondent.

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**Stanley Turitz**, Esq., for petitioner (Winne Banta, attorneys)

**Kenneth J. Lindenfelser**, Esq., for respondent

Record Closed: January 8, 2016 Decided: January 27, 2016

BEFORE **IRENE JONES**, ALJ:

On October 2, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for telephone conference on March 30, 2015 and during that time, the parties notified the undersigned that the matter was tentatively settled. On January 8, 2016, a signed Stipulation of Settlement and Board Resolution was forwarded to the undersigned and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the dismissal and **ORDER** that the parties comply with the dismissal terms and that these proceedings be **CONCLUDED**.

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

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

January 27, 2016

DATE

**IRENE JONES**, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 2 2016

sej

2-2-16

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

78-16

**STATE OF NEW JERSEY COMMISSIONER OF EDUCATION**

| | | |
|---|---|---|
| IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE | :: | DOE DOCKET NO. 336-10/15 |
| between | :: | |
| **STATE OPERATED SCHOOL DISTRICT, CITY OF NEWARK, ESSEX COUNTY** | :: | |
| Petitioner, | :: | **OPINION** |
| -and- | :: | **AND** |
| **JAJUANA VAUGHN**, | :: | **AWARD** |
| Respondent | :: | |

**BEFORE:** MICHAEL J. PECKLERS, ESQ., ARBITRATOR

**DATE(S) OF HEARING:** January 6, 2016; January 25, 2016

**DATE OF AWARD**: February 22, 2016

**APPEARANCES:**

For the Petitioner:

Robert Tosti, Esq., PURCELL, MULCAHY, HAWKINS, FLANAGAN & LAWLESS, LLC
Homere Breton, Executive Legal Assistant, Talent Office of Administrative Operation Services, Newark Public Schools

For the Respondent:

Colin M. Lynch, Esq., ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FREIDMAN, P.C.
Jajuana Vaughn, Respondent

## I. BACKGROUND OF THE CASE

Jajuana Vaughn is a tenured instructor of the State Operated School

District of the City of Newark, New Jersey, Essex County ("the District"). On August 25, 2015, the District executed a tenure charge against Ms. Vaughn, charging her with conduct unbecoming a teaching staff member by virtue of being AWOL, pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3. After being permitted to file a written statement of position in response to the charge, on October 27, 2015, State District Superintendent Christopher Cerf determined that there was probable cause to credit the evidence in support of the tenure charge, and that such charge if credited, was sufficient to warrant a dismissal or reduction in salary. Ms. Vaughn was then suspended without pay for a period of 120 days, per N.J.S.A. 18A:6-14, with the charges submitted to the Commissioner of Education and concomitantly served upon Ms. Vaughn via Federal Express on October 27, 2015. See, CERTIFICATE OF DETERMINATION.

In a November 23, 2015 letter to counsel, M. Kathleen Duncan, Director of the DOE Bureau of Controversies and Disputes, advised the parties that: "following receipt of the Respondent's answer on November 13, 2015, the above captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of Respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard."

By separate cover letter that same date, I was advised of my appointment

as Arbitrator pursuant to *P.L. 2012, c. 26* by Ms. Duncan. On December 8, 2015, I conducted a conference call with counsel, at which time a discovery schedule that included the propounding of interrogatories was set down. An initial hearing in the case was originally scheduled for January 6, 2016, but then subsequently cancelled. Oral argument in support of the respective positions was nevertheless undertaken during a conference call that was convened that afternoon.

A hearing took place on January 25, 2016 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey. At that time, counsel were provided with a full opportunity to introduce relevant and admissible documentary evidence; to participate in oral argument; and to engage in the direct and cross-examination of the witnesses who testified under oath. A verbatim transcription of the proceedings was provided by RIZMAN RAPPAPORT DILLON & ROSE. No post-hearing briefs were submitted, and the instant OPINION & AWARD is issued in timely fashion.

## II. FRAMING OF THE ISSUE

*Has the District satisfied its burden in having the tenure charge established by a preponderance of the credible evidence? If not, what shall the remedy be?*

## III. STIPULATION

- The basis of the tenure charge is the failure of Ms. Vaughn to properly advise the District of her status following the absences commencing on November 12, 2014.

## IV. STATUTORY & REGULATORY CONSIDERATIONS

### NEW JERSEY STATUTES ANNOTATED TITLE 18A

**18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system.** No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

**18A:6-16 Proceedings before commissioner; written response; determination**

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

**18A:6-17.1 Panel of arbitrators**

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

**NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION**

* * *

**SUBCHAPTER 1. GENERAL PROVISIONS**

* * *

**6A:3-1.5 Filing and service of answer**

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

**6A:3-5.1 Filing of written charges and certificate of determination**

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

**6A:3-5.3 Filing and service of answer to written charges**

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

**6A:3-5.5 Determination of sufficiency and transmittal for hearing**

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

## V. POSITIONS OF THE PARTIES

Petitioner State Operated School District City of Newark

This is a very circumscribed proceeding. The tenure charge basically

refers to a period of time beginning in September of 2014, in which a certain aspect of the District found it unsatisfactory that Ms. Vaughn did not respond to certain AWOL notices. If the District sends out an AWOL notice, it needs a response. Notwithstanding the fact there may be an excuse, it's good to tie those things together and say "[p]lease check with Health Services because they're aware that I'm out due to a serious automobile accident, and I am not in the Bahamas sipping Pina Coladas, as the Arbitrator said. I am ready, willing and able to come back to work when I can."

So this is a very technical case that as a professional, we expect our teachers to respond to notices. The crux of this case is therefore sort of legal verbiage as opposed to reality. The District understands that the term "conduct unbecoming" implies wrongdoing. That's not the case here. We live with the documents and laws that we're given, and the AWOL charge falls under the category of conduct unbecoming. It's not meant as a pejorative term or that she did something wrong, other than the limited scope of the question. From the District's perspective, we have to keep track of our teachers; to know that they come to school; if they are out, when they will come back to school. There can't be a nebulous relationship that extends forever with a current teacher who is not teaching.

In conclusion, the context of this case is that the higher-ups in the Newark Public Schools have people in Trenton who they report to. They have an open position, like Ms. Vaughn's, that extends without date. That is something that is

bureaucratically undesirable and almost forbidden. It is therefore very difficult to have a situation like this, and the District certainly understands and apologizes for people suggesting Ms. Vaughn retire, but that wasn't a formal position of the District. Ms. Vaughn said very eloquently how dedicated she is. There comes a time when that dedication may be interrupted by her health situation. So that is the reason for the charge, which should be taken with that understanding. She comes in peace, we come in peace. But we need to have a school district that operates efficiently and with full knowledge of what happens next week, next month and next year.

Respondent Jajuana Vaughn

The District in this case, and I am not referring to Mr. Breton, is — it's like cutting off their nose to spite their face, in this case. Ms. Vaughn is a dedicated teacher, who originally is from Pittsburgh, Pennsylvania. She was a teacher there and was recruited by the District to come here in 2001. She gave up all the time she had in Pittsburgh to come here to the City of Newark and teach its kids. Since then, she has shown herself to be an asset to the District, and testified to the impact she has had on some of the children of this community. She has successfully done her job and done her part. Ms. Vaughn has performed well. This is not a teacher who absent an injury, would be out of school.

Unfortunately, she has had some injuries starting in 2012. She got injured by a student in a work-related matter previously. Ms. Vaughn came back from

that, fought hard, and came back to work. No sooner had she come back from that, then in November 2014, she was driving home from school and got rear-ended through no fault of her own. This car accident added a new injury to her neck and exacerbated some back problems that she had. Since that time, she has been fighting to get back; had surgeries; and has been rehabilitating.

Ms. Vaughn did get a notice from the District in April of 2015, and she responded. The evidence includes numerous doctor's notes, and status reports that were filed with the District's Health Service's Department. They are stamped "File Received." These say why she is out and how long they anticipate her being out. Ms. Vaughn dutifully supplied these during the period of time she was out. She was told that's where to bring the notices. This is a legitimate injury, and since November of 2014, Ms. Vaughn has been doing everything she can to get back.

Ms. Vaughn explained that teaching is not just a job to her, it's a calling and she wants to make an impact on the kids. She does not want to retire and is too young. Frankly, she's 41 and believes that she's got a lot to offer the kids of this community. The record is pretty clear that when she was given notice by the District about letting them know her status, she did. It is not clear whether the eighth floor is not communicating with the ninth, or the ninth floor is not communicating with the eighth. One thing that is pretty undisputed though, is that she was keeping them advised from the minute she went out in November 2014 until the present. Fortunately, she's getting better, and expects to be able to

return to work. She had surgery in September, and is going to physical therapy. Ms. Vaughn expects and hopes to be back as soon as she is physically able to do so. Hopefully that will be relatively soon.

In conclusion, this is an educator who has been commended for her attendance in the past. Ms. Vaughn has dedicated her life to teaching and to the students in Newark. Under these circumstances presented, the District therefore cannot meet the burden of proving conduct unbecoming, which is a pretty severe charge for what we are talking about for the alleged missteps on the part of Ms. Vaughn. We do not think these were missteps, but even if they were, it would seem that a conduct unbecoming charge would seem to be unduly harsh. Discipline is also supposed to be progressive and there have been no prior increment withholdings. We accordingly ask that the Arbitrator conclude that the District did not meet its burden and that Ms. Vaughn should be returned to her position with the Newark Public Schools.

## VI. STATEMENT OF THE CASE

As I have often remarked in other cases, the tenure laws of the State of New Jersey were enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons." See generally, Viemeister v. Prospect Park Board of Education, 5 N.J. Super, 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a

tenured individual should accordingly not be lightly removed. See, In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." The District has acknowledged that it bears the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the subject tenure charge by a *preponderance* of the credible evidence. See, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Tenure Hearing of Ziznewski, A-0083-10T1, 2012 WL 1231874 (New Jersey Sup. Ct. App. Div. April 13, 2012) (unreported); see also, State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as the "[g]reater weight of the credible evidence in the case."); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954); see also, In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ. 1996).

In that event, the burden of production shifts to Respondent to plead and

establish her affirmative or exculpatory defenses. Should that be accomplished, the burden will finally return to the District to rebut this showing with substantial, credible evidence. After a determination has been made of whether the tenure charges have been established, Petitioner is then encumbered with the additional burden of demonstrating that the dismissal of Ms. Vaughn for the charged conduct is warranted. In deciding whether to remove Respondent from her tenured teaching position with the Newark Public Schools, I am required to give due weight to the totality of the circumstances, the nature of the act(s) and the impact on her career. See, In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

In Karins v. Atlantic City, 152 N.J. 532 (1998), the Supreme Court of New Jersey determined the phrase *unbecoming conduct* "is an elastic one that has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" citing, In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App. Div. 1990) (quoting, In re Zeber, 398 Pa. 35, 156 A. 2d. 821, 825 (1959); see also, Laba v. Board of Education, 23 N.J. 364, 129 A.2d 271 (1957); I/M/O The Tenure Hearing of Christopher Molokwu, OAL Docket No. EDU 9650-04 (Jones, ALJ). In the case at bar, the District has emphasized that of necessity conduct unbecoming was cited under the statute due to the perceived AWOL status of Ms. Vaughn, but recognized that she has committed no wrongdoing in the traditional sense.

Notice was also taken of Respondent's eloquent testimony regarding her dedication.

Upon my comprehensive analysis of the record evidence, with full consideration of the respective positions, I find that the Petitioner has failed to make the requisite prefatory showing, requiring that the instant tenure charges be **DISMISSED**. The underlying facts of the case are generally not in contention, and are found to be the following:

1. Jajuana Vaughn has been employed by the Newark Public Schools as an elementary teacher since September 2001, when she was recruited from Pittsburgh, Pennsylvania. She is tenured in her position, and at all times that are relevant for the purposes of the case, worked at the Brick Avon Academy. T28.

2. In or about October 1, 2012, Ms. Vaughn sustained a workplace accident, when she was struck with a chair by a special needs student. This eventually required her to take a continuous approved leave of absence commencing on January 16, 2013, until on or about March 25, 2013. See, POSITION STATEMENT, Joint Exhibit 4, at Tab A; T33:14-25; T34:1-3.

3. After returning to work in April of 2013, on or about May 22, 2013, Ms. Vaughn was pulled to the floor by another student. This aggravated her back condition. While she again attempted to teach, the condition of her back would not allow it. Ibid.

4. In the following 2013 – 2014 School Year, Ms. Vaughn was absent on leave from approximately November 14, 2013 until June 30, 2014. On August 28, 2014, the District notified Ms. Vaughn that the prior year's leave was approved, and that her request for an extension of her illness leave of absence from her position at the Louise A. Spencer School would be reviewed accordingly. See, STATEMENT OF EVIDENCE, at Exhibit 1.

5. The requested leave was again acknowledged by the District in a September 19, 2014 letter. Id. at Exhibit 2. Ms. Vaughn was out on sick leave from September 9, 2014 until October 9, 2014. By letter dated October 8, 2014, Respondent was notified by the

District's Chief Talent Officer Vanessa Rodriquez that her further request to extend her leave had been denied as a result of exhausting greater than 12 months of leave time. She was therefore directed to make appropriate arrangements to return to work as soon as possible. Id., at Exhibit 3.

6. On October 14, 2014, Ms. Vaughn was hired to fill a vacancy at the Brick Avon Academy, and reported for work until November 12, 2014.

7. On or about November 12, 2014, Ms. Vaughn was involved in a car accident, when she was rear-ended by another vehicle. The impact of the accident aggravated her pre-existing back injuries, and also caused a new injury to her cervical spine. See, POSITION STATEMENT, Id. at Joint Exhibit 4, Tabs B + C; T35:13-25.

8. Respondent currently has a herniated disc and disc bulge in her neck resulting from the car accident for which she is receiving treatment, in addition to her back injuries. Id., at Tab C.

9. On April 28, 2015, Ms. Rodriquez notified Ms. Vaughn via overnight mail that she had been AWOL since November 13, 2014; should return to work immediately; and was subject to disciplinary action. See, STATEMENT OF EVIDENCE, Id., at Exhibit 4; ATTENDANCE INCIDENT DETAIL REPORT at Exhibit 5.

10. While Ms. Vaughn failed to respond to the April 28, 2015 correspondence directly, she had been in contact with the District's Health Service's Department at all relevant times. See, POSITION STATEMENT, Id., at Tab D. Respondent had also asked them to notify the AOS. T36:18-25; T37:1-25; T38:1-25; T39-42.

11. In February 2015, Ms. Vaughn filed a claim for disability benefits through Unum, which indicated an inability to work beyond March 2, 2015. The medical certification was provided to the District's Health Service's Department. Id.

12. On or about May 4, 2015, Respondent provided Health Services with a letter from her pain management physician, which confirmed her inability to return to her teaching duties until at least May 29, 2015. Id.

13. A subsequent update was submitted to Health Services on May 20, 2015, which memorialized an inability to return to work through June 29, 2015. Id.

14. On August 27, 2015, additional medical updates were furnished to Health Services, which established Respondent's inability to work from July 29, 2015 through September 30, 2015. Id.

15. On September 1, 2015, Ms. Vaughn had surgery on her back, and on September 23, 2015 received injections to her cervical spine to help alleviate some of the pain. Id. at Tab E.

At the outset, I credit the position of Petitioner that it has a significant interest in not retaining positions for a prolonged period of time for instructors who may be unwilling or unable to return to duty following various leaves. That said, by any measure the District has failed to establish that Ms. Vaughn was "AWOL" within the traditional contemplation of that term, and instead has ably relied upon what I perceive as a technical argument in support of the instant tenure charge. It essentially conceded the same in its closing argument while at once recognizing Ms. Vaughn's eloquent and moving testimony concerning her dedication to the children of Newark as well as the long-term effect she has had upon some of them.

It is of course true that Ms. Vaughn did not respond directly to Ms. Rodriquez's April 28, 2015 letter. She should have done so and in a perfect world, that may have saved her from having these tenure charges brought. During her testimony, Respondent acknowledged receiving the correspondence, and explained that:

Q. Do you recall receiving the letter?

A. Yes I recall receiving this letter.

Q. Did you – upon receiving this letter, did you keep the District advised of your status?

A. Yes, I called – at the time, the date that I was given that, I had no ability to move my legs at that time. It was hard for me to get from my bed to the bathroom at that time. So I made a phone call to Health Services and let them know I received a letter, I don't know what to do about this letter.

And I said 'I can't drive and I can barely walk.' What should I do about this letter?

And I asked if my doctor's notes were good enough and I asked Health Services to please communicate with the – and I told them who the letter was from.

And I said 'could you please communicate and give them whatever information they need to just let them know I'm working as hard as I can to get my body back so that I could return as soon as possible?'

And they told me they would communicate the information to the other office.

T42-43.

There is however, no basis in fact for the statement by the chief talent officer that there had been no record of communication with Health Services. Respondent pled numerous affirmative defenses in her ANSWER, most particularly, that the teacher gave the District fair notice of the absences, which were for legitimate reasons. The record indicates and the parties do not dispute that Ms. Vaughn was injured-on-the job when a special needs student struck her with a chair. After receiving treatment, this situation was exacerbated when yet another student pulled her to the ground, reinjuring her back. And when

Respondent again fought back to return to the classroom, the November 2014 car accident took place. This added yet another layer of injuries upon the preceding ones, and ultimately has prevented Ms. Vaughn from returning to work.

Prior to that time, there were no issues with respect to Respondent's attendance, and in fact, the certificates entered into evidence reflect that during the month of March in both 2007 and 2008, she had perfect attendance. See, Respondent Exhibit 1(a); 1(b). Ms. Vaughn likewise received a CERTIFICATE OF APPRECIATION on June 16, 2012 for her support and dedication to the EMBRACING THE COMMUNITY FESTIVAL. Ibid., at 1(c). The Stipulation that was entered at hearing by counsel indicated that the only period at time considered for AWOL purposes was from November 12, 2014 forward.

I note that the District opted to file the tenure charge based on the discrete fact that Ms. Vaughn purportedly failed to respond to the April 28, 2015 letter with a status update, and not based upon incapacity grounds by virtue of her continued absence. It is therefore relegated to the facts as they are. On balance, the evidence demonstrates that Ms. Vaughn kept Health Services informed of her status at all times, including the period following the filing of the tenure charges. Parenthetically, there are numerous medical documents stamped received by the District's Health Department that appear at Tab D of Respondent's POSITION STATEMENT in evidence at Joint Exhibit 4.

In closing, notwithstanding the fact that Respondent failed to communicate directly with Ms. Rodriquez following the April 28, 2015 letter, she was diligent in keeping the District's Health Service's Department fully apprised of her status, which as Mr. Breton confirmed during his testimony was the procedure. Ms. Vaughn's credible and at times compelling testimony on this point was not rebutted, and she continued to express great interest in returning to the classroom.

The remaining question that must be answered is the proper remedy in this case. Respondent testified to her September 2015 surgery, as well as cervical spine injections which have assisted her in getting better. While she has made significant progress toward returning to the Newark Public Schools, she is continuing her rehabilitation and is not yet able to do so. Under these circumstances, she may not be left in legal limbo and I believe the District should be required to place her on an approved medical leave or leaves of absence through June 30, 2016. At that point, the parties may explore their options. She will be however, required to keep both Health Services and AOS fully informed of her continuing treatment and prognosis. IT IS SO ORDERED.

## VII. CONCLUSION

Petitioner State Operated School District of the City of Newark has failed to establish the tenure charges of unbecoming conduct by a preponderance of the credible evidence.

## AWARD

THE INSTANT TENURE CHARGE BROUGHT AGAINST MS. VAUGHN BY THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK IS DISMISSED WITH PREJUDICE. THE ENTIRE PERIOD IN QUESTION SHALL BE RECORDED ADMINISTRATIVELY AS AN APPROVED MEDICAL LEAVE(S) OF ABSENCE THROUGH JUNE 30, 2016. MS. VAUGHN SHALL BE UNDER A CONTINUING OBLIGATION TO PROVIDE BOTH THE HEALTH SERVICES DEPARTMENT AS WELL AS THE AOS WITH ALL RELATED MEDICAL DOCUMENTATION. THIS CONSISTS OF THE ENTIRE AWARD IN THIS MATTER.

Dated: February 22, 2016
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 22ND DAY OF FEBRUARY, 2016, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ZOILA R. VARGAS
NOTARY PUBLIC OF NEW JERSEY

79-16

**NEW JERSEY DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

In the Matter of the Tenure Hearing of Chet Churchill:

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**CAMDEN CITY SCHOOL DISTRICT**

"Petitioner,"

- and -

**CHET CHURCHILL**

"Respondent."

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Agency Docket No. 340-11/15

# DECISION APPROVING SETTLEMENT AGREEMENT

**Before**
**Joyce M. Klein**
**Arbitrator**

**Appearances:**

**For the Petitioner:**
Tara L. Humma, Esq.
Brown & Connery, LLP

**For the Respondent:**
Cosmas P. Diamantis, Esq.
Zeller & Wieliczko, LLP

On January 22, 2016, representatives of the State Operated School District of the City of Camden [the "Petitioner"] and Chet Churchill [the "Respondent"] met with the arbitrator, reviewed the terms of settlement and

formally adopted terms resolving the tenure charges filed by the Petitioner with the State of New Jersey, Department of Education on October 14, 2015. The terms of settlement were approved by Respondent on February 1, 2016. The terms were also approved by the Camden City School District on February 10, 2016.

The terms of settlement provide that Respondent Chet Churchill will tender his resignation in exchange for a monetary settlement of $40,000.00. The Settlement Agreement also provides that Respondent is not eligible for rehire, includes a general release and other terms addressing outstanding issues concerning Respondent's separation from employment with the District.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent and will allow both parties to move forward without using valuable educational time to proceed with the hearing in this matter. The Respondent's determination to tender his resignation in exchange for a monetary settlement will allow the District to continue its efforts to provide a thorough and efficient education to the District's students. The Respondent has been advised and understands that by accepting this settlement and tendering his resignation the Commissioner of Education has a duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Additionally, I note that both on the record and in the Settlement Agreement, Respondent acknowledged that he has read, understands and agrees with the terms of the Settlement Agreement and that he signed it "knowingly and voluntarily."

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: February 22, 2016
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 22nd day of February, 2016, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

PATRICIA G. MURRAY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/7/2018

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Chet Churchill ("Churchill") and the Camden City School District (the "District"). Together, Churchill and the District may be referred to herein as "the Parties."

**WHEREAS**, Chet Churchill is a teacher of Science;

**WHEREAS**, the District certified tenure charges against Churchill to the Commissioner of Education for inefficiency and other just cause;

**WHEREAS**, the Parties mutually desire to resolve this matter and believe this resolution is in the public interest;

**NOW, THEREFORE, IT IS HEREBY AGREED** by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by both the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

(a) Chet Churchill shall provide the District immediately, through its counsel, Brown & Connery, LLP, with an irrevocable letter of resignation to be attached to this agreement as Exhibit A in a form mutually agreed upon by the Parties. The resignation shall be effective on the date the agreement is fully executed by the Parties.

(b) The District reserves its rights to contest, appeal or challenge any past, present or future claim for unemployment benefits by Mr. Churchill to the extent permitted by law. Mr. Churchill reserves his rights to assert any and all defenses available to him in any proceeding where the District contests, appeals, or challenges any past, present, or future claim for unemployment benefits by Mr. Churchill.

3. Dismissal of Tenure Charges: The District shall take all necessary actions with the Commissioner of Education or his designee to withdraw the tenure action against Churchill bearing agency reference number 340-11/15.

4. Settlement Payment:

(a) The District shall pay Churchill the total sum of $40,000.00 ("Settlement Payment") in consideration for his irrevocable resignation from employment with the District and for his general release of claims and agreement not to sue in accordance with Sections 5 and 6 of this agreement.

(b) The District shall issue the Settlement Payment by way of a check payable to "Chet Churchill" between February 5, 2016 and February 28, 2016 following the receipt of:

(1) IRS W-9 Forms for Churchill and (2) an executed Child Support Judgment Certification as is required under N.J.S.A. 2A:17-56.23b.

(c) The Settlement Payment shall be reported on an IRS 1099 Form. Churchill assumes sole responsibility for all applicable state, federal and local taxes required to be paid with respect to the Settlement Payment. In addition, Churchill agrees that if any taxing authority seeks or deems due and owing from the District any taxes, interest, penalties or other amounts with respect to the Settlement Payment, he will indemnify and hold harmless the District for any sums it may be required to pay, and he will reimburse the District for any attorney's fees and costs it incurs in defending against such claims.

(d) The Settlement Payment shall be the total amount borne by the District under this Agreement. The District shall have no obligation to make any other payment to Churchill including, but not limited to, any form of back pay and/or any reimbursement for accumulated unused sick leave.

(e) The irrevocable letter of resignation shall be attached to this Agreement as Exhibit A and shall state that Mr. Churchill resigns from his position of employment with the Camden City School District effective the date this agreement is fully executed.

5. General Release: The District releases Churchill, and Churchill releases the District, from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that the District, or Churchill, has, ever had, or may have had, against Churchill, or the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims the District, or Churchill, asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which the District, or Churchill, is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

6. Covenant Not to Sue: Churchill warrants he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Churchill agrees that he will not commence any legal

proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Churchill's behalf, Churchill agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Churchill agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Churchill agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

7. Claims Not Released: Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Churchill is not waiving: (a) claims that were filed or could be filed under any state workers' compensation; (b) any claim arising from a breach of this agreement; or (c) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Churchill represents that he is not aware of any present basis for such claims. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Churchill agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 6, above.

8. Unemployment Disputes:

(a) Churchill is aware that the District disagrees that Churchill is entitled to unemployment benefits. Churchill understands, acknowledges, and agrees that nothing in this Agreement shall limit the District's right to pursue any appeals, suits, disputes, or challenges to Churchill's unemployment benefits compensation. Churchill understands, acknowledges, and agrees that the District can freely appeal, file suit, dispute, or otherwise challenge Churchill's receipt of, and application for, past, present, and future unemployment compensation.

(b) The District understands, acknowledges, and agrees that Churchill can freely assert any and all defenses available to him in any appeal, dispute, and/or challenge by the District for Churchill's receipt of, and application for, past, present, and future unemployment compensation benefits.

9. Older Workers Benefit Protection Act: The releases in section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Churchill specifically acknowledges that:

(a) He has been advised to consult with an attorney of his choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that he understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which he is not otherwise entitled and is adequate and sufficient to support his promises, covenants and releases as set forth in this Release;

(d) He has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period he will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) He has been advised that during the **seven (7) day** period following his execution of the Settlement Agreement and the Release, he may revoke his acceptance of this Agreement by delivering written notice to counsel for the District (as identified below), and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
**Brown & Connery, LLP**
360 Haddon Ave.
Westmont, NJ 08108

10. Not Eligible for Rehire: Churchill acknowledges and agrees that his employment with the District is irrevocably severed upon the effective date of this Agreement and that he is ineligible for re-hire as an employee of the District. Churchill agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Churchill's employment, the District shall have no obligation to consider or review his application for employment.

11. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

12. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

13. No Contingencies: The effectiveness of this agreement shall not be contingent on any event not articulated herein, including but not limited to any applications Churchill may file with the Teachers' Pension and Annuity Fund to purchase pension service credit and/or for retirement. Churchill understands the District has no control over the approval or denial of any such applications and he cannot revoke this Agreement based upon same.

14. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

15. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to

this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

16. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

17. Individuals Bound: This Settlement Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

18. Breach: Chet Churchill understands that if he breaches any provision of this Agreement, the District will file an action to enforce this Agreement. The District understands that if it breaches any provision of this Agreement, Churchill will file an action to enforce this Agreement.

19. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Chet Churchill:

Chet Churchill
133 Patricia Lane
Runnemede, NJ 08078

With a copy to:

Cosmas P. Diamantis, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire

Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 0810

20. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

**BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE**

**A. HE HAS READ IT;**

**B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;**

**C. HE AGREES WITH EVERYTHING IN IT;**

**D. HIS ATTORNEY NEGOTIATED IT WITH HIS KNOWLEDGE AND CONSENT;**

**E. HE HAS CONSULTED WITH HIS ATTORNEY ABOUT IT; AND**

**F. HE SIGNS IT KNOWINGLY AND VOLUNTARILY.**

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties hereby execute this Agreement.

**Chet Churchill**

2-1-16

**Date:**

**Paymon Rouhanifard**
**State District Superintendent**
**Camden City School District**

**Date:** 2/10/16

# EXHIBIT "A"

Mr. Chet R. Churchill
133 Patricia Lane
Runnemede, NJ 08078

February 1, 2016

Paymon Rouhanifard, State Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Re: Resignation Letter

Dear Mr. Rouhanifard:

Please be advised that I am resigning from the Camden City Public School District ("District") and my position as a Science Teacher. In accordance with Paragraph 4(e) of the Settlement Agreement and Release ("Agreement"), this resignation letter shall take effect upon the date the Agreement is fully executed by all parties.

Very truly yours,

Chet Churchill

Chet Churchill

SC-16

**STATE OF NEW JERSEY**
**COMMISSIONARE OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

---

**IN THE MATTER OF THE TENURE CHARGES OF:**

BOARD OF EDUCATION CITY OF LONG BRANCH COUNTY OF MONMOUTH.

AND **AWARD AND OPINION**

KEVIN GARIFINE, RESPONDENT
**Agency Docket No. 317-10/15**

BEFORE: ERNEST WEISS, ARBITRATOR

FOR THE RESPONDENT: MICHAEL T. BARRETT, ESQ.
BERGMAN & BARRETT

FOR THE DISTRICT: J. PETER SOKOL, ESQ.
McOMBER & McOMBER

**ISSUE: What shall be the disposition of the tenure charges filed against Respondent Kevin Garifine by Board of Education City of Long Branch County of Monmouth New Jersey.**

## BACKGROUND

Respondent Kevin Garifine has been employed by the District as a groundskeeper/plumber and worked in a number of capacities, in the various schools of the District, during his 13 years of service.

He was evaluated semi-annually and he received the highest mark in every evaluation during each year of his employment. There are no documented instances of discipline in evidence herein.

The "industrial capital punishment" of discharging Kevin Garifine occurred as a result of a playful incident on March 1, 2012 when Mr. Garifine and Mr. Rigo were working in the boys' bathroom of Gregory School. While Kevin Garifine was working in one of the stalls, several boys initially arrived in the bathroom, which increased eventually to approximately seven boys. The boys were being loud. The noise had significantly increased as testified by Respondent Garifine at the instant arbitration hearing. He also stated that he was a father of three children with various ages.

The children in question indicated that they were playing with the yellow Scotch tape for less than three minutes. It was "fun" and none complained that they were restrained when they returned to the classroom.

The tape in question, in evidence herein, was a half inch yellow Scotch electrical tape which was playfully given to some of the boys by Rrespondent. As described at the instant hearing by Respondent. He testified that he gave the boys about three feet of electrical tape and about an inch and a half piece which the boys placed lengthwise on their mouth. They used the longer, three foot piece, as a wrap loosely on each others' arms not wrists. When they were ready to leave the bathroom the boys were able to pull their arms from the tape and discard all their tape pieces into the trash can. After being less than three minutes in the bathroom, they returned to the classroom visibly "happy" according to their teacher. Later, the School Nurse indicated in writing that she did not find any tape marks on their hands or face.

**THE POSITION OF RESPONDENT**

In his post-hearing brief, Mr. Barrett, Esq. argued for Respondent in relevant part that, during his thirteen (13) years of service, Mr. Garifine received only the highest semi-annual evaluations of his work performance. His evaluations were submitted in evidence at the instant arbitration hearing. As stated above, there have been no documented instances of discipline submitted in evidence herein. Respondent comes before this tenure hearing as a "first offender" with documentation that his action does not meet "the statutory requirement to find abuse" (IAIU) (Institutional Abuse Investigation Unit)

**On June 12, 2012, Superintendent Salvatore of the Long Branch Board of Education, received the IAIU Findings Report in the Matter of Child Physical Abuse at the Gregory Elementary School on March 1, 2012.**

**Four seven year old students were examined individually by the school nurse who observed no visible injuries and described the students' demeanor as happy.**

**(Two of the four nameless herein), both reported placing the tape on their own mouths'.**

**The students easily removed their arms out of the tape and returned to their classrooms. As per (school recorded) surveillance tape, the students were in the bathroom less than three minutes including their time using the facilities. Based upon the information obtained, the actions of Mr. Garifine do not meet the statutory requirement to find abuse.**

(The IAIU concluded.)
**Since the allegation of abuse is unfounded, the School District is not required to take any disciplinary or other actions against School Plumber Kevin Garifine. (EX. R-1) (Underline added)**

In his post-hearing brief, Counsel Barrett stressed that Mr. Garifine has been employed by the Long Branch Board of Education (Board) as a groundskeeper/plumber and worked in a number of capacities in schools throughout the District.

During his 13 years of service, he was evaluated semi-annually and those evaluations were submitted in evidence at the hearing. A review of those evaluations will demonstrate that he received the highest mark possible in every evaluation during each year of his employment. "General Rating" comments like "good," "very good" and "excellent" pepper the evaluations. During his tenure of service for Petitioner, it is quite clear that he excelled at his job. In addition, there have been no documented instances of discipline submitted in evidence. As a consequence, Mr. Garifine comes before this tribunal as a "first offender."

In prosecuting these tenure charges, the Board takes the position that the question of discipline in this case should be measured not by what Mr. Garifine actually did but, rather, what he was perceived to have done by virtue of the acts of others. He clearly and without hesitation acknowledges his acts, acknowledges that what he did was wrong and injudicious and is prepared to accept both the responsibility for and consequences of those actions. However, he should not have to be responsible for the acts of others that were a significant factor in the exponential growth of this incident as to constitute supervening events.

It is quite clear through the prism of three (3) years that what Mr. Garifine did on March 1, 2012, although inappropriate, was not actually harmful to the children involved. But interestingly, as early as the evening of March 1, 2012, lead investigator Police Detective Michael Decker was quite aware of what actually did and did not happen earlier that day. In the middle of page 2 of Detective Decker's report (B-21), the following is stated:

> I explained to them [the parents] that after speaking with Hunter and Jeffrey that the children did not feel threatened or in danger. I explained to them that the children thought that the maintenance workers, no matter how inappropriate, were joking with them. The parents agreed that they don't believe that their children were harmed, but they could not understand why the school had handled the situation in the manner that they did. It was explained to me that they [the parents] received a phone call from the school stating that their children were bound and gagged in the bathroom by two maintenance workers and that a photograph was taken by one of the workers. **(Emphasis Added)**

A day or two after the event, when it became clearer still that, though injudicious, the bathroom event was in and of itself relatively benign, an individual believed to be the uncle of one of the children involved, leaked information to a local news outlet essentially echoing what the principal had told the parents. That is, that the students were bound and gagged, forcibly prevented from leaving and that pictures were taken of them. It was this misinformation leak that brought the District into the local and, eventually, national media spotlight.

The entire theme of the Petitioner's prosecution here is that Mr. Garifine is to blame for all of this. Any reasonable review of the facts here must conclude that while Mr. Garifine and Mr. Rigo share a modicum of responsibility, they and, in particular, Mr. Garifine, are not responsible for this matter becoming a national

media event. One can reasonably conclude that maintenance workers doing what they did in this instance might cause a rumble within the school and even within the District. But the fact of the matter is that those kinds of events happen all the time and no one would reasonably predict that an event such as this would garner national headlines. It is far easier to understand and predict that an event such as this would result in media attention when the Chief Operating Officer of the school calls parents telling them that their children were bound and gagged in the bathroom by two adult male maintenance workers' who took a picture of them. Indeed, as stated by Detective Decker (see quote above), after only 2 or 3 hours of investigation and explanation, "the parents agreed that they don't believe that their children were harmed, but they could not understand why the school had handled the situation in the manner that they did. **(Emphasis Added.)**

The bottom line is that Mr. Garifine's behavior that day should be measured by what it actually was and not by what others claimed it to be either by embellishment or fabrication. Similarly, the tenure charges should be analyzed and measured by what the proofs actually show and not by some conclusary determination that this event cost the District one million dollars and Mr. Garifine should be solely responsible.

**RESPONCE TO THE HEREIN TENURE CHARGES**

**(As presented in the post hearing brief of Respondent' )**

Tenure Charges #2, #3, and #4 should be dismissed outright as there was absolutely no evidence adduced at the hearing that even suggested access to tools.

While Board witness Dudeck glibly suggested that tape was a tool, Mr. Garifine acknowledged that he provided two small pieces of tape to the students that first entered, and one larger piece of tape to the four students (dropping it over their hands) just before they left. There is no evidence in the record at this point suggesting that the students "had access to his tools."

In addition, there is absolutely no evidence that the Board, the central administration or the building administration made any effort, on the day in question (or any other day in Mr. Garifine's experience), to police or in any way close off the bathroom in question. It is certainly not Mr. Garifine's responsibility nor is it within the ambit of his authority, to be closing down school bathrooms. While reasonable people can argue whether a policy is needed to address a circumstance such as this (there was no policy), those same people would have to conclude that the building administrator has *some* responsibility in supervising such a circumstance. They take no responsibility here.

Tenure Charges #5 and #6 are charges that call into question, the propriety of the actions of Mr. Garifine on the day in question. As stated at hearing and as stated above, Mr. Garifine acknowledges what he did. He acknowledges providing small pieces of tape to the students in what was clearly a joking manner. He also acknowledges having given a larger piece of tape to the students in response to their request that be provided. Such actions were unnecessary and outside of the scope of his employment. There was no work basis for those actions and he should be held accountable for what he did. Critical to this acknowledgement of responsibility, however, is the limitation that his accountability should be for "what he did." If

there was no media spotlight and no lawsuits directly related to the media spotlight, it is submitted that tenure charges would not have been filed, let alone prosecuted. Indeed, but for the embellished irresponsible initial communication from principal to parents and the subsequent, nearly identical leak to the press of the bogus account of what occurred, there would be no media response, no lawsuits and in all likelihood, no tenure charges. To hang all of this around Mr. Garifine's neck is unfair and legally inappropriate.

Tenure Charge #8 seeks to terminate Mr. Garifine for being untruthful and evasive. This allegation is baseless. The conversation between the Superintendent and Mr. Garifine on that day and over the telephone was an informal conversation and not an interrogation. At the time of the conversation, Mr. Garifine had already spoken with the investigator and told him precisely what happened. Mr. Garifine's statement, if parsed, is actually accurate. He didn't do anything (nothing close to what he was accused of doing by the principal and later in the media); he didn't touch the children but rather handed them tape; and he didn't wrap them up. He did what he testified to doing and nothing more. An informal conversation where protestations of innocence were made, can hardly be described as an interrogation and his comments cannot accurately be described as untruthful and evasive.

The balance of the tenure charges relate to the lawsuits that followed the events in question. The argument that the passing of information from the principal to the parents and the publication of the fabricated news release constitute supervening causes was made above and will not be repeated herein again at length. However, it must be pointed out that nothing in the investigation of the event, either

by the police or the Institutional Abuse Investigation Unit (IAIU) found its way into the lawsuits. Rather, it was the language employed by the principal to the parents and subsequent leak by the parent (or uncle) to the press that was mimicked in the lawsuits. A review of Tenure Charge #9 makes this abundantly clear. Both the police investigation and the IAIU investigation found that the event was intended as a joke and, as or more importantly, was interpreted by the children as a joke. In addition, both investigators found that the children were un-phased by the event and were laughing about it rather than being cowed by it. The language of "bound and gagged" is taken directly from the principal's comment and press release. In view of the direct connection between those two things, it is irrational to conclude that Kevin Garifine is solely responsible for the lawsuits as alleged in the Tenure Charges (Charge #10) - Mr. Garifine "caused two lawsuits by four families." **(Emphasis Added.)**

The police did a thorough investigation and found that no charges were warranted. Even in the face of that determination, the parents were free to file charges against Mr. Garifine but chose not to. IAIU did a thorough investigation and found that no action should be taken against Mr. Garifine in view of their determination that the charges were unfounded. Indeed, even the Petitioner itself completed an investigation and determined not to terminate the employment of Mr. Garifine. They were certainly free to terminate him but they chose not to. Curiously, they now do so, after three (3) years and only in the face of a determination by the Commissioner of Education that Mr. Garifine now enjoys tenure status.

Mr. Garifine's legal responsibility in this matter should be measured by the actions he took on March 1, 2012. As stated above, he accepts full responsibility for those actions. If the Arbitrator believes that these actions in and of themselves constitute misconduct sufficient to warrant termination in the face of no prior documented transgressions, then he will be detenured. However, if his behavior is measured by what he did that day and that day alone, as it should be, then he should not lose his tenure status. If some penalty or consequence must be imposed, then a letter of reprimand, increment withholding or brief period of suspension should be imposed.

Finally, all tenure charges should be dismissed as a consequence of N.J.S.A. 18A: 6-7(a). This statute and the requirement of the statute were pleaded as an affirmative defense in the Answer to Tenure Charges filed on October 13, 2015.

> N.J.S.A 18A:6-7(a) states the following:
>
> > When a complaint made against a school employee alleging child abuse or neglect is investigated by the Division of Youth and Family Services, the division shall notify the school district and the employee of its findings. Upon receipt of a finding by the division that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by the Division of Youth and Family Services shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

This provision is important for two reasons. First, it's clear and concise language prevent tenure charges from being prosecuted in a case such as this where a determination of "unfounded" has been made by DYFS (IAIU). Second, it

demonstrates the import that the legislature placed upon IAIU investigations and determinations. For those reasons, and the above stated reasons, the Tenure Charges should be dismissed.

## PORTIONS OF THE POST HEARING BRIEF OF SCHOOL DISTRICT OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY.

Counsel J. Peter Sokol argued extensively in relevant part on behalf of the District, that the removal from his tenure position of Mr. Garlfine, for "misbehavior" or "other offence" under the tenure statute and if so, whether he should be removed from his tenured position of employment, or in the alternative, whether suspension without pay is warranted for his March 1, 2012 behavior.

The District argued that the Respondent provided no valid excuses for his misbehavior on the day in question. It is also expected that he should be reinstated without a suspension or loss of pay since the event in question became exaggerated by others, to the local and national media.

The District further argued that Respondents' behavior is inexplicable with seven year old boys in an elementary school bathroom and for lying about his participation in the events to the Superintendent and to the BOE investigation. In its post hearing brief the District listed a sampling of 28 separate statements of excuses during the sworn testimony of the of the Respondent at the instant arbitration hearing.

The District also argued that his inaccurate and incomplete description of his actions demonstrate to this day that he is not

professional enough to be trusted with a return to a public school district's employment.

Based on the above, Mr. Garifine is responsible for his inappropriate, unprofessional and inexplicable actions and the damages that resulted and he should lose his tenured position of employment.

**DISCUSSION AND OPINION**
**(*In the interest of time and space the tenure charges of Kevin Garifine submitted by the District, are hereby attached but not reproduced herein but replied above herein, by Counsel Barret for Respondent.* )**

Respondent Kevin Garifine was assigned to fix a plumbing problem in one of the stalls of the second floor boys' bathroom in the Gregory Elementary School, on the morning of March 1, 2012.

The bathroom door lock was broken. Initially, two seven or ten year old students came in, followed by additional elementary students mostly seven years old and came to the bathroom at around the same time in the morning when classes were in progress.

A number of seven year old students came into the bathroom and were making much noise while Respondent was repairing a flushing problem in one of the stalls.

Students H.D, V.O, J.F, and M.D were all seven year old and were examined individually by the school nurse who observed no visible injuries and described the students' demeanor as "happy."

Students H. and V. were talking to the staff and Mr. Garifine gave the two boys tape to cover their mouths to stop them from talking and interrupting their work. H. and V. both reported placing the yellow Scotch one half inch wide tape and about one and one-half inch in length and placed it on their own mouths by suggestion of Mr. Garifine. Given the half inch wide tape, it was impossible to have been "bound and gagged"

All four students reported that either the Janitor Supervisor (Mr. Rego), or Mr. Garifine subsequently wrapped tape loosely around the students' arms as they stood in a circle. The students easily removed their arms out of the one-half inch tape and returned to their classrooms. As per a recorded surveillance tape, (B2 in evidence) the students were in the bathroom for less than three minutes, including their time using the facilities.

Based upon the information obtained by IAIU, during their investigation, found that the actions of Mr. Garifine did not meet the statutory requirement to find abuse.

**Investigative Findings**

Physical abuse/Tying/Close Confinement is "**unfounded**" regarding the actions of School Plumber Kevin Garifine, in accordance with N.J.S.A.9:6-8.21. No adjudicative findings have been made as the Institutional Abuse Investigation Unit's review herein is solely investigative.

**Additional Observation**

As per school administration, the school staff should have placed an "Out of Order" sign on the bathroom while doing the repairs. However, there is no written school policy relative to this issue.

**The IAIU Findings Report concluded:** (As above stated)

**"Since the allegation of abuse is unfounded, the school District is not required to take any disciplinary or other personnel actions against School Plumber Kevin Garifine."(R1)**

He was working with the presence of his co-worker Robert Rego, who witnessed the brief joking with the young students involving the one half inch yellow Scotch tape in question and who took some pictures with his smart phone. If the children were in fact "bound and gaged," pictures would obviously not have been taken by Mr. Rego. Additionally, the children would not have been capable to remove a two inch wide construction tape from their mouth and wrists, as they in fact did with the one-half inch yellow Scotch tape the size used in the average office. Clearly, such narrow tape could not cover even a seven year old mouth with which it would be impossible to be "bound and gagged".

The students who were interviewed all pointed out that they were in the bathroom less than three minutes as corroborated by the recorded School Surveillance (B2) in evidence. They removed their own tape without the help of one of the present adults. The students removed the tape themselves and discarded it into the wastebasket or on the floor on the way out of the bathroom after a period of less than three minutes, which included their sanitary stop.

Significantly, according to the record before me, they all responded, when asked, that the bathroom incident was just a joke. Additionally, if they were actually "bound and gagged" they would not have been able

to remove the tape themselves as they were leaving to return to their classroom.

**N.J.S.A 18A:6-7(a) contains a portion of following:**

> Upon receipt of a finding by the division that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by **Division of Youth and Family Services** shall not be used against the employee for any purpose relating to employment including but not limited to discipline, salary, promotion, transfer demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment.

Having thoroughly considered all the evidence, arguments and allegations of both parties at the Arbitration Hearing before me, and in in their extensive post-hearing briefs, I have found that Respondent Kevin Garifine provided thirteen (13) years of unblemished service to the Board of Education of the City of Long Branch Monmouth County. However, the episode which occurred on the morning of March 1, 2012 which was essentially trivial but became enormous and embellished to almost criminal behavior. It involved the local and national print media the local Police, the Prosecutors, IAIU the State of New Jersey Department of Children and Families. All of this, due to the existence of a mysterious "uncle" of one of the children, who exaggerated a joke

created essentially by seven year old children themselves during a less than three minute bathroom break which included a sanitary stop.

Having also thoroughly considered all the evidence including the arguments and allegations of both parties at the tenure arbitration hearing before me and in their extensive post hearing submissions, I have concluded that the behavior of Kevin Garifine on the morning of March 1, 2012 was merely joking with the seven or so students who congregated in the boys' bathroom where Mr. Garifine was repairing one of the stalls that was out of order. His playfully distributing some peace's of narrow electrical Scotch tape was acknowledged their presence with a joke which they regarded as such and said so during the various investigations.

Therefore, since the evidence herein clearly demonstrated that the extensive investigations resulted in "unfounded" findings, and there was clearly no showing that Kevin Garifine misbehaved in the presence of seven or ten year old students which was nothing more than several minutes of joking. As a result I found no punishable transgression on the morning of March 1, 2012 and the tenure charges provided by the District are hereby dismissed.

The District is hereby directed to reinstate Respondent Kevin Garifine forthwith, to his employment and make him whole financially, and benefits. Should the parties herein be unable to agree on the nature and amount of his make whole remedy, then for that sole purpose I herby retain jurisdiction.

February 15, 2016 Ernest Weiss, Impartial Arbitrator.

*In the Matter of the Tenure Hearing of*

**Marie Ebert,**
**State-Operated School District**
**of the City of Newark**
**Essex County**

Agency Docket No. 49-3/15

# Arbitrator's Opinion and Award

**Tia Schneider Denenberg,** *Arbitrator*

## APPEARANCES

FOR THE PETITIONER:

Ramon E. Rivera, *Scarinci Hollenbeck*
Shana T. Don, *Scarinci Hollenbeck*
Christina M. Michelson, *Scarinci Hollenbeck*

FOR THE RESPONDENT:

Nancy I. Oxfeld, *Oxfeld Cohen*

## BACKGROUND

On November 20, 2014, the parties and the arbitrator opened hearings by telephone in the tenure charges filed by the district against the respondent, Marie Ebert [Agency Docket No. 267-9/14] and agreed to postpone two hearing days scheduled for November 21 and 22. In a ruling on January 30, 2015, the arbitrator granted respondent's motion to dismiss the charges for failure to comply with statutory time limits. The ruling stated, in relevant part: "[T]he dismissal is without prejudice to the district's right to file charges again in a manner that fully comports with applicable statutory provisions" [at p. 19].

Subsequently, the district filed "amended" tenure charges against the respondent, alleging inefficiency[1] and unbecoming conduct, pursuant to Section 25 and Section 8 of TEACHNJ [Agency Docket No. 49-3/15]. In a telephone conference held on April 8, 2015, the arbitrator advised the parties that, in light of her decision in *Rinita Williams, SOSD of Newark* [Agency Docket No. 241-8/14, January 31, 2015], she was inclined to dismiss the Section 25 charge of inefficiency. As requested, the arbitrator allowed the parties to file submissions. Hearings were scheduled for June 11 and 12 at the offices of Scarinci Hollenbeck in Lyndhurst, New Jersey.

On April 20, 2015, the respondent submitted another motion to dismiss the charges. On April 30, 2015, the district replied, opposing the motion. On May 21, 2015, the arbitrator ruled that both charges would proceed to hearing under Section 8 on June 11 and 12. A transcript was taken, and the following witnesses testified for the district under oath or affirmation:

Katherine Kaczka,[2] Special Education Teacher, Alexander Street School

Rebekah (Rhodes) de La Rosa,[3] Special Education Teacher, Alexander Street School

Homere Breton,[4] Executive Legal Assistant, 504 Compliance Officer, NPS

Keith Barton,[5] Managing Director of Operations, Affirmative Action Officer, NPS

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[1] The amended document charged inefficiency under both Sections 8 and 25. DOE docketed the case as a new matter.

[2] Ms. Kaczka, who has worked in the district since September, 2012, holds a master's degree in education. In 2013-2014, she and Ms. Rhodes taught a fifth-grade inclusion class of 18 students, some with an IEP, at Alexander Street School [Tr., pp. 30-31, 59]. Ms. Rhodes said that she functioned as the designated Special Education teacher in the classroom and that Ms. Kaczka was the general education teacher [Tr., p. 92].

[3] Ms. Rhodes has a bachelor of arts degree in sociology and a master of arts degree in teaching from Montclair State University. She has three New Jersey standard teaching certificates: preschool to third grade, 16 kindergarten to fifth grade, and teacher of students with disabilities. In her first year in the district (2013-2014) she taught in the Alexander School until it closed [Tr., pp. 85, 113].

[4] Mr. Breton has served in various administrative capacities in the district, including manager of administrative operation services and manager of records and verification for the Talent Office. He has been employed since 1999 [Tr., pp. 125-126, 128].

[5] In his EEO capacity, Mr. Barton said, "my office responds to allegations of harassment, hostile work environment, that sort of thing.... [W]e investigate claims that come into our office, and we also are responsible for training each year throughout the District [Tr., p. 194]. He was been with the district for 20 years [Tr., p. 196].

Kimberly Kassnove,[6] Executive Director of Staffing and Recruitment, NPS

Sharanda Evans-Humes,[7] Vice Principal, Alexander Street School (2013-2014)

Rhonda Williamson-Green,[8] Vice Principal, Alexander Street School (2013-2014)

Al-Jathiyah Cannon,[9] Social Worker, Alexander Street School (2013-2014)

Maria Ortiz,[10] Principal, Alexander Street School (2012-2014)

The respondent called no witnesses and entered one exhibit for the purpose of impeaching a district witness [Respondent Exhibit 22]. Briefs and all other submissions were received by the arbitrator. The commissioner extended the due date for the arbitrator's award to February 23, 2016. In the course of the proceeding the arbitrator conducted conference calls with the parties.

The objective of this proceeding is to determine the validity of following charges:

**CHARGE ONE: INEFFICIENCY**

During the period from October 19, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

a. The Respondent was rated as "ineffective" and/or "partially effective" in 2 consecutive annual evaluations.
b. The Respondent has failed to implement curricular goals and objective(s).
c. The Respondent has failed to design coherent instruction.
d. The Respondent has failed to assess student learning.
e. The Respondent has failed to manage classroom procedures.
f. The Respondent has failed to establish a culture of learning.

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[6] Ms. Kassnove is responsible for teacher transfers and other staffing matters in the district [Tr., pp. 212-213]. She explained that teachers may apply for vacancies during a yearly transfer period (April through June), using Talent Match, an online, web-based portal [Tr., p. 213].

[7] Ms. Evans-Humes was a vice principal at Alexander Street during the 2012-2013 and 2013-2014 school years. A holder of teaching and principal certificates, she has been with the district for 17 years [Tr., p. 239].

[8] Ms. Williamson-Green is a certified K-8 teacher and holds an administrator's certificate [Tr., p. 286].

[9] Ms. Cannon was assigned to the Alexander Street School in 2013-14. She was tasked with investigating an incident of alleged name-calling that involved the respondent [Tr., p. 346].

[10] Principal Ortiz now leads the Munoz Marin Elementary School in Newark [Tr., p. 354].

g. The Respondent has failed to communicate clearly and accurately.
h. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
I. The Respondent has failed to engage students in learning.
J. The Respondent has failed to provide feedback to students.
k. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
l. The Respondent has failed to reflect on teaching.
m. The Respondent has failed to contribute to the School and District.
n. The Respondent has failed to grow and develop professionally.

**CHARGE TWO: CONDUCT UNBECOMING AND OTHER JUST CAUSE**

During the period from June 7, 2013 to the present, Respondent has demonstrated unbecoming conduct in the following manner:

a. The Respondent has failed to create an environment of respect and rapport.
b. The Respondent has failed to manage student behavior.
c. The Respondent has failed to engage students in learning.
d. The Respondent has failed to contribute to the School and District.

[Petitioner Exhibit 1]

Accompanying the charges was a Statement of Evidence (SOE), comprising 45 points. Specific evidentiary items were attached to the SOE as exhibits keyed to each point. The exhibits are shown herein as italics in parentheses: Evidence admitted at the hearing is bracketed. Quoted material is shown as it was received in evidence. Errors in spelling, grammar, punctuation, and capitalization have not been corrected unless necessary for clarity. The legibility of many exhibits was poor, and some were missing dates or signatures. On some observations it was difficult to ascertain with precision when they occurred. The signature date is indicated in this opinion as a post-observation conference [POC]. The absence of a date is odd since the forms appear to reside in a computerized system which should make it simple to note the actual date of the observation.

The district's brief maintained that the evidence related to the two charges has proven just cause to remove the respondent from her tenured teaching position. The evidence establishes, acccrding to the district, that she "was incapable of managing her classroom" and "demonstrated a pattern of racism and prejudice toward her students"[at pp. 1 and 2].

Charge One, the district asserted, focused on the respondent's

> consistent lack of improvement and declining performance as documented in her evaluation ratings of "partially effective" and "ineffective", consecutively for the 2012-2013 and 2013-2014 school years.

> These evaluation ratings took into account the Respondent's poor attendance, failure to prepare and implement a behavioral management plan; failure to provide lesson plans for an extended absence, and her inability to effectively manage a classroom. In the 2012-2013 school year alone, the Respondent's inefficient classroom management was demonstrated by the thirty-seven (37) incident reports she herself submitted documenting disruptive students, name calling, being off-task or taking art supplies. Therefore, Ebert did not have control over her classroom [at pp. 1-2].

The respondent's brief [at p. 2] countered the district's argument as follows:

> There are two charges against Ms. Ebert, the first charge being Inefficiency and the second charge being Unbecoming Conduct and Other Just Cause. There are fourteen specifications (a-n) to the charge of Inefficiency and four specifications (a-d) to the charge of Conduct Unbecoming. The arbitrator can only consider allegations that are set forth specifically in those charges, and the burden is on the NPS to prove those allegations....[T]he NPS has not met its burden. No testimony was proffered on most of the fourteen subcategories of Inefficiency and four subcategories of Conduct Unbecoming.

By failing to meet its burden, according to respondents's brief, the district has not demonstrated just cause for removal. The teacher thus should be reinstated and made whole.

**DISCUSSION**

At the time of the charges, the respondent was an art teacher in the Alexander Street School.[11] Located in the Newark's West Ward, the school closed in June, 2014 [Tr., p. 196]. According to Mr. Barton the building had been emptied by the second week in July, 2014, in order to allow a charter school to prepare for its opening in August [Tr., p. 197]. Mr. Barton described the school's pre-closure student population:

> The majority of the student population is African-American. There's certainly a portion of the population in that area of the city that is Jamaican, that is Haitian. So I don't know particularly to what degree the student population consisted of folks from Haiti or from Jamaica, but I would say easily 90 percent, 95 percent African-American [Tr., p. 201].

## Charge One: Inefficiency

Charge One is based on two annual evaluations in which the respondent was rated less than effective. "Newark Public Schools Framework for Effective Teaching—Teacher Observation and Performance Evaluation" was a guidebook for administrators and teachers

[11] The respondent had worked there since the 2011-2012 school year.

in 2012-2013 and in 2013-2014 [Petitioner Exhibit 26 and 27 respectively]. The guidebook called for teachers to be rated as Highly Effective, Effective, Partially Effective, or Ineffective in the following competencies:

> Competency 1: Lesson Design and Focus
> Competency 2: Rigor & Inclusiveness
> Competency 3: Culture of Achievement
> Competency 4: Student Progress Toward Mastery
> Competency 5: Commitment to Personal and Collective Excellence

The first four competencies would be rated on the basis of observations throughout the year. The fifth competency would reflect the teacher's cumulative performance and would appear only in the mid-year review and end-of-year evaluation. A mid-year review conference was not required in Year One but was strongly recommended by the guidebook as

> an opportunity for the administrator to discuss the teacher's progress toward student, classroom, school, and district performance goals as well as the implementation and alignment of the professional standards for teachers.
>
> * * *
>
> The mid-year ratings are formative ratings, rather than summative. The mid-year ratings serve as one piece of evidence for the Annual Review Ratings and as an important element of formative feedback for the teacher.
>
> [Petitioner Exhibit 26, pp. 22-23]

In 2013-2014, teachers on a Corrective Action Plan (CAP) were subjected to additional minimum requirements:

- Four observations per year, one in each semester.
- Two short observations (20 minutes in length), completed by different observers.
- Two long observations (40 minutes in length or an entire lesson, the shortest of the two).
- Midyear reviews, to be completed by February 15th.
- Annual reviews, to be completed by May 15th.

[Petitioner Exhibit 27, pp. 21- 25]

The fifth competency rating may add points for highly effective teaching or subtract points for poor attendance and lateness. Tenured teachers require one announced observation, with a pre-observation conference, followed by a POC within ten calendar days of the observation [Id., pp. 20-22]. A performance review "must be completed for each teacher on an annual basis. This evaluation is a summative statement which incorporates the data and evidence gathered throughout the year" [Id., p. 23].

Table A, below, indicates observations and evaluations of the respondent during SY 2012-2013.

**Table A—SY 2012-2013**

| Date | Observation Type | Evaluator | Rating | Exhibit No. |
|---|---|---|---|---|
| 12/14/12<br>12/17/12 | Announced<br>POC | Ortiz | Effective | P 70 |
| 2/15/13<br>2/20/13 | Mid-Year Evaluation<br>Signed | Ortiz | Effective | P 72 |
| 5/10/13<br>5/21/13 | Formal Observation<br>POC | Williamson-Green | Partially Effective | P 29 |
| 6/7/13 | Annual Evaluation | Ortiz | Partially Effective | P 73 |

Every teacher was instructed to create a Professional Development Plan that year, as noted in the SOE:

9. A Professional Development Plan for Evaluation Year 2012-2013 *(SOE Exhibit 4)* [Petitioner Exhibit 74].

10. The Plan provided that Respondent would work on enhancing her teaching strategies *(SOE Exhibit 4)* [Petitioner Exhibit 74].

The period, according to the SOE, began on October 19, 2012:

2. During the period from October 19, 2012 to the present Respondent failed to satisfactorily perform the duties and responsibilities of a classroom teacher despite numerous suggestions and assistance given by the administrative staff. The following documents are relied upon to support the charge of inefficiency:

3. Correspondence from Maria J. Ortiz, Principal, to Respondent dated October 19, 2012 *(SOE Exhibit 1)* [Petitioner Exhibit 67].

4. The correspondence advises Respondent that she is responsible for providing her students with effective classroom management, Respondent having reported 4 incidents where students were out of control in her class *(SOE Exhibit 1)* [Petitioner Exhibit 67].

The SOE refers to the following memo by Principal Ortiz about classroom management, dated October 19:

> Mrs. Ebert, this notification is to memorialize our conversation in reference to your classroom management. You are responsible for providing your students with effective classroom norms that promote positive and productive teacher-student and student-student relationships.
>
> Since September 2012, you have reported 4 incidents w[h]ere the students were out of control in your class. Since, several of the students in the classes who you have reported as having difficulty have transferred out of Alexander Street School. On Tuesday, October 16, 2012 at 3:10 p.m. you came in to my office stating that, "The students were out of control again, that they were getting up from their seats and being disruptive." You stated, "Something has to be done." I informed you, that it was not a good time to discuss because I was in the middle of preparing for the Staff Development day the next day. I proceeded to tell you that when we meet to come with solutions, you stated, "We have to get these kids out of here." I stated that was not an option and I repeated that it was not a good time to discuss the matter. You insisted that we discuss the concern and before storming out of my office, you stated, "It's never a good time."
>
> Again I remind you that time is available on your schedule for PLC weekly meetings where a forum is provided to problem solve, raise student concerns and create SMART goals in order to maximize student learning. I also remind you that PD360 is a district resource that can offer several classroom management strategies. It is the teacher's professional duty to adhere to all the responsibilities that are required for teaching.
>
> In an effort to set a culture of rigor and high quality instruction, you must re-design your classroom management plan. A meeting is scheduled for October 26, 2012 at 2:05 p.m. to discuss the new classroom management plan that you will implement. If there are any problems with regard to this matter, please feel free to speak to me.
>
> [Petitioner Exhibit 67]

On the meeting day, the respondent and principal were apparently working cooperatively to improve the teacher's control of a classroom. The respondent emailed Ms. Ortiz (October 26, 2012) to report her progress:

> Attached find two articles which I have read and am currently implementing with Room 312.
> The second article titled "What to Do when you realize you have lost control of your class," has proved to be very helpful.
> By walking around the room and politely asking students to take their seats.. I was able to keep everybody in their seats for the duration of the lesson on Monday, October 24th. They were not disrespectful at all. Unfortunately 7 of the students did not complete the assignment. I gave them all week to finish it but as of 2:05 today they did not hand in the completed assignment. They told me they could not access the PP on the computer in their classroom, therefore I am extending the deadline for them.
> I look forward to seeing them again on Monday October 29th and will again visit them in their classroom.
> I will keep you posted. Have A Great Weekend
>
> [Petitioner Exhibit 69]

The respondent's first observation (December 14, 2012) was announced. Pre- and post-observation conferences were held with the principal, who rated her "effective" overall. Ms. Ortiz was particularly impressed with her effectiveness in Competency 2:

> Rigor and Inclusiveness, she did a very good and effective job at questions and tasks. I think underneath that I rated that indicator Highly Effective, because she really captured and did a great job in making sure that the students were asking questions and they were really having an opportunity to get deep into the objective of the lesson. So I was so impressed with that indicator that I even encouraged Ms. Ebert to do a lesson or share that technique of what it took for her to plan questions and tasks that well with other teachers, and she did do that, which was awesome. She did have an opportunity for her to share that workshop of questions and tasks with the rest of the staff and she did really well [Tr., pp. 365-366].

The teacher's mid-year evaluation rating was also "effective" [Petitioner Exhibit 72]. The mid-year report called attention to the following aspects of her professional conduct:

> Competency 2: Rigor and Inclusiveness
>
> 2b. Questions & Tasks: Questions and tasks ensure student comprehension and ask for application, analysis and/or synthesis - Highly Effective for 2.b
>
> Competency 3: Culture of Achievement (Partially Effective) under evidence:
>
> > A reduced number of incidents related to student behavior in the third grade shows that classroom management and classroom culture supports a culture of learning [at p. 2].

Finally, in Competency 5 (Commitment to Personal and Collective Excellence) the teacher exceeded expectations, earning an extra point in the overall rating. The bonus appeared to recognize her commitment to professional growth through workshop and conference participation, as well as a good attendance and promptness record: "The teacher is present and prompt and attendance reflects his/her focus on student learning as a priority" [at p. 4]. The following comment appears under IPDP:

> By February 19, 2013 attend the workshop on classroom management offered by the district's Special Education department and immediately turnkey to colleagues during PLC meetings. In order to promote a classroom culture of Achievement when the students are disruptive, arrange with homeroom teachers to have Art lectures and lessons in the homeroom classes [at p. 4].

During the first half-year, the respondent avoided a negative rating. Her second and final observation was conducted on May 10; the post-observation conference occurred on May 21. The observer described the lesson as follows:

> Lesson Objective: Warm & Cool Tissue Paper Flower. After reviewing the color wheel and naming the primary secondary colors, the art student will Learn about warm and cool colors by looking at a slide Show, - Choose and be able to identify a warm or cool scheme. - Create a tissue paper flower for mother's day using warm or cool colors.
>
> Ms. Ebert went over the concept of warm and cool colors using a slide show. She questioned her students to gauge their understanding of the concept. Then she had them create tissue paperflowers using warm and cool colors.

The SOE summarized what the district found lacking:

> 5. A Formal Observation Form dated May 21, 2013 wherein Respondent was rated "partially effective" *(SOE Exhibit 2)* [Petitioner Exhibit 29].
>
> 6. Respondent was advised in this Formal Observation Form that, among other things, her questions and tasks for students were not challenging and she did not adjust instructional strategies based on student reactions *(SOE Exhibit 2)* [Petitioner Exhibit 29].

That is an apparent reference to Competency 2,"Rigor and Inclusiveness: Instructional strategies challenge all students and provide multiple pathways to mastery," the sole competency in which she was rated less than effective. The teacher's comment was "Rigour was related to student testing and the fact that Sunday was Mother's Day."

The annual evaluation, held 17 calendar days later,[12] also rated her "partially effective:"

> 7. An Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated "partially effective" *(SOE Exhibit 3)* [Petitioner Exhibit 73].
> 8. Respondent was advised in this Evaluation Summary Form that, among other things, she needed to consider the population of students she is servicing and prepare lessons matching her students' learning styles and further that she needed to promote positive and productive teacher-student and student-student relationships. It was also noted that Respondent had filed 37 incident reports concerning the conduct of her students and that she had made statements to the effect that she would rather teach in a school where "the students are better behaved" and that the kids at the school "are out of control" *(SOE Exhibit 3)* [Petitioner Exhibit 73].

In her mid-year evaluation she gained an extra point for Competency 5, but in the annual evaluation two points were deducted. Point 8, quoted above, is from that section. Several events were also mentioned, including that

> several students in Mrs. Ebert's class have been recognized by the Essex County... Executive for their art work. Mrs. Ebert joined the Alexander Street School Essex County Fun Run. Mrs. Ebert conducted

[12] School days would not include weekends and the Memorial Day holiday.

a workshop on how to provide highly effective questions and task to her colleagues.

Her attendance also met expectations.

Table B, below, lists observations and evaluations of the respondent during SY 2013-2014:

**Table B—SY 2013-2014**

| Date | Observation Type | Evaluator | Rating | Exhibit No. |
|---|---|---|---|---|
| 10/8/13<br>10/11/13 | Announced<br>POC | Williamson-Green | Effective | P. 36 |
| 5/8/14<br>5/9/14 | Long Observation<br>POC | Ortiz | Ineffective | P. 83 |
| 5/12/14<br>5/13/14 | Short<br>POC | Evans-Humes | Partially Effective | 41 a,b<br>[Tr., pp. 249] |
| 5/13/14<br>5/15/14 | Short<br>POC | Williamson-Green | Ineffective | P. 38 a, b |
| 5/14/14<br><br>5/15/14 | Annual Conference<br>Date<br>Signed | Williamson-Green | Ineffective | P. 39 |

Because of her rating of ineffective for the previous school year, the respondent was required to follow a CAP, as noted in the SOE:

11. Corrective Action Plan ("CAP") prepared by Respondent in collaboration with Maria J. Ortiz, Principal dated September 27, 2013 *(SOE Exhibit 5)* [Petitioner Exhibit 33].

12. In the CAP, Respondent set forth numerous professional goals, including but not limited to the development of a timeframe for student mastery of various standards, the establishment of a baseline using beginning and end-of-the-year assessments, and the commitment to the design of lessons predicated upon the NJ Core Curriculum Standards *(SOE Exhibit 5)* [Petitioner Exhibit 33].

Additionally, the SOE indicates that all teachers received the following:

13. ASE Actionable Feedback SY 13-14 "Five Focus Indicators for November 2013-January 2014", provided to all Alexander Street School teachers, including Respondent, in November of 2013 *(SOE Exhibit 6)* [Petitioner Exhibit 79].

14. The Actionable Feedback SY 13-14 document provides 3 areas of indicators upon which all teachers, including Respondent, were encouraged to focus. The indicators included Pacing

and Momentum, Questions & Tasks, and Responsiveness *(SOE Exhibit 6)* [Petitioner Exhibit 79].

The district listed other supports that were provided to the respondent:

15. Email dated March 10, 2014 from Rhonda Williamson-Green, Vice Principal, to Respondent *(SOE Exhibit 7)* [Petitioner Exhibit 35].

16. The email advises Respondent that Ms. Williamson-Green intended to set up a formal weekly meeting schedule and provided proposed times *(SOE Exhibit 7)* [Petitioner Exhibit 35].

On October 8, Vice Principal Williamson-Green undertook a Long Observation of the respondent. Her summary comment was as follows:

> Ms. Ebert has established an exemplary classroom environment that promotes student learning. She has taken the time to know the needs of her students and teaches accordingly. Her lessons are thorough and rigorous which lea[d]s most of her children to mastery.
>
> [Petitioner Exhibit 36, p. 4]

As in the first year, there was a long gap—in this instance seven months—between her first, "effective" observation of the year and her next observation. She had a number of lengthy absences (discussed below), beginning in late November. She also submitted several requests for transfers to another school.

**Leave and Transfer Requests**

In evidence is the respondent's absence **authorization** report [9/3/13-5/15/14] rather than her complete attendance record. There is a handwritten notation, indicating that, from November 26, 2013, through February 18, 2014, she was on FMLA leave [Petitioner Exhibit 15]. The record was not adequately explained in the hearings, but it appears that only some days of absence were authorized, from the district's perspective. Despite requests from the arbitrator, the district did not provide data for school year 2013-2014 that would summarize her complete record and indicate the sources that were relied on.[13] It is also apparent that, owing to the siloing of functions, there was a marked lack of coordination between the school and various district officials. It goes without saying that employees must be accountable for their attendance, but the district did not confront the respondent promptly and precisely and neither did the school.

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[13] The absence authorization report lists a total of 81 sick days [Petitioner Exhibit 15, p 2] but the annual evaluation lists 35 days out [Plaintiff Exhibit 39].

On February 6, prior to her return to work, the respondent's psychiatrist wrote to Vanessa Rodriguez, the Chief Talent Officer:

> I am writing this letter in regards to Marie Ebert (dob 11/4/59), a patient in my care. I have been treating Mrs. Ebert since December of 2013. After several visits with Mrs. Ebert, it is my firm recommendation that she be given priority in transferring to a different public school other than the one she is currently working in (Alexander Street School).
>
> I find it quite likely that a return to the environment in this school would be a detriment to her health & well being.
>
> [Petitioner Exhibit 17]

Shortly after her return, on February 26, the respondent wrote to the principal and other officials:[14]

> As of February 19th I returned to work at Alexander Street School as the Art teacher. My Dr. Had recommended that I not return to the same location as it would be a detriment to my health and well being. Against his advice NPS Human Resource Department placed me back at Alexander Street School. On Monday February 24th I was involved in an incident in my classroom, where students began fighting. I was pushed into the door and the door knob struck me in the back. I sustained a bruise and injury to my back. I was sent to Concentra for X-rays. Luckily I am not seriously injured. I am back to work today. However I feel this incident is a clear indication that I should not be in this environment. The procedures and protocols to protect my safety are not in place at this school and therefore I am asking that you honor my doctor's recommendation.
>
> A full investigation of the incident has not been reported to me. Security did not arrive when I first called them. I sent a student to get security. A teacher from upstairs heard the commotion and came to my aide.
>
> [Petitioner Exhibit 9]

Mr. Breton recalled that he contacted the respondent

> because it was understood that she was in need of a 504 accommodation. Ms. Ebert actually paid a visit to me and stated, No, she is not in need of a 504 accommodation, she is not disabled. What she is in need of or was in need of was a transfer from the respective school location....She stated that the students were out of control; that she feared for her safety. And that she had brought it to the attention of her respective administrator, to no avail [Tr., pp. 136, 139-140].

He said that she was "adamant" [Tr., p. 180] about not being disabled but desired a transfer based on medical need. The district had received two letters from her psychiatrist,

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[14] Superintendent Cami Anderson, Assistant Superintendents Michael Mailaro, Mitchell Center and Chief Talent Officer Vanessa Rodriguez.

requesting a transfer [Petitioner Exhibits 17 and 18], but Mr. Breton explained to her that a request for transfer must be addressed to "our staffing department, the head of which is Kimberly Kassnove" [Tr., p. 138].

On March 5 the psychiatrist wrote to Tiffany Hardgrove, Assistant Superintendent:

> I continue to see this woman on a monthly basis. On 2/19/14 she returned to work at the Alexander Street School It is quite unfortunate that on 2/24/14 she was involved in an altercation in her classroom, where she was pushed into a door, requiring medical attention.
>
> As her physician, I am reporting to you that her health & well being is being compromised by her working environment & the conditions in her school.
>
> I have been treating Mrs. Ebert since December of 2013. After several visits with Mrs. Ebert, it is my firm recommendation that she be given priority in transferring to a different public school other than the one she is currently working in.
>
> [Petitioner Exhibit 18]

Mr. Breton testified that the respondent had a leave that terminated in March, 2014 [Tr., p. 124]. He explained the procedure that employees are required to follow when applying for leave:

> They...will give me an application which will secure medical document to support their medical disability. And once I have that information, we will move forward to see whether or not we can provide reasonable accom[m]odation for the respective employee [Tr., p. 127].

For FMLA, he said, the process is similar:

> The teacher must go through the same process as an employee would go through, and there are particular requirements that the employee must have in order for them to go out on an FMLA. First and foremost, we need to make certain that the employee had been with the District for one year, and that they have provided the District with 1,250 hours. Step one of that process really speaks to whether or not the person is eligible. If they have satisfied that requirement of 1,250 hours, they would go into the next level, which would be qualifying the employee. Qualification occurs when the employee provides medical documentation to our Health Services Department. Our Health Services Department reviews that medical documentation, and then ascertains whether or not they would recommend that the employee be approved for Family Medical Leave and/or an illness leave of absence. Once we receive that recommendation from Health Services, a letter goes out to the respective employee denying or approving or even asking for further supportive medical documentation to see whether or not we could provide such approved leave [Tr., pp. 128-129].

Teachers may apply directly through an on-line, self-service system [Tr., p. 130]. When returning from an approved leave, the employee must be cleared by the district's

Health Services as well as the employee's personal physician. When cleared, Health Services will provide a receipt of return to the Administrative Operations Services Department, which Mr. Breton also heads. This allows the district to notify the teaching location when to expect the employee's return.

Mr. Breton advised her that because she was alleging a hostile work environment that complaint "needs to be brought to the attention of our Affirmative Action officer," Keith Barton [Tr. p. 138].

Ms. Kassnove testified that there are no midyear transfers except "unless there is a true hardship" [Tr., p. 214]. On March 7, 2014, the respondent emailed Joy Lindsay, the former manager of staffing, with copy to Ms. Kassnove, requesting a transfer to Park Elementary, where she believed there was a vacancy. She noted she was placed in Alexander school against the recommendation of her physician at the end of her FMLA leave [Petitioner Exhibit 10]. Ms. Kassnove wrote to Principal Ortiz, asking her views on the possible transfer:

> we are looking into whether there is a vacancy at Park. I wanted to make you aware of her request. Per our earlier conversation we will not be allowing a transfer until next year.
>
> If there is a budgeted role at Park, will you support her getting hired into that role should Sylvia make her an offer?
>
> [Petitioner Exhibit 10].

Since Alexander School was closing, there would be a necessity to place staff, including Ms. Ebert, in other schools for the next school year. Ms Kassnove recalled there was a request to transfer to Lafayette as well but she was told that it was denied since

> is not District policy to transfer educators outside of the transfer period....It's the policy because when we transfer educators, it leaves holes at schools. So it doesn't actually support the holistic means of the District. It's really important for students that they have a consistent teacher throughout the year. It's really important for schools that they're not scrambling midyear to find a replacement [Tr., p. 218].

She noted that the two schools she requested are "in higher socioeconomic brackets" and are sought after by teachers [Tr., pp. 219-220]. She acknowledged that teachers who was suspected of causing harm to students could be transferred at any time to a non-teaching assignment, pending investigation [Tr., p. 233].

There was a series of emails beginning on March 14, in which the respondent's complaint of a hostile working environment and the need for a transfer was discussed. The respondent wrote

> As of March 13, 2014 I have not heard any response from the Human Resources Department regarding my Dr's requests that I be placed in a different environment. The hostility and aggressive behaviors from students at Alexander Street School Is placing me In a detrimental situation. I am looking into extending my FMLA or filing a new one. I have asked you in good faith to find me another placement. I continue to experience a great amount of stress and anxiety surrounding the working conditions at Alexander Street School. I look forward to hearing from you.
>
> [Petitioner Exhibit 12]

Mr. Barton responded:

> Per our conversation today, you were previously informed by Ms. Kassnove that you were to report to Alexander St. School. Your assignment has not changed. I am continuing to follow up on this matter per our meeting and our brief talk today. I am scheduled to visit Alexander St. School on Thursday of this week. You stated to me today that your FMLA has been extended until May. I am now unable to observe your interaction with students in the classroom setting. During our first meeting I stated that I would make an unannounced visit to your classroom during one of the periods you identified for me. In closing I will continue to progress through the steps previously outlined for you.
>
> [Petitioner Exhibit 12]

Mr. Barton said that he met with the respondent in her classroom for about 20 minutes to discuss her concerns about student behavior, but "at this point Ms. Ebert had been out consecutively. So it was rendering it virtually impossible me for to visit her while she was teaching, which was really the whole thing" [Tr., p. 207]. However, the classroom visit never happened. Ms. Ortiz informed him that "Ebert has been out" [Petitioner Exhibit 11].

On May 2, Ms. Rodriguez wrote to the respondent:

> It has come to the attention of the Talent Office of Administrative Operation Services that you are and have been on an unauthorized leave of absence as of Friday, March 14, 2014. Although the district has recognized that you submitted a medical documentation to our Health Services department, it is evident that you have not received a notice of approval to be out as of the above-mentioned date. Consequently, your employment status with the district is AWOL (absent without authorized leave). Accordingly, you are directed to report to your school location immediately; failure to do so may have already subjected you to disciplinary action.
>
> [Petitioner Exhibit 14]

On May 5, Ms. Kassnove wrote: "Concerning the stated disciplinary action, should Marie Ebert report to Alexander Street School effective 5/5/14 all disciplinary infractions for this stated period will be dropped" [Petitioner Exhibit 14]. Ms. Kassnove said she did not give the respondent a chance to correct any paperwork problems or deficiencies regarding the so-called AWOL period [Tr., p. 230].The respondent's brief noted that she "returned to

work on Monday, May 5, 2014 and worked on that date through May 13, 2014, dates on which she was deemed medically unable to work by the Board's physician" [Respondent Brief at p. 16, Respondent Exhibit 22].

Mr. Breton maintains that while the district received medical notes the respondent never in fact applied for a new FMLA leave or extension in March [Tr., 188]. Leave, he said, is "formally authorized by Vanessa Rodriguez," Chief Talent Officer and ultimately approved by the superintendent [Tr., p. 189]. During the March exchange of emails [Petitioner Exhibits 11 and 12], Mr. Breton said, he looked into the respondent's claim that she was on an FMLA leave, found it not to be so but did not contact her and did not know if anyone else in the district did [Tr., pp. 190-191].

In quick succession after her return, the respondent underwent three observations, in which she was rated "ineffective." The last was signed on the same day that she received one of these ratings as her annual evaluation:

17. A Long Observation Summary Form, dated May 9, 2014, wherein Respondent was rated "ineffective" *(SOE Exhibit 8)* [Petitioner Exhibit 83].

18. Respondent was advised in this Long Observation Form that, among other things, she did not plan the lesson and prepare the necessary components for effectiveness and as a result did not have a clear understanding of the objective. Respondent was also informed that some new students sat idle without instructions, that she experienced difficulty maximizing learning times and that classroom values and norms were inconsistently reinforced *(SOE Exhibit 8)* [Petitioner Exhibit 83].

19. A Short Observation Summary Form dated May 13, 2014, wherein Respondent was rated as "ineffective" *(SOE Exhibit 9)* [Petitioner Exhibit 41].

20. The Short Observation Summary Form notes that, among other things, Respondent's instructional strategies did not challenge the students *(SOE Exhibit 9)* [Petitioner Exhibit 41].

21. A Short Observation Summary Form dated May 15, 2014, wherein Respondent was rated as "ineffective" *(SOE Exhibit 10)* [Petitioner Exhibit 38].

22. The Short Observation Summary Form notes that, among other things, that Respondent needed to maximize student learning time and that her lessons may not be met as a result of pacing and momentum *(SOE Exhibit 10)* [Petitioner Exhibit 38].

A major criticism of observer Williamson-Green was that the teacher "spent to much time on preparing for the lesson" and that "direct instruction" began after five minutes. However, "once order has been restored Ms. Ebert's lesson content and instructions are communicated clearly." The teacher's comments were as follows:

The observation was made following testing, I served as a hall monitor from 8:15 am to 11:55. I did not have a prep period. The art room had been used as a testing sight. All resources and placement of furniture have been disrupted. I have a letter from my Physician stating that for my health and well being I should not be in this work environment. The NPS Human Resource Department has chosen to disregard the letter and placed me back in this environment.

23. An Annual Evaluation Summary Form dated May 15, 2014, wherein Respondent was rated "ineffective" *(SOE Exhibit 11)* [Petitioner Exhibit 39].

24. Respondent was advised in this Annual Evaluation Summary Form that, among other things, Respondent needed to work on responsiveness and that her instruction was not shifted to meet the demands of the entire class, which led to disengagement and inability to master the lessons' objectives. It was also noted that Respondent often raised her voice and engaged in unproductive exchanges with her students *(SOE Exhibit 11)* [Petitioner Exhibit 39].

Throughout most of the year, the respondent lacked a functional CAP. After the "partially effective" rating for school year 2012-2013, she apparently did not collaborate with district administrators to create a plan. The teacher did not come forward because she was still disputing the prior year's evaluation [Petitioner Exhibit 33]. Waiting for her input, the principal did not suggest the steps she needed to include in her CAP. Creating a CAP is a joint responsibility. The SOE notes:

25. Corrective Action Plan IPDP and/or Corrective Improvement Plan Feedback Summary Form for School Year 2013-2014 dated May 15, 2014 *(SOE Exhibit 12)* [Petitioner Exhibits 30-34].

26. The Feedback Summary Form lists, among other things, dates and topics of reviews conducted with respect to Respondent and follow-up action steps taken thereafter *(SOE Exhibit 12).*

27. Corrective Action Plan IPDP and/or Corrective Improvement Plan Feedback Summary Form for School Year 2013-2014 dated May 30, 2014 *(SOE Exhibit 13).*

28. The Feedback Summary Form lists, among other things, dates and topics of reviews conducted with respect to Respondent and follow-up action steps taken thereafter *(SOE Exhibit 13).*

**Charge One—Conclusion**

The inefficiency charge has not been proven. Although the evaluation process in 2012-2013 satisfied the required elements, the respondent's first "partially effective" observation did not occur until May, just before the annual evaluation. In 2013-2014, the process was marred by other arbitrary timing decisions and serious deficiencies in the district's record-keeping.

The respondent had an "effective" observation in October, but there is no satisfactory record of a mid-year review, which is a required element. The district's brief maintains that the "evaluation" or "observation" occurred on February 14, 2014, citing Petitioner Exhibits 28 and 34 [Brief, pp. 25 and 45]. The former exhibit is titled "Data Driven Instruction 2013-2014." It includes the respondent's CAP Feedback Summary Form, on which is an entry for February 14, 2014: "IPDP/Corrective Action Plan/Review Conference." The second exhibit is the respondent's CAP, signed on March 12, 2014. Neither provides any detail which establishes that a mid-year review was conducted, that it contained the required components, or that the respondent received a performance rating. When questioned about a mid-year review of the CAP, Ms. Williamson-Green said that she believed it occurred in March, 2014 [Tr., p. 326], which would seem to refer to Petitioner Exhibit 34. That exhibit contains little useful guidance and suffers in comparison to the 2012-2013 mid-year evaluation. In any case, the respondent's brief correctly argues that it is an incomplete document, promising to "update by Monday, 3/17/14." The brief notes: "No update was ever provided" [at p. 12]. By any measure, the record of the mid-year review is woefully inadequate.

The remaining observations for 2013-2014 followed the respondent's return in May from a lengthy absence, even though, as the respondent's brief correctly points out, the framework recommends a timeline for observations and evaluations that is front-loaded for teachers with a CAP [at p. 11, Petitioner Exhibit 27, p. A20]. Moreover, the series of observations came in rapid succession. No time was left in between for the teacher to improve her performance on the basis of each preceding observation. The final observation was signed on the same day as her annual evaluation. In a similar case, Arbitrator Gandel aptly commented that "there has to be a reasonable time period between evaluations to show improvement" *[Patsy Cuntrera, Passaic County Vocational School District, Agency Docket No. 223-8/15, November 27, 2015, p. 5]*. The respondent's absence itself was so poorly managed by the district that it adversely influenced many elements of the observation and evaluation process.

## Charge Two: Conduct Unbecoming

Charge Two focuses on a pattern of bizarre events, extending from about June, 2013, to May, 2014. The evidence, consisting primarily of SOE entries combined with testimony, begins to accumulate when the respondent received an annual evaluation of "partially effective" along with a critique of her approach to teaching. The SOE notes:

> 29. During the period from June 7, 2013 to the present Respondent has demonstrated unbecoming conduct. The following documents are relied upon to support the charges of conduct unbecoming and other just cause:

30. An Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated "partially effective" (Exhibit 3) [Petitioner Exhibit 73].

31. Respondent was advised in this Evaluation Summary Form that, among other things, she needed to consider the population of students she is servicing and prepare lessons matching her students' learning styles and further that she needed to promote positive and productive teacher-student and student-student relationships. It was also noted that Respondent had filed 37 incident reports concerning the conduct of her students and that she had made statements to the effect that she would rather teach in a school where "the students are better behaved" and that the kids "are out of control" *(SOE Exhibit 3)* [Petitioner Exhibit 73].

Ms. Evans-Humes commented that the respondent's resort to Student Incident Reports was not typical "or an effective way of handling student behavior." She explained:

> Most of the time I received a lot more Incident Reports from Ms. Ebert than anybody else. The Incident Reports, a lot of them were just basic kind of classroom management issues, not specifically, say, what would normally be considered an incident. So a lot of times the incidents as they came in, they were read, but they were kind of pushed to the side. I would go back to Ms. Ebert, I would ask her, Well, what did you do? And I said, You have to send me, you know, what you did in this process [Tr., p. 265].

Two further incident reports about her students were submitted by the respondent in December, 2013. The principal determined that they were unfounded:

34. Email dated December 5, 2013 from Maria J. Ortiz, Principal, to Respondent (Exhibit 14).

35. The email advises Respondent that a review of 1 of the incident reports she had filed with respect to alleged misconduct of a student was conducted and it was found that Respondent had attributed a witness statement to a teacher who reported that she did not, in fact, make the statement Respondent alleged she had made *(SOE Exhibit 14)* [Petitioner Exhibit 64].

36. An Incident Report dated December 9, 2013 filed by Maria J. Ortiz, Principal, wherein details of the investigation of the above-referenced incident report filed by Respondent were set forth and it was concluded the allegations were unfounded *(SOE Exhibit 15)* [Petitioner Exhibit 62].

Almost three months later, an incident report was filed against the respondent for "inappropriate dialog," involving students in one of the respondent's art classes. It resulted in a Letter of Warning:

37. An Incident Report dated March 12, 2014 filed by Rhonda Williamson-Green, Vice Principal, wherein allegations made by teachers against Respondent for having made inappropriate remarks were memorialized *(SOE Exhibit 16)* [Petitioner Exhibit 3].

38. The Incident Report attached notes from the teachers. Those notes included expressions of concerns wherein students reported to the teachers that they felt that Respondent did not like them and that they felt disrespected by her. The students identified these feelings as

being the cause of some of their disruptive behaviors. Students further reported having been called stupid, lazy and racist by the Respondent and one student was told by Respondent that she stinks. Students also reported that they have been kicked out of class and had nowhere to go *(SOE Exhibit 16)* [Petitioner Exhibit 3].

39. The Incident Report reflects that administrative action taken as a result of the investigation included a conference with the Respondent *(SOE Exhibit 16)* [Petitioner Exhibit 3].

40. An Incident Report dated March 13, 2014 filed by Al-Jathiyah Cannon, School Social Worker, wherein allegations made by students against Respondent for numerous inappropriate conduct were memorialized *(SOE Exhibit 17)* [Petitioner Exhibit 7].

41. The Incident Report described allegations made by students wherein students reported that Respondent called one student "retarded", that Respondent called students racist, crazy and stupid, that Respondent yelled "for no reason", and that Respondent said students act like "fools" and "wild monkeys" *(SOE Exhibit 17)* [Petitioner Exhibit 7].

42. Correspondence dated March 13, 2014 from Rhonda Williamson-Green, Vice Principal, to Respondent *(SOE Exhibit 18)* [Petitioner Exhibit 8].

43. The _ correspondence served as a letter of warning for conduct unbecoming for the inappropriate dialogue described in the March 13, 2014 Incident Report *(SOE Exhibit 18)* [Petitioner Exhibit 8].

The respondent gave art lessons to a fifth-grade class that included special needs students taught by Ms. Kaczka and Ms. Rhodes. The former acknowledged that some of the students presented behavioral issues but maintained that the co-teachers had equipped them with a check list of effective coping strategies. Their class received a single period of instruction each week from the respondent. Art was later changed to a double period on Wednesday afternoon [Tr., p. 38]. Ms. Kaczka said that problems followed the change [Tr., p. 63], prompting her to write Principal Ortiz on March 12, 2014:

> [Ms. Rhodes] and I are concerned with our students' experiences in art class. On Wednesday afternoons, the students attend art class for two periods while Ms. [Rhodes] and I are at our OLC meeting. At the end of the day, our students return to the classroom and express their feelings about art class and Ms. Ebert. Students have reported that Ms. Ebert has called them stupid, crazy, and racist. In addition, one student was told that she stinks. Students have also reported that they have been kicked out of class and have no where to go. They feel Ms. Ebert does not like nor respect them.
>
> We are concerned with our student's safety, emotional well-being and their academic growth.
>
> Please let us know if you need an additional information. Thank you for your attention in this matter.
> [Petitioner Exhibit 3]

That was the only time the students reported being called names, according to Ms. Kaczka [Tr., p. 66], but the students also faulted other aspects of the respondent's performance:

believed that derogatory remarks

> can almost be a self-fulfilling prophecy, where the student starts to internalize. If they just keep hearing it over and over again, they start to feel like, Oh, maybe it is true. So it's very harmful to the students and their growth, and especially their emotional and social [Tr., pp. 56-57].

Another allegation under Charge Two is that the respondent loudly irrupted into the main office. The details are given in the SOE:

> 44. Correspondence dated May 19, 2014 from Maria J. Ortiz to Respondent *(SOE Exhibit 19)* [Petitioner Exhibit 82].
>
> 45. The correspondence describes that Respondent, on even date [sic], walked into the main office during a class and began yelling how disruptive the 8th grade class was behaving. The correspondence further advised that it was imperative that she supervise students at all times *(SOE Exhibit 19)* [Petitioner Exhibit 82].

The next day, the respondent went to the Office of Health Services and Nursing. Mr. Breton's testimony pointed to the following statement, prepared by the office:

> On Tuesday, May 20, 2014, Mrs. Ebert, Art Teacher, had a medical situation and went to the health office for attention. Mrs. Lara, our school guidance counselor attended to Mrs. Ebert after Mrs. Ebert requested for her.
>
> Below is a brief description from Mrs. Lara;
>
> "When I came into the nurse's office, Ms. Ebert was crying about apparently getting written up. She expresses frustration with not being able to handle the students. I was there to listen to her. I did not offer any advice or counsel. I was simply present [to] allow her to vent her frustrations.
>
> Question: Is Mrs. Ebert able to continue her duties to teach Art in grades 2-8?
>
> We believe that this educator is unfit for duty, and would like to evaluate to determine whether or not she is capable of leading instruction.
>
> Mrs. Ebert claims that she is seeking a transfer to another school due to a hostile work environment
> - We have investigated and our investigation has shown no evidence of a hostile environment
> - She claims that she is traumatized -wakes up screaming in the middle of the night -as a result of working at the school
> - She abandoned her classroom earlier this week because children were throwing markers at her
> - She identified to the school nurse on or around Tuesday of last week that Mrs. Ebert felt like she was having a breakdown
>
> If there are any further questions, we will send them on Tuesday, May 27, 2014.
>
> [Petitioner Exhibit 22]

**Charge Two–Conclusion**

Viewed as a whole, the record portrays the deterioration of an elementary school art teacher over a period of less than 12 months. When the district was introducing a new evaluation rubric, coupled with a campaign to keep teachers aware of every student, the respondent initially was successful. In December, 2012, she collaborated with her principal and colleagues to adopt an approach that seemed to produce good results. In her first observation she was rated "effective." One of the three components was even rated "highly effective." The principal invited her to model her techniques, which she did. She was rated "effective" in her mid-year evaluation.

But she began showing signs of difficulty in controlling a class. The respondent filed frequent complaints about student misbehavior. The principal regarded the incident reports as trivial and an admission that the teacher could not manage students. In 2013-2014, the respondent sought a transfer out of the school—apparently to avoid anxiety linked to students. Transfers are not generally granted at mid-year, and she would have been assigned elsewhere in any event when the school closed. She refused to apply for disability accommodation that might have permitted a transfer, insisting that nothing was needed but better-behaved students.

In March, 2014, students turned the tables on the respondent. Four of them complained to their classroom teachers and the social worker that she had addressed them in demeaning, racially-tinged terms.[15] She freely acknowledged that she was afraid of them, which was also taken to be an expression of racism.

The respondent began a two-month absence, to which the district seemed oblivious —a remarkable lapse in oversight—until discovering that she had never initiated the formal administrative procedure for leave-taking. The parties agreed not to make the absence a reason for discipline. Nevertheless, she was penalized in her summative evaluation for poor attendance without making clear which periods were involved.

The respondent's return in May was followed by the outburst in the main office, which was apparently heard by visitors. The respondent had abandoned a classroom to reach the main office and the next day went to see the nurse because she was fearful that students would harm her. Although the Office of Health Services reported that the

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[15] The students' own testimony was absent from the hearing, which means that their accounts are hearsay. Hearsay is generally admissible in arbitration but is accorded less weight than other types of evidence.

respondent might be experiencing an emotional breakdown, the district never demanded an independent medical examination that would focus on her psychological fitness.[16]

The respondent's sustained pattern of erratic behavior demonstrates that, at the very least, she "failed to manage student behavior" (Charge Two), an element of unbecoming conduct that corresponds with her loss of self-control when faced with unruly students. Taken together, her resort to degrading epithets, her outburst in the main office, her unexplained absence for months, and her desperate search for another school cast doubt on her fitness to teach. The most plausible interpretation of the record is that her judgment has been clouded by an inordinate fear of students.

Consequently, there is just cause to find that the respondent has committed conduct unbecoming a teacher. However, the district has not proven just cause for a penalty as severe as loss of tenure and discharge.[17] She should be reinstated, but without back pay, at the beginning of the 2016-2017 school year, provided that an Independent Medical Examination (IME) finds her fit to teach and manage students. Failure to cooperate with the IME and to abide by its conclusions will be tantamount to constructive resignation. In the interim, she should strive to improve her inter-personal and professional skills, ensuring that she can succeed in any environment she may be placed in if she returns to work.

Tia Schneider Denenberg
*Arbitrator*

[16] The district did not order the respondent to undergo a fitness examination until May 23. She refused by means of a lawyer's letter, which produced an offer of a hearing. She did not undergo an IME [Tr., p. 149].

[17] For one thing, the district had already imposed a penalty short of discharge—a formal letter of warning—for the four-student incident. The same event cannot be used to justify discharge.

*In the Matter of the Tenure Hearing of*

**Marie Ebert,**
**State-Operated School District**
**of the City of Newark**
**Essex County**

Agency Docket No. 49-3/15

## Arbitrator's Award

*The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:*

There is just cause to find that the respondent has committed conduct unbecoming a teacher. However, the district has not proven just cause for a penalty as severe as discharge and loss of tenure. She should be reinstated, but without back pay, at the beginning of the 2016-2017 school year, provided that an Independent Medical Examination (IME) finds her fit to teach and manage students. Failure to cooperate with the IME and to abide by its conclusions will be tantamount to constructive resignation. In the interim, she should strive to improve her inter-personal and professional skills, ensuring that she can succeed in any environment she may be placed in if she returns to work.

Tia Schneider Denenberg
*Arbitrator*

Dated: February 22, 2016

*State of New York*
*County of Columbia*

*On this 20th day of February 22, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.*

Kristy Lee Brailey
*Notary Public State of New York*
*No. 01BR6326865*
*Qualified in Columbia County*
*Commission Expires June 29, 2019*

| | | |
|---|---|---|
| AAA SCHOOL, LLC, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, | : | |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner AAA School, LLC (AAA) – a company that provides transportation services to public schools – owns six (6) seven-passenger minivans. Petitioner has bid several times for business from the respondent, Passaic County Educational Services Commission (Commission), and has filed several appeals before the Commissioner prior to the instant case. Petitioner submitted a bid in March 2015 for one of the respondent's student transportation routes – Route 8213 – but was not awarded same because it was not able to meet the requirement in the specifications that a sixteen-passenger yellow school bus be provided. Petitioner filed the within appeal on May 25, 2015. Respondent filed a motion to dismiss in lieu of an answer, and requested reimbursement of attorney fees as well as an order that petitioner be barred from filing repetitive petitions.

The ALJ found, *inter alia*, that: the respondent's motion to dismiss in lieu of an answer was accompanied by documents and certification in addition to the pleadings, and was therefore converted to a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5; there were no genuine issues of material fact, and the matter was ripe for summary decision; AAA's petition fails to state a claim upon which relief can be granted, as petitioner admits that AAA does not possess the type of vehicle that is required by the bids specifications; AAA has filed six previous petitions, all of which argue that he should be awarded a sixteen-passenger vehicle route even though he does not own a sixteen-passenger yellow bus; petitioner owns only white minivans; petitioner is not legally capable of performing the service required by the bid specifications; petitioner's position that he should not be required to own or lease a sixteen-passenger yellow bus because it is an unnecessary extravagance is without merit; the Commission's bid specifications were approved by the Department of Education through the Passaic County Executive Superintendent's Office and are both appropriate and legal; a yellow bus is clearly needed to make other drivers aware to use caution around the vehicle; AAA's appeal is barred by the doctrine of *res judicata*; the actions of the *pro se* petitioner do not at this time rise to the level of being in bad faith and solely for the purpose of harassment, delay or malicious injury as required by *N.J.S.A.* 2A:15-59.1(b); and petitioner was cautioned regarding the filing of another petition in this same issue. The ALJ granted the respondent's order to dismiss, but denied the Commission's request for attorney fees and costs, as well as its request to bar petitioner from filing repetitive petitions.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Commission is entitled to summary decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed. In so doing, the Commissioner emphasized that the petitioner is not legally capable of performing the services required by the bid specifications for Route 8213 because AAA does not own or operate the required vehicle.

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

Issued 2/29/16

OAL DKT. NO. EDU 8740-15
AGENCY DKT. NO. 117-5/15

| | | |
|---|---|---|
| AAA SCHOOL, LLC, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, AAA School, LLC, and the Passaic County Educational Services Commission's (Commission) reply thereto.[1] This case is one of a series of appeals filed by the petitioner, in which it is alleged that the Commission improperly denied it a contract after it submitted bids for transportation services that require a sixteen-passenger yellow school bus. The specifics of this case involve the March 2015 bid for Route 8213.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Commission is entitled to summary decision for the reasons thoroughly set forth in the Initial Decision. The objections raised in the exceptions filed by the petitioner mimic the arguments previously raised before the ALJ and were clearly taken into account by him in determining that the Commission was entitled to summary decision. Notably the petitioner admits that he does not own a sixteen-passenger yellow school bus, which was expressly required in the bid specifications for Route 8213.

[1] The petitioner also submitted a reply to the Commission's reply exceptions. *N.J.A.C.* 1:1-18.4 makes no provision for replies to reply exceptions; therefore, the petitioner's submission was not considered.

Moreover, the Commissioner is not persuaded that the bid specification is unlawful simply because the petitioner believes the Commission's expressed bid requirement of a sixteen-passenger yellow school bus is illogical and a "ridiculous extravagance." (Petitioner's Exceptions at 9) There is simply no doubt that the petitioner is not legally capable of performing the services required by the bid specifications for Route 8213 because AAA School does not own or operatethe requisite vehicle. For this reason, the petitioner cannot be awarded the transportation route.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/26/16
Date of Mailing: 2/29/16

[2] The Commissioner is also in accord with the ALJ's determination that the Commission is not entitled to attorney's fees and costs pursuant to the Frivolous Litigation Statute, *N.J.S.A.* 2A:15-59.1. Neither the Commissioner nor the OAL have the authority to award the monetary judgment sought by the Commission. The Commissioner does, however, reiterate the sentiment of the ALJ in that the petitioner should be mindful going forward that a bid specification that requires the use of a sixteen-passenger yellow school bus is not unlawful on its face, and there is no requirement that the Commission's transportation bids must be altered to specifically fit the vehicles possessed by the petitioner.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 08740-15
AGENCY DKT. NO. 117-5/15

**AAA SCHOOL, LLC,**

Petitioner,

v.

**PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY,**

Respondent.

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**El Eldesouky**, Principal/Owner, for petitioner, pursuant to N.J.A.C. 1:1-5.4(a)(5)

**Derlys Maria Gutierrez**, Esq., for respondent (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: December 31, 2015 Decided: January 12, 2016

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

## STATEMENT OF THE CASE

Petitioner, AAA School, LLC (AAA/petitioner), is a closely held corporation that provides transportation services to public schools and other related and unrelated

services. The Petition alleges that AAA was improperly denied contracts by the Passaic County Educational Services Commission (the Commission or PCESC) after submitting a March 2015 bid specification for Route 8213, which requires a sixteen-passenger yellow school bus. The Commission asserts that AAA's claims fail to state a claim upon which relief may be granted and that pursuant to the doctrine of *res judicata*, petitioner is barred from pursing this matter as similar cases which the petitioner filed were dismissed and thus the Petition of Appeal should be dismissed.

## PROCEDURAL HISTORY

AAA filed its Petition of Appeal with the Commissioner of Education (the Commissioner) on May 25, 2015. The Commission filed a motion to dismiss in lieu of an answer on June 15, 2015, and the contested case was transmitted to the Office of Administrative Law (OAL) on June 16, 2015. A telephone prehearing conference was held on July 22, 2015, at which time the parties were advised to file all motions by December 31, 2015, and a hearing was scheduled for February 1, 2016. Petitioner filed its opposition with the Commissioner on June 15, 2015, and with the undersigned on December 30, 2015.

On December 2, 2015, petitioner filed an application to consolidate this matter with the remanded case pending before Administrative Law Judge JoAnn Candido under OAL Dkt. No. EDU 09967-15, which is currently scheduled for hearing on May 11, 2016. Counsel for the Commission objected to the consolidation by motion, dated December 14, 2015. In light of the action taken with reference to the motion to dismiss, I issued a letter order dated January 4, 2016, denying the consolidation of this matter with the remanded matter presently pending before Judge Candido.

## FINDINGS OF FACT

The salient **FACTS** are uncontroverted and I **FIND**:

The Petition filed by AAA asserts that it was the unsuccessful bidder at a bid opening in March 2015. AAA contends in its Petition that the PCESC's bid specification

for this route, which requires a sixteen-passenger yellow school bus with a wheelchair lift, favors the "big yellow bus companies." Petitioner also relies heavily on the Commissioner's remand of Judge Candido's decision on which I take no position.

PCESC is an educational services commission as defined by N.J.S.A. 18A:6-51 and was established for the purpose of carrying out programs and providing educational and administrative services to public school districts. One of the services that PCESC provides to local school districts is coordinating transportation for school districts' regular and special education students.

PCESC sends a Coordinated Student Transportation Information Sheet (Information Sheet) to each school district to be completed for each student in need of transportation. The Information Sheet expressly states that if the school district does not indicate the type of vehicle required, a sixteen-passenger yellow school bus will be provided. (See Coordinated Student Transportation Information Sheet for Route 8213.)

PCESC's transportation route bid specification for the route at issue in this case (Route 8213) was formulated based upon the Information Sheet completed by the district serviced, Prospect Park. The March 2015 transportation bid specifications were submitted and approved by the Passaic County Executive County Superintendent of Schools.

In March 2015, the District advertised for public bids for transportation services for various bus routes, including Route 8213. The route description for Route 8213 advertised by the District contained requirements as to the vehicle necessary to service the bus route and other special instructions regarding this route. For example, the route description for Route 8213 notes the requirement for a "Minimum Vehicle Capacity 16 Passenger Yellow School Bus (two-way radios required on vehicle). Air conditioned – Wheelchair Lift Bus with additional special instructions that an aide was also required."

Petitioner submitted a bid on Route 8213 and requested that AAA be permitted to use his "big van wheelchair vehicle white not yellow." It was determined that petitioner's bid was nonconforming, and PCESC rejected AAA's bid. There can be no dispute that

the petitioner's bid was, in fact, nonconforming even though petitioner argues in its papers that the district's requirements are an "extravagance." The petitioner has failed to present evidence sufficient to counsel me to set aside the bid specifications and award the bid to AAA.

Prior to this Petition, AAA filed two complaints in the New Jersey Superior Court, Passaic County (PAS-L-4303-12 and PAS-L-4651-13), in which it disputed the legality of the bid specifications and the award of a contract to another bidder. Via order dated December 21, 2012, the Superior Court transferred the matter to the Commissioner, noting its lack of jurisdiction[1] and the other complaint was dismissed with prejudice on February 14, 2014.

The matter currently before this tribunal is the sixth Petition petitioner has filed on behalf of AAA with the Department of Education asserting the same allegations and claim, i.e., that he was the lowest bidder for transportation route(s) he admittedly cannot perform because he does not possess the equipment required by the bid specifications. See AAA Sch. v. PCESC, EDU 06429-14, Initial Decision (June 18, 2014), http://nj.law.rutgers.edu/collections/oal; EDU 07495-14 Initial Decision (July 9, 2014), http://nj.law.rutgers.edu/collections/oal; EDU 08063-14; and EDU 13493-14. In each of these cases, the filed Petition was dismissed. The case handled by Judge Candido was held on a Motion for Summary Decision and was then remanded to Judge Candido by the Commissioner and is presently awaiting a hearing to be held on May 11, 2016.

To the point of this Petition, it is clearly undisputed that the petitioner does not own a sixteen-passenger yellow school bus. Petitioner only owns a white minivan and the petitioner attacks the bid requirements as merely an extravagance which should be set aside. Petitioner further claims that the requirement of a sixteen-passenger yellow bus is "illogic."

[1] The submissions of the parties leave is unclear what path the 2012 complaint took upon transfer to the Commissioner.

## CONCLUSIONS OF LAW

The Commission's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Since the motion was accompanied by documents and certification in addition to the pleadings, I have converted the Commission's application to a motion for summary decision under N.J.A.C. 1:1-12.5.

This rule provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Under N.J.A.C. 6A:3-1.10, the Commissioner of Education may dismiss a petition on the grounds that the petitioner has not advanced a cause of action, even if the petitioner's factual allegations are accepted as true, or for lack of jurisdiction, failure to prosecute or other good reason. Since evaluating a motion to dismiss is a quasi-judicial responsibility, State agencies may look to judicial principals for guidance. See City of Hackensack v. Winner, 82 N.J. 1, 29 (1980); see also N.J.A.C. 1:1-1.3.

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)). I

**CONCLUDE** that this matter is ripe for summary decision, and that the Commission's motion should be granted.

**Petitioner's Failure to State a Claim and Res Judicata**

A review of the Petition filed by AAA clearly shows that it fails to state a claim upon which relief can be granted. Petitioner admits that he/it does not possess a vehicle that is required by the bid specifications. Petitioner takes issue with PCESC's decision to award the contract for Route 8213 to a vendor whose bid was higher than his who was capable of performing the services required by the bid specifications. Petitioner insists that he was the lowest bidder even though his bid failed to conform to the bid specification requiring a sixteen-passenger yellow school bus. This fact cannot be disputed by the Petition as by petitioner's own admission, he/it does not own a sixteen-passenger yellow school bus. Petitioner also raises issues of the accepted bid of being noncompliant, yet fails to address how that makes his bid compliant with the bid qualifications.

It is further without dispute that petitioner has filed six previous petitions, all of which opine that he should be awarded a sixteen-passenger vehicle route even though he does not own a sixteen-passenger yellow bus. It is undisputed that the petitioner only owns a white minivan. Petitioner advocates that the Commissioner should award him this route and, in addition, award him money damages in order to compensate him for the work that he states he had lost. It seems clear to this body that since this petitioner is not qualified, he/it cannot be awarded this route. "Each bidder shall be compelled to conform to every substantial condition imposed upon other bidders." N.J.A.C. 6A:27-9.10(a)(2)(c) (emphasis added.)

Petitioner is not legally capable of performing the services required by the bid specifications. The school bus route in question requires a sixteen-passenger yellow school bus, which petitioner clearly does not own or lease. It is the petitioner's position that he should not be required to own or lease such a school bus because such a requirement is an extravagance.

Furthermore, this Petition is barred by the doctrine of *res judicata*. Petitioner has, on numerous occasions, repeatedly filed petitions on the same issue, for different bus routes. Respondent has taken the same position in each case, i.e., that petitioner is not qualified to be awarded each route as he does not own/lease the necessary sixteen-passenger yellow bus required by the bid specifications. Such bid specifications are approved by the Department of Education through the Passaic County Executive Superintendent's Office.

I **FIND** that these bid specifications are both appropriate and legal. Accordingly, in order to be awarded a route, the petitioner's bid must conform to the bid specifications. For purposes of public awareness, a yellow bus is clearly needed to make other drivers aware to use caution around the vehicle. The public is well aware that when seeing a yellow school bus, they should drive with caution as the vehicle is likely dropping off or picking up young school children. Instead the petitioner, in this case, is arguing to have the bid specifications be altered to fit the type of vehicle he possesses. Petitioner's position has previously been presented to the OAL, adjudicated and rejected in prior cases. In AAA/El Eldesouky v. Passaic County Educational Services Commission, EDU 8063-14, Commissioner Decision No. 489-14 (December 18, 2014), http://nj.gov/education/legal/commissioner/2014/, the Commissioner found "Petitioner could not be awarded the contracts in question because he does not own and operate the sixteen-passenger yellow school buses which the contracts called for in their specification." The issue in that case and in this case should begin and end there.

**Barring Petitioner From Filing Repetitive Petitions and Request For Attorney's Fees and Costs**

With a more detailed review of all the petitions and complaints filed by this petitioner, I am unable to grant the respondent's request to bar the petitioner from filing additional petitions. In addition, I am unable to grant the respondent's request for attorney's fees and cost as the cites presented by the respondent are applicable to Superior Court matters. I **FIND** that the actions of the pro se petitioner do not, at this point and time, rise to the level of being in bad faith and solely for the purpose of harassment, delay or malicious injury as required by N.J.S.A. 2A:15-59.1(b). I further

**FIND** that the petitioner neither knew nor should have known that the complaint was without reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. N.J.S.A. 2A:15-59.1(b)(2). I am giving some amount of deference to the fact that the petitioner, here, is not an attorney and is representing himself; however, I would advise the petitioner to seek legal counsel prior to filing another petition on this issue. I would further caution this petitioner regarding the filing of another petition in this same issue.

## ORDER

Based on the foregoing, I **ORDER** that the respondent's motion to dismiss is hereby **GRANTED** and the claims raised by the Petition are **DISMISSED**. I further **ORDER** that the respondent's request to bar the petitioner from filing repetitive petitions and reasonable attorney's fees and costs are hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

January 12, 2016
DATE

**MICHAEL ANTONIEWICZ**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

90-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges Against Daniel Ojomoh:

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**CAMDEN CITY SCHOOL DISTRICT**

Petitioner,

- and -

**DANIEL OJOMOH**

Respondent.

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Agency Dkt. No.
283-9/15

**OPINION AND AWARD**

**Before: Joyce M. Klein, Arbitrator**

Appearances:

**For the Petitioner:**
Joseph G. Antinori, Esq.
Brown & Connery, LLP

**For the Respondent:**
Barbara E. Riefberg, Esq.
Shimberg & Friel, P.C.

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012*, c. 26 ("TEACHNJ"), the tenure charges brought by the Camden City School District (the "District" or "Petitioner") against Daniel Ojomoh ("Ojomoh" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and decision on October 6, 2015. I conducted hearings at the Board's offices in Camden, New Jersey on December 17, 18, and 21, 2015.

At the hearing, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from David Corvi, Principal of Forest Hill School, Dr. Jennifer Foley-

Hindman, currently Chief School Administrator, Greenwich Township School District, Charles Dawson, Vice President of Forest Hill School, Jerry L. Brown, Vice Principal of Camden High School, Nick Pillsbury, Implementation Manager for the Office of Evaluation, Robert Atwell, Vice Principal of Yorkshire Elementary School, Sonja Cuspid-Roane, former Special Needs Teacher at Forest Hill School, and Daniel Ojomoh. Post-hearing briefs were received on February 8, 2016, whereupon the record was closed.

## THE CHARGES

The Sworn Tenure Charges brought against Daniel Ojomoh on August 21, 2015, are in pertinent part as follows:

1. The Camden City Board of Education entered into a Consent Order with the Commissioner of Education in March of 2013 to allow for full State intervention to begin on the last day of the school year in June 2013. The State of New Jersey began operating the Camden City School District ("the District") on June 26, 2013. In accordance with the newly enacted "Teacher Effectiveness and Accountability for the Children of New Jersey Act" ("TEACHNJ"), one of the crucial initiatives upon state intervention was a thorough assessment of all teachers within the District.

2. Daniel Ojomoh has been found to be an inefficient teacher pursuant to the process outlined in the TEACHNJ legislation. He lacks the ability to effectively perform his daily responsibilities. This is simply not acceptable in a State-operated school district which is trying to effectuate important reforms, including the elimination of school teachers who fail or refuse to grasp the concept of being an efficient and effective teacher. Daniel Ojomoh must be dismissed from his employment.

***Year 1: The 2013-2014 Evaluation Process and Requirements***

***Practical Portion***

10. N.J.A.C. 6A:10-4.4(c) requires that teachers are observed at least three (3) times in the first year with each observation lasting at least twenty (20) minutes.

11. Daniel Ojomoh was observed three (3) times in the 2013-2014 academic year on the following dates by the following evaluators:

a. Short Observation #1: December 12, 2014 – Robert Atwell
b. Short Observation #2: February 19, 2014 – Jen Foley
c. Short Observation #3: February , 2014 – Jerry Brown

12. Upon information and belief, each observation lasted for the required twenty minutes.

13. N.J.A.C. 6A:10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) working days after the observation.

14. It is the practice of District evaluators to conduct post-observation conferences within the timeframe required and, upon information and belief, each evaluator conducted post-observation conferences in accordance with the regulation.

15. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced and preceded by a pre-observation conference.

16. In the 2013-2014 academic year, Daniel Ojomoh participated in a pre-conference which, upon information and belief, was in compliance with the timing requirements set forth in the regulations.

17. N.J.A.C. 6A:10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and at least one occur during the second half of the school year.

18. In the case of Daniel Ojomoh, at least one observation occurred in the first half of the school year and at least one occurred in the second half.

19. Finally, every teacher of the District had access to each of their observations as soon as it was uploaded via the TeachScape program and continued to have such access throughout the remainder of the academic year.

***Student Growth Achievement Portion***

20. Pursuant to N.J.A.C. 6A:10-4.1(b) and 4.1(c), each teacher shall have a measurement of student growth achievement such as an SGO.

21. Daniel Ojomoh's SGO scores for the 2013-2014 academic year were a 1.00 and a 1.00.

***2013-2014 Summative Rating/Conference***

22. After weighing each component of the evaluation, Daniel Ojomoh's summative rating was calculated to be 1.79, ineffective.

23. Pursuant to N.J.A.C. 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on June 23, 2014 and the summative form was signed by the teacher on June 23, 2014 and by the supervisor on June 23, 2014.

***Corrective Action Plan***

24. A teacher who is rated "partially effective" or "ineffective" during an academic year is required to be placed on a corrective action plan ("CAP") pursuant to N.J.A.C. 6A:10-2.5(a). The CAP is required to be created prior to September 15th of the next academic year in most cases and both the teacher and supervisor are required to participate in creating the CAP, N.J.A.C. 6A:10-2.5(b).

25. Daniel Ojomoh's CAP was created and, upon information and belief, both the teacher and the supervisor participated in its creation.

***Professional Development***

26. During the 2013-2014 academic year, all teachers were provided with professional development opportunities both generally and specific to the areas of improvement needed for each teacher individually.

***Year 2: The 2014-2015 Evaluation Process and Requirements***

***Practical Portion***

27. N.J.A.C. 6A:10-2.5(n) requires that teachers who are on a CAP must be observed at least four times with each observation lasting at least twenty (20) minutes. Additionally, multiple (more than one) evaluators must perform observations of a teacher on a CAP. N.J.A.C. 6A:10-2.5(l).

28. Daniel Ojomoh was observed four (4) times in the 2014-2015 academic year on the following dates by the following evaluators:

    a. Short Observation #1: October 28, 2014 – Charles Dawson
    b. Short Observation #2: November 10, 2014 – David Corvi
    c. Short Observation #3: February 5, 2015 – Charles Dawson
    d. Short Observation #4: February 24, 2015 – David Corvi

29. Upon information and belief, each observation lasted for the required twenty minutes and Daniel Ojomoh was evaluated by more than one evaluator during the 2014-2015 academic year.

30. N.J.A.C. 6A:10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) working days after the observation.

31. It is the practice of the District to conduct post-observation conferences within the timeframe required and, upon information and belief, each evaluator conducted such post-observation conferences in accordance with the regulation.

32. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced and preceded by a pre-observation conference.

33. In the 2014-2014 academic year, Daniel Ojomoh participated in a pre-conference which, upon information and belief, was in compliance with the timing requirements set forth in the regulations.

34. N.J.A.C. 6A:10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and that at least one occur during the second half of the school year.

35. In the case of Daniel Ojomoh, at least one observation occurred in the first half of the school year and at least one occurred in the second half.

36. Finally, every teacher of the District had access to each of their observations as soon as it was uploaded via the TeachScape program and continued to have such access throughout the remainder of the academic year.

***Student Growth Achievement Portion***

37. Pursuant to N.J.A.C. 6A:10-4.1(b) and 4.1(c), each teacher shall have a measurement of student growth achievement such as an SGO.

38. Daniel Ojomoh's SGO scores for the 2014-2015 academic year were a 4.00 and a 1.00.

***2014-2015 Summative Rating/Conference***

39. After weighing each component of the evaluation, Daniel Ojomoh's summative rating was calculated to be 1.83, ineffective.

40. Pursuant to N.J.A.C. 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on June 3 2015 and the summative form was signed by the teacher on June 3, 2014 and by the supervisor on June 3, 2014.

***Corrective Action Plan***

41. A teacher who is rated "partially effective" or "ineffective" during an academic year is required to be placed on a corrective action plan ("CAP") pursuant to N.J.A.C. 6A:10-2.5(a) for the next academic year. During the year for which the CAP applies, the teacher and the supervisor are required to meet by February 15th in order to review the teacher's mid-year progress in accordance with the CAP. N.J.A.C. 6A:10-2.5(m).

42. Daniel Ojomoh and the supervisor had a mid-year conference.

***Professional Development***

43. During the 2014-2015 academic year, all teachers were provided with professional development opportunities both generally and specific to the areas of improvement needed for each individual teacher.

**Conclusion: Inefficiency**

44. Due to the fact that Daniel Ojomoh received an ineffective rating for the 2013-2014 academic year and an Ineffective rating for the 2014-2015 academic year, the Superintendent is required to bring tenure charges for inefficiency under the TEACHNJ statute.

45. As such, the District is pursuing tenure charges against Daniel Ojomoh for inefficiency.

## BACKGROUND

The Respondent, Daniel Ojomoh, has a Bachelor's Degree in Business Administration from Temple University and a Master's Degree in Finance from St. Joseph's University. He also has a Master's Degree in Education from Cheney University. He initially served as a substitute teacher in the Camden City School System between 1991 and 1994. Mr. Ojomoh was hired by the District as a computer teacher in 1995. He is certified in elementary education as well as business education K-12.

When Mr. Ojomoh was initially hired, he was assigned as a computer teacher at the Camden Middle School. Mr. Ojomoh was transferred to several different schools until the 2013-2014 school year when he was assigned to Camden High School. Mr. Ojomoh was assigned to teach Web Page Creation, Personal Financial Literacy and Office Systems.

In order to implement the TEACHNJ law, the District has adopted the Charlotte Danielson Framework for use to evaluate teacher practices and professional development. The Danielson Framework has four domains: (1) planning and preparation; (2) classroom environment; (3) instruction and (4) professional responsibilities. Each domain includes several components.

The Danielson Framework is used to evaluate teachers by collecting "evidence," that is, collecting facts from what is seen or heard from teachers or students in a classroom. The evidence that is collected is then aligned to the components within the four domains. Evaluators from the District, after aligning the evidence to the components, then score the components on a scale of one through four, one being ineffective and four being highly effective.

In addition to the scoring the components within the four domains of the Danielson Framework, teachers are also evaluated and measured for "student growth objectives" ("SGOs"), where baseline or diagnostic data on students are taken in September and then growth marks or goals are set that students need to achieve before the end of the school year. For example, in core subject areas,

standardized test assessments are used to measure whether there has been growth in student academic performance. The goals are set by the teachers with input from administrators and finalized between the teacher and the administrator. Under the Danielson Framework, in the second year, 20 percent of a teacher's overall evaluation score is based on SGOs and the remaining 80 percent based on classroom observation. In special subject areas, such as computer classes, the teacher establishes the SGO.

The District uses an online platform called TeachScape as a portal to implement the Danielson Framework. TeachScape is used by approximately one hundred and ninety (190) other school districts in New Jersey. Teachers can access TeachScape on laptop computers provided by the District, their home computer or smart phone through an account, login and password assigned to each teacher. Information such as records of classroom observations, SGO scoring, information or documents provided by teachers to support their instruction can be uploaded into TeachScape by teachers and administrators.

During the 2012-2013, 2013-2014 and 2014-2015 school years, Mr. Ojomoh received training in TEACHNJ, the Danielson Framework and TeachScape. Mr. Ojomoh also recalled that he attended optional workshops presented by the NJEA to address TEACHNJ and the new evaluation process. Mr. Ojomoh described these workshops as "general". Mr. Ojomoh acknowledged, "[p]ersonally, I didn't understand it." He believed that the Danielson model was supposed to help teachers improve their skills rather than being used as a tool to terminate teachers.

During the 2013-2014 school year, Mr. Ojomoh taught computer and business classes at Camden High School. Jerry Brown, a Vice Principal at Camden High School, conducted a short or twenty minute observation of Mr. Ojomoh on November 12, 2013. Mr. Brown did not recall conducting a pre-observation conference. Mr. Brown found that Mr. Ojomoh did not "try to ascertain varied ability levels among students in the class." Mr. Brown observed that the "quality of interactions between teacher and students, or among students, is uneven, with occasional disrespect or insensitivity." Mr. Ojomoh submitted a Post-Observation Reflection Form that addressed his lesson plans and objectives as well as pointing out "inadequacies" in his classroom. These included "lack of heat, lack of adequate furnitures (sic), use of laptops coupled with student logins problems." After receiving this, Mr. Brown conducted but could not specifically recall a post-observation conference.

Robert Atwell worked as a Vice Principal at Camden High School. After scheduling a pre-conference and observation with Mr. Ojomoh that needed to be rescheduled as a result of a weather-related delayed opening, Mr. Atwell conducted a short observation of Mr. Ojomoh on December 10, 2013. Mr. Atwell does not specifically recall conducting a pre-conference with Mr. Ojomoh, but Mr.

Ojomoh submitted a pre-observation form on December 10. Further, a December 9, 2010 email from Mr. Atwell to Mr. Ojomoh rescheduled the pre-observation conference to 7:30 a.m., the next day and advised that he would conduct the observation on December 10 during second period. Atwell rated Mr. Ojomoh as partially effective at "managing student behavior" and recommended, that he "[d]evelop better techniques and strategies to manage behavior." According to Mr. Ojomoh, Atwell returned to classroom at a later date for an informal observation. At that time, Mr. Atwell told him that he was improving.

On February 19, 2014, Dr. Jennifer Foley, who at the time worked for the District as a coach evaluator within the Office of Evaluation, conducted a short evaluation of Mr. Ojomoh. Based upon her twenty minute plus unannounced observation, Dr. Foley noted that the observation occurred "during the opening days of a new semester" and, as a result, Mr. Ojomoh "had limited time to get to know his students." She further observed that the lesson plan, had it been followed, would have provided Mr. Ojomoh with "ample opportunity to get to know his students." Dr. Foley addressed the classroom environment finding "numerous examples of disrespect" that were ignored by Mr. Ojomoh. Dr. Foley observed that instructional goals were set so low that students received a message that they were not capable of more and stopped making an effort.

Dr. Foley made other observations and urged Mr. Ojomoh to establish "clear procedures for work within the classroom and then follow through with them." Dr. Foley documented several examples and noted that "[s]tudents were in control of the classroom and demonstrated that regularly by ignoring Mr. Ojomoh's limited attempts at control."

Documentation of a post-observation conference that occurred on February 24, 2014 included a suggestion by Foley that Mr. Ojomoh "speak with your building principal about being assigned a mentor to aid you in your development. Observe other teachers and reflect upon what they do to establish control in their classrooms." Dr. Foley rated Mr. Ojomoh as ineffective. Foley also recommended that Mr. Ojomoh watch TeachScape videos addressing components, 1E, Designing Coherent Instruction, 2A, creating an environment of respect and rapport and 2C, managing classroom procedures.

Mr. Ojomoh explained that the day Dr. Foley conducted an observation was not a typical day. It was very cold and the High School was conducting a "round up" where security officers round up students from hallways, the campus or the streets and bring students into classrooms. According to Ojomoh, this caused a lot of commotion. Mr. Ojomoh explained that students were dragged in one at a time over the course of ten or fifteen minutes. Mr. Ojomoh observed that it took these students, who did not want to be in the classroom, a long time to settle down. Further, the class was not one that Mr. Ojomoh had been teaching on a regular basis. The class had been assigned to another teacher. Mr. Ojomoh

acknowledged that the situation was so chaotic that day he considered calling security.

Mr. Ojomoh recalled that at the post-observation conference, Dr. Foley told him that she would speak to the principal about providing him with some workshops on how to handle this type of situation. According to Mr. Ojomoh, the principal never offered him the opportunity to attend any such workshops. Mr. Ojomoh did not take any action to secure a mentor. The record does not reflect that Ojomoh watched the recommended TeachScape videos.

On June 23, 2014, Camden High School Principal James Thompson completed Mr. Ojomoh's annual evaluation. As a result of that evaluation, Mr. Ojomoh received an overall score of 1.79, ineffective. This score was based on a score of 2.6 for student growth objectives, which received a weight of .15 and a score of 1.65 for teacher practice which received a weight of .85.[1] This overall evaluation was based upon the three short (minimum twenty minutes) observations by Mr. Brown, Mr. Atwell and Dr. Foley. Based upon these observations, Mr. Thompson listed three areas for growth:

- Teacher needs to improve classroom management
- Teacher needs to improve engaging students
- Teacher must become more familiar with the Danielson rubric

For the 2014-2015 school year, Mr. Ojomoh was transferred to the Forest Hill School. According to David Corvi, Principal at Forest Hill, there were weekly staff meetings that included training sessions on best practices for instruction. Those sessions included information about ACHIEVE NJ, TeachScape and the Danielson Framework. Mr. Corvi also indicated that one of the three professional development days prior to the start of the school year addressed the Danielson model, AchieveNJ, SGOs and TeachScape. The District also offered a Summer Teacher Academy before the beginning of the 2014-2015 school year that included optional training on the Danielson Model, AchieveNJ and SGOs. Mr. Ojomoh acknowledged that he attended this training. The NJEA also offered similar training and Mr. Ojomoh acknowledged attending that training.

Based upon his summative rating of ineffective for the 2013-2014 school year, Mr. Ojomoh was placed on a corrective action plan (CAP) for the 2014-2015 school year. Mr. Ojomoh met with Principal Corvi on September 15, 2014 to review the CAP. According to Mr. Ojomoh, he was given approximately five minutes to review the CAP and asked to sign it. Mr. Ojomoh explained that he was not given an opportunity to review the document prior to his meeting with Mr. Corvi and was

[1] Nick Pillsbury, Implementation Manager for the District's Office of Evaluation, explained that Respondent's SGOs were scored incorrectly and Mr. Ojomoh actually received a score of 3. This change would not have materially affected his summative rating of ineffective for the 2013-2014 school year.

not asked for his input. Mr. Corvi estimated that Mr. Ojomoh had approximately five minutes to review the document before their meeting began. The CAP was developed by Vice Principal Charles Dawson and approved by Principal Corvi.

The CAP addressed 1E – Designing Coherent Instruction by requiring Mr. Ojomoh to submit weekly lesson plans which required weekly approval, feedback and revisions by Mr. Corvi and/or Mr. Dawson. Mr. Ojomoh's Measure of Success required a score of 4/5 on each lesson plan rubric throughout the school year.

The "Action Step for Supervisor" block of the CAP addressing "Managing Classroom Procedures incorrectly references Mr. Turner, a physical education teacher who was also placed on a CAP. Specifically, the "Action Steps for Supervisor" provides:

> Mr. Corvi and/or Mr. Dawson will check equipment inventory submitted by Mr. Turner, as well as check that the equipment closet is organized according to inventory.
>
> Similarly, the "Measure of Success" for that same component provides:
>
> - Mr. Turner will submit an itemized inventory of all Physical Education equipment to Mr. Corvi and Mr. Dawson by October 3, 2014.
>
> - Mr. Corvi and/or Mr. Dawson will check that the closet in the gymnasium has been organized according to the inventory.
>
> - Mr. Turner will score at least a 3 – effective during his three observations in the component 2C – Managing Classroom Procedures.

Likewise, component 3C – Engaging Students in Learning also references Mr. Turner under "Action Steps for Supervisors," providing that "Mr. Corvi and/or Mr. Dawson will check Mr. Turner's lesson plans for the times he will stop and the questions he will pose to students." Mr. Corvi characterized these errors as typographical errors. Neither Mr. Corvi, Mr. Dawson, nor Mr. Ojomoh appeared to notice these errors. According to Mr. Corvi, these typographical errors "would not have had any major impact" on the implementation of Mr. Ojomoh's CAP.

"Action Steps for Supervisor" also provided that Mr. Corvi or Mr. Dawson "will conduct weekly walk-throughs and coaching conferences to observe that Mr. Ojomoh is stopping 3-4 times throughout instruction and implementing these strategies."

teacher were not productively engaged." Mr. Corvi conducted a post-observation conference with Mr. Ojomoh on November 13, 2014.

Mr. Ojomoh submitted a Post-Observation Conference Form acknowledging that the lesson was not successful but asserting that classroom procedures are in place because "students line up before they enter the lab and sit on assigned seats." Mr. Ojomoh viewed the login issues as an impediment to delivering the lesson effectively.

Mr. Dawson conducted a second observation of Mr. Ojomoh on February 5, 2015. Mr. Dawson's ratings and comments about Mr. Ojomoh's control of the classroom mirror those of his first observation. Specifically, Dawson observes that students are talking to each other throughout the class requiring Mr. Ojomoh to repeat instructions over and over. Students are not responding to Mr. Ojomoh's directives. Mr. Dawson identified the following areas of growth:

> 2c – The transitions are disorganized with much loss of instructional time. Procedures for transitions, and a classroom routine has not been clearly established. There do not appear to be any established classroom routines or procedures. A considerable amount of time is spent off task because of unclear procedures.

Mr. Dawson gave Mr. Ojomoh the following recommendations:

> As the instructional leader, you must establish and maintain full control of your classroom. The first routine or procedure that must be implemented is an effective entry routine. Your entry routine describes how you expect students to enter the classroom and how the classroom session begins. Secondly, institute daily "Do Now" activities should be written on the white board or placed on student's desks for them to do as soon as they enter the classroom. In order to increase communication between with all of your students, they should be fully aware of the objective being taught each day. Post It means displaying your lesson plan objective in the same location every day so that anyone that walks into the classroom can identify your purpose. This technique will help students pursue the objective more intentionally and will help peers give you useful feedback on whether you are doing what you set out to do.

Mr. Dawson recalled that this observation was conducted shortly after Mr. Ojomoh returned from a bereavement leave in Africa where one of his wife's relatives had passed away.

Mr. Corvi conducted an additional observation of Mr. Ojomoh on February 24, 2015. During that observation, Corvi observed students playing computer

games for approximately 16 minutes and noted that the "materials do not meet instructional outcomes." Based upon this observation, Mr. Corvi rated Mr. Ojomoh ineffective in Component 1E, Designing Coherent Instruction.

Mr. Corvi rated Mr. Ojomoh partially effective for Component 2A – Creating an Environment of Respect and Rapport. Corvi noted that Mr. Ojomoh attempted to "respond to disrespectful behavior among students with uneven results." Corvi also rated Mr. Ojomoh partially effective on Component 2B – Establishing a Culture of Learning, noting that Mr. Ojomoh's "primary concern appears to be complete the task at hand" and that Mr. Ojomoh's "energy for the work is neutral, neither indicating a high level of commitment nor ascribing need to do the work to external focus." Mr. Corvi rated Mr. Ojomoh ineffective on Component 2C – Managing Classroom procedures, noting that "there do not appear to be any established procedures for distributing and collecting materials" and as a result, "a considerable amount of time is spent off task." Mr. Corvi also observed that "[s]tudents not working with the teacher are not productively engaged." Mr. Corvi rated Mr. Ojomoh partially effective for Component 2D – Managing Student Behavior. Mr. Corvi noted that Mr. Ojomoh "attempted to keep track of student behavior, but with no apparent system" and that he attempted to "maintain order in the classroom" by referring to classroom rules, "but with uneven success." Addressing Component 2E – Organizing Physical Space, Mr. Corvi rated Mr. Ojomoh partially effective, noting that the physical environment neither "enhance[d]" nor impeded learning.

Turning to the instructional component, Mr. Corvi rated Mr. Ojomoh ineffective at communicating with students observing that "at no time during the lesson does the teacher convey to students what they will be learning." Mr. Corvi also rated Mr. Ojomoh ineffective on Component 3C – Engaging Students in Learning, observing that "[f]ew students are intellectually engaged in the lesson" and "[l]earning tasks/activities and materials require only recall or have a single correct response or method."

After this observation, Mr. Corvi again identified as areas of growth, Components 1E – Designing Coherent Instruction, 2C – Managing Classroom Procedures and 3A – Communicating with Students. Mr. Corvi provided the following recommendations:

> Map out all your routines down to the smallest student action. How do students enter the classroom; how do they sit down; how do they log in; what should the classroom sound like, etc. Provide students very clear what to do directions and implant (sic) 100% strategy, start with narrative the positive.

Mr. Ojomoh completed a Pre-Observation Conference Form for his February 24, 2015 observation on February 27, 2015.

Mr. Corvi also recounted instances of "coaching in the moment" where he stopped by Mr. Ojomoh's classroom and stepped in and took over the classroom to get students in their seats and settled. Mr. Corvi explained that this would model an approach to controlling the classroom for Mr. Ojomoh.

Dawson walked through the school two or three times daily and often peeked in to make sure everything was okay in Mr. Ojomoh's classroom. According to Mr. Dawson, if necessary, an informal conference to address issues or provide assistance. Mr. Dawson recalled that Mr. Ojomoh sent students to the administrative office to request his presence in the classroom when Mr. Ojomoh had trouble controlling the class. Mr. Dawson recalled that students were unruly when they came into Mr. Ojomoh's classroom, so he suggested not allowing them to enter the classroom until they were lined up and quiet. Dawson also suggested that Mr. Ojomoh assign seats or computers so that students cannot sit where they are most comfortable. Mr. Dawson explained that it reduced talking in class. Mr. Dawson also addressed making sure that the level of instruction is appropriate and the lesson is sufficiently rigorous. Mr. Dawson testified that he did review Mr. Ojomoh's lesson plans on a bi-weekly basis and was in his classroom for walk-throughs on a weekly basis. Dawson acknowledged that they did not have weekly meetings as provided in the CAP.

Because Mr. Ojomoh was on a CAP, he received a mid-year evaluation. This mid-year evaluation was conducted at the same time as the post-observation conference after his fourth observation conducted by Mr. Corvi. That review reflected that Mr. Ojomoh did not meet the goals set out for him in the CAP and concluded:

> At this time, Mr. Ojomoh has not met the criteria set forth in this Corrective Action Plan. Additionally, he has been receptive to the recommendations made by Mr. Dawson, however, successful and effective implementation of these strategies has not yet occurred. A Summative Evaluation Meeting for Mr. Ojomoh will be scheduled between May-June of 2015 to assess whether these goals were reached. At this meeting, next steps will be discussed and decided, which may include any one of the following: Removal from Improvement Plan with Support, or Recommendation for Termination from Position.

Mr. Corvi explained that at this point, "it might be that there was some kind of effort involved" ... [b]ut overall, Mr. Ojomoh's ability to instruct and deliver instruction and manage the classroom were just unsuccessful."

Although no formal observations occurred between that meeting on February 27, 2015 and his final summative evaluation, Mr. Dawson continued to

visit his classroom and walk-throughs which generally lasted five to ten minutes. They discussed and Mr. Ojomoh was receptive to suggestions regarding classroom management, classroom routine and classroom procedures.

Mr. Ojomoh received a summative evaluation for the 2014-2015 school year on June 3, 2015. Mr. Ojomoh's summative rating was 1.83 or ineffective. This rating was based on an average score for Domain 1 – Planning and Preparation, of 1.75, an average score for Domain 2 – Classroom Environment of 1.53; an average rating for Domain 3 – Instruction 1.5; an average rating for Domain 4 – Professional Responsibility of 2; and a score of 2.5 for Student Growth Objectives.

Mr. Ojomoh recalled that when Mr. Corvi gave him his summative evaluation, he learned that tenure charges would follow.

## DISCUSSION

The District asserts that Respondent is required to prove that one of the four factors in N.J.S.A. 18A:6-17.2(a) apply and, if so, he must also establish that this factor "materially impacted the outcome of the evaluation." N.J.S.A. 18A:6-17.2(b). Further, the District emphasizes that the TEACHNJ Act provides explicitly that "the evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review."

The District argues that Respondent is required to show that "the employee's evaluation failed to adhere substantially to the evaluation process." (emphasis added). Acknowledging that Respondent may point to alleged omissions by the District in implementing the TEACHNJ Act procedures, the District asserts that none of those alleged omissions are "substantial." To the contrary, the District contends that the record establishes its substantial efforts to comply with the new statutory and regulatory requirements for removal of teachers for inefficiency. The District maintains that even if Respondent is able to demonstrate the alleged problems in his evaluation process, either individually or collectively, he cannot demonstrate either that they amount to substantial failure by the District to adhere to the evaluation process or that they materially affect the outcome of his evaluation.

The District emphasizes that although Respondent received poor scores in other areas, observations from seven different observers over a two year period, all identified the same fundamental problem, that Respondent was unable to control the classroom. Further, the District points out that despite having two entirely different sets of evaluators in two different school years at two different schools, Respondent received "pretty close overall scores."

The District contends that Respondent cannot show that it did not try to help him overcome his classroom management problems and he was simply unable to do so despite the support provided by the District.

The District emphasizes its substantial efforts during the 2013-2014 school year to provide training to evaluators as well as training to teachers regarding TEACHNJ, the Danielson Framework and TeachScape. That training continued into the 2014-2015 school year with the Danielson Framework discussed repeatedly in weekly staff meetings. Further, the District points out that it provided full-day non-mandatory education and training session for teachers and additionally, teachers may review training videos provided on TeachScape. The District points out that Respondent took advantage of seminars on TEACHNJ that were conducted by the NJEA.

The District points to Mr. Corvi's testimony that during the 2014-2015 school year, he informally met with Respondent and engaged in "coaching in the moment" with him by taking over the classroom to provide Respondent with a model to follow in controlling classroom behavior. The District notes that Mr. Corvi also went to Respondent's classroom on several occasions to assist with noisy students and provide visible support for him in the classroom.

Further, the District points to Mr. Dawson's testimony that he went to Respondent's classroom to "just see if he needed support." Mr. Dawson also noted that on occasion, Respondent would send a student to him and Dawson would go to Respondent's classroom to find out what the problem was. The District points out that these informal meetings occurred frequently because Mr. Dawson walked through the school two or three times each day. The District points out Mr. Dawson also provided specific tips to Respondent.

The District argues that the record is devoid of evidence of alleged failure to comply with the TEACHNJ evaluation requirements that would have made any difference in Respondent's evaluation over a two-year period. The District acknowledges that pre-observation conferences were missed but notes that Respondent did not demonstrate how the failure to conduct such a conference rose to the level of a "substantial" failure to adhere to the evaluation process or how it "materially" impacted the results of Respondent's evaluation.

Addressing other alleged failures, the District points to the allegation that Thompson did not discuss Respondent's summative evaluation with him in 2013-2014 when it was given in June of 2014. However, the District points out that Respondent signed the acknowledgment for the summative evaluations in which he certified that Thompson discussed it with him.

Addressing that Respondent's CAP for the 2014-2015 school year mistakenly referred to "Mr. Turner" rather than Respondent, the District maintains

that this error cannot be considered a "substantial" failure to adhere to the evaluation process and cannot be said to have a "material" impact on the evaluation. Rather, the District considers it to be a "mere proofreading error" that was overlooked by everyone, including Respondent who also signed off on the CAP.

The District asserts that its alleged failure to review Respondent's lesson plans also was neither a "substantial" failure to adhere to the evaluation process or "materially" affected the outcome the final score of "ineffective." Addressing the alleged failure to conduct weekly coaching sessions, the District points to the substantial support, backup and coaching provided by both Mr. Corvi and Mr. Dawson throughout the 2014-2015 school year. The District maintains that given this extensive support, backup and coaching, the record does not support an alleged substantial failure to adhere to the evaluation process based upon an alleged failure to conduct weekly coaching sessions.

Finally, the District asserts that there is no meaningful consequence arising from the fact that Respondent's mid-year review in the 2014-2015 school year occurred on February 27 instead of February 15, 2015, the date set by TEACHNJ. The District emphasizes that there is no evidence that it would have made any material difference in the outcome if the mid-year review occurred two weeks earlier. The District points out that by February of 2015, Respondent had gone through seven observations with the attendant post-observation conferences, a summative evaluation conference in June of 2014, a CAP conference in September of 2014, and ongoing coaching and counseling provided by Mr. Corvi and Mr. Dawson throughout the 2014-2015 school year. The District maintains that despite extensive interactions with administration members regarding how to handle a classroom, Respondent, through receptive to counseling, was unsuccessful in implementing the ongoing tips, recommendations and advice he received.

The District notes that Respondent showed a "surprising indifference or lack of comprehension" about the District's implementation of TEACHNJ, the Danielson Framework and TeachScape. The District notes that Respondent received extensive training and education but claimed that he did not know what a CAP was until he met with Corvi and Dawson to go over his CAP. Further, Respondent claimed that he did not understand that if he did not perform well under the Danielson Framework, he could receive tenure charges and ultimately termination. Further, the District points out Respondent acknowledged that he was advised to seek a mentor but never did so and never sought out someone from the Association to complain that the District's observations, evaluations, CAP or mid-year review were unfair but instead felt that he "knew the material well enough to teach effectively." The District maintains that Respondent bears the burden to show that an omission in the implementation in the TEACHNJ standards was substantial and, if so, that it materially affected his evaluation. The District asserts

that Respondent did not offer evidence supporting this and thus the District asks that the tenure charges be sustained.

Respondent asserts that the District has not met its burden of proof. Respondent argues that that the District did not comply with the statutory evaluation procedures and CAP procedures did not take place. According to Respondent, these deficiencies were significant enough to influence the outcome of the scoring. Specifically, Respondent asserts that the manner in which the evaluations were conducted and in which the CAP was prepared and implemented, materially affected the outcome of the evaluations and Respondent was set up for failure rather than success. Respondent points to the lack of pre-observation conferences as well as the fact that one of the critical observations during the 2014-2015 school year took place the day he returned to school from an extended bereavement leave of absence in Nigeria. Further, the final observation took place shortly thereafter and did not provide Respondent with a reasonable time period between observations to exhibit improvement.

Specifically, Respondent asserts that for the 2013-2014 school year, at least one of the three required observations was to be announced and preceded by a pre-observation conference. Respondent points out that none of his observations during the 2013-2014 school year included a pre-observation conference. Further, addressing the summative conference conducted on June 23, 2014, by Principal James Thompson, Respondent points out that Mr. Thompson did not appear at the hearing and Respondent testified that Thompson failed to explain the ramifications of an ineffective rating to him. Respondent points to his testimony that he did not know that he would be placed on a corrective action plan and he did not know that he would be transferred to a different school until mid-August of 2014.

Turning to the CAP, Respondent points out that Mr. Corvi and Mr. Dawson created the CAP based only on the information in TeachScape without input from prior administrators at the high school who had observed Respondent. Respondent emphasizes that the CAP was not properly prepared in that it contains many references to Mr. Turner who is a physical education teacher who was also placed on a CAP. Respondent maintains that this demonstrates that Mr. Corvi and Mr. Dawson were rushing to put together a CAP for Respondent that was not truly designed to facilitate his improvement and growth as a teacher. Further, once Respondent was presented with the CAP, he was only given a few moments to read it and review it and was not provided with a copy of the CAP before the meeting. Respondent emphasizes that he did not understand the ramifications of the CAP. Respondent also points to the differences between Corvi's testimony that Respondent was shown a CAP at a meeting and given a chance at input and Respondent's testimony that he was shown the CAP for the first time on September 15, 2014 and asked to sign it without previous review or an opportunity for input into the development of the CAP. Respondent emphasizes that his

meeting with Mr. Corvi and Mr. Dawson to discuss the CAP lasted five or six minutes and he understood that Mr. Dawson was assigned to work with him under the CAP. Further, Respondent points out that according to the CAP, he and Dawson were to have weekly coaching sessions on Tuesday mornings but those never occurred.

Further, Respondent points out that it is undisputed that Dawson, as the supervisor assigned to implement Respondent's CAP, did not comply with significant aspects of the plan. Respondent points out that lesson plans were not reviewed on a regular basis, weekly coaching sessions did not occur, and feedback was not provided to Respondent other than the reports following each of the observations that took place during the 2014-2015 school year. Respondent emphasizes that the discussion during each post-observation conference of Respondent's progress towards the goals set forth in the CAP was not occurring as required by N.J.A.C. 6A:10-2.5(f).

Respondent also points out that during the 2014-2015 school year, he had four observations with two being conducted by Corvi and two being conducted by Mr. Dawson and that none of these observations included a pre-conference before the observation. Further, because Respondent was on a CAP, he was required to have a mid-year evaluation before February 15 to include, at a minimum, a discussion of the teacher's goals outlined in the CAP. Pursuant to regulation, this evaluation may be combined with a post-observation conference. Respondent points out that his mid-year and fourth and final observation was conducted on February 24, 2015 by Mr. Corvi and he was scheduled to have a post-observation conference with Mr. Corvi on February 27, 2015. Respondent emphasizes that although a meeting occurred on February 27, 2015, there was no discussion of the CAP but rather Respondent was presented with a document dated February 13, 2015 that was a mid-year evaluation form. Respondent points out that regulation requires that the mid-year evaluation be completed by February 15, 2015 and thus, his mid-year evaluation was out of compliance.

Respondent emphasizes that he had no additional observations after February 24, 2015 and it is evident from the mid-year evaluation that Mr. Corvi had already determined that Respondent had not met the goals under the CAP. Respondent asserts that this conclusion is supported by the fact that he had no interaction with either Mr. Corvi or Mr. Dawson from the end of February until his summative conference on June 3, 2015.

Respondent argues that the tenure charges against him should be dismissed because the District failed to comply with the mandatory evaluation procedures and the corrective action plan. Respondent emphasizes that for the 2013-2014 school year, none of his observations were preceded by a pre-observation conference in violation of N.J.A.C. 6A:10-4.4(c). Similarly, Respondent emphasizes that the District did not establish that any of his

observations were preceded by a pre-observation conference for the 2014-2015 school year. Based on the failure to conduct pre-observation conferences, Respondent argues that he was deprived of the opportunity to discuss the lessons and what he was trying to accomplish prior to the observation.

Respondent also asserts that the numerous procedural deficiencies in the preparation of the CAP, as well as its implementation, also warrant dismissal of the tenure charges. Citing N.J.A.C. 6A:10-2.5(b), Respondent points out that the CAP is required to be developed and the teacher and his designated sponsor are required to meet to discuss the CAP before September 15 of the following school year. In this instance, Respondent points out that the record shows that Mr. Dawson prepared the CAP with no discussion or input from Respondent who was being transferred from another school in the District. Further, Respondent points out that neither Mr. Dawson nor Mr. Corvi ever contacted Respondent's previous principal but rather simply accessed the observation reports that were uploaded into TeachScape. Respondent argues that this process was both one-sided and non-collaborative, thus violating both the substance and spirit of the TEACHNJ Act.

Citing N.J.S.A. 18A:6-120(c), Respondent was required to receive a mid-year evaluation before February 15, 2015 to include, at a minimum, a conference to discuss progress towards the teacher's goals outline in the CAP. This conference did not occur until February 27, 2015, following Mr. Corvi's February 24, 2015 observation. At that conference, Respondent received a document indicating he had not met the goals set forth in the CAP. That document also references the coaching sessions that were to take place between Mr. Dawson and Respondent despite the fact that those sessions never took place. Further, although the form provided that Respondent would continue to be observed and monitored throughout the school year, no additional observations took place. Because no additional evaluations took place after February 27, 2015, the summative evaluation for the 2014-2015 school year was based only on four observations that occurred prior to February of 2015. As a result, Respondent was deprived of any opportunity to show that he exhibited improvement or progress to the goals set forth in the CAP.

Under the Teacher Effectiveness and Accountability for Children of New Jersey Act (TEACHNJ), N.J.S.A. 18A:6-17.2(a) the arbitrator's review of a board of education's finding of teacher inefficiency is limited to considerations of whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

Pursuant to N.J.S.A. 18A:6-17.2(b), if a respondent is able to prove one or more of the above considerations, then the arbitrator must determine whether "that fact materially affected the outcome of the evaluation." In reviewing these considerations, the "quality of an employee's classroom performance shall not be subject to an arbitrator's review." N.J.S.A. 18A:6-17(c).

Initially, the District is required to prove that the statutory criteria for tenure charges have been met. Passaic County Vocational School District & Patsy Contrera, Agency Dkt. No. 223-8/15 (Arb. Gandel).

Focusing on alleged deficiencies in the evaluation process in both the 2013-2014 and 2014-2015 school years, as well as in the creation and implementation of his CAP in the 2014-2015 school year, Respondent argues that the District failed to adhere to the evaluation process and its actions were arbitrary and capricious to the extent that the District's actions "materially affected the outcome of the evaluation".

Beginning with the 2013-2014 school year, Respondent points out that at least one of the three required observations was required to have a pre-observation conference and to be announced. Although Mr. Atwell does not have specific recall of such a pre-observation conference, Mr. Ojomoh submitted a Pre-Observation Planning Form on December 10, 2013 and email suggests that a pre-observation conference, along with the observation, was rescheduled due to a weather-related delayed opening. Under these circumstances, I find that Mr. Ojomoh was provided an opportunity for a pre-observation conference and had notice of when the December 10, 2014 observation would occur. That observation was not unannounced.

Further, Respondent notes that Mr. Thompson, who gave Mr. Ojomoh his summative evaluation in June of 2014, failed to appear at hearing and did not explain the ramifications of an ineffective rating. That Mr. Thompson did not appear at the hearing does not alter Respondent's summative evaluation and has little impact on whether the District substantially adhered to the evaluation process. In this instance, the summative evaluation was based primarily on the three underlying observations. The individuals who conducted those observations testified to what occurred during the observations and the basis for both the ratings

and suggestions for improvement. Although Mr. Ojomoh was receptive, there is little evidence that his control over the students and the classroom or his planning and preparation improved. As an administrator, Mr. Thompson should have explained the ramifications of an ineffective rating to Mr. Ojomoh, but if he failed to do so, that does not render the summative evaluation itself or the underlying observations insufficient. Further, Mr. Ojomoh received training covering TEACHNJ during the 2012-2013 and 2013-2014 school years. Mr. Ojomoh should have been aware of the ramifications of an ineffective rating. There is insufficient evidence that the District failed to adhere substantially to the evaluation process in its observation and evaluation of Mr. Ojomoh during the 2013-2014 school year.

Turning to observations conducted during the 2014-2015 school year, Respondent asserts that although he had four observations, two conducted by Mr. Corvi and two conducted by Mr. Dawson, he had no pre-observation conference and his fourth and final observation was conducted on February 24, 2015, several months before the end of the school year, thus depriving him of the opportunity to have further improvement observed. There is no requirement that the fourth observation be conducted towards the end of the school year. The only requirement is that at least one observation be conducted during the first half of the school year and at least one observation be conducted during the second half of the school year. N.J.A.C. 6A:10-4.4(c). In this instance, two of four observations were conducted during the first half of the school year and the remaining two were conducted during the second half of the school year. Although Mr. Ojomoh completed a pre-observation form dated February 27 for the February 24, 2015 observation, there is no other evidence that a pre-observation conference was conducted. The District has not established that Mr. Ojomoh had a pre-observation conference at any point during the 2014-2015 school year.

Because Mr. Ojomoh was on a CAP, pursuant to N.J.S.A. 18A:6-120(c), the District was required to provide him with a mid-year evaluation by February 15, 2015. The District provided a mid-year evaluation together with a post-observation conference on February 27, 2015. Pursuant to N.J.A.C. 6A:10-2.5(m), the District is permitted to combine the mid-year evaluation with a post-observation conference, but does not have discretion to conduct that conference after February 15. Thus, the mid-year evaluation did not technically adhere to the evaluation process, but the deviation from the process was not substantial. I find that in this case, the twelve calendar day discrepancy between the deadline for the mid-year evaluation and the date when it occurred does not constitute substantial deviation from the evaluation process. I further find that Mr. Corvi's comments on the mid-year evaluation did not foreclose significant improvement by Mr. Ojomoh in the remaining months of the 2014-2015 school year. Mr. Corvi noted that Mr. Ojomoh had been "receptive" to suggestions but "successful and effective implementation of these strategies had not yet occurred." (emphasis added). Mr. Corvi, by noting that "successful and effective implementation had not yet occurred," left room for

Mr. Ojomoh to achieve such improvement in the remaining months of the school year.

I am not convinced that the late mid-year evaluation and likely lack of a pre-observation conference during the 2014-2015 school year, on their own, are sufficient to "materially affect the outcome of the observation." Nonetheless, I consider them together with the District's missteps and omissions regarding the creation and implementation of Mr. Ojomoh's CAP.

Mr. Ojomoh's CAP was drafted without due care and included significant references to requirements for improvement for a physical education teacher rather than a computer or business teacher. These errors are more significant than mere typographical errors. Specifically, a CAP requiring Mr. Ojomoh to take care to put away physical education equipment is not the same as a requirement that he take care of computer equipment. Further, although there is significant evidence that Mr. Ojomoh had difficulty controlling his classroom, there is no evidence that Mr. Ojomoh had difficulty corralling computer equipment. The record does not reflect that keeping track of physical education equipment is a task that appropriately should have been in Mr. Ojomoh's CAP.

It is troubling that neither Mr. Corvi nor Mr. Dawson caught these mistakes. Given the brief opportunity for Mr. Ojomoh to review the document before meeting with Mr. Corvi, it is understandable that he did not immediately notice the errors. However, I note that as the school year progressed, neither Mr. Ojomoh nor Mr. Dawson, who was assigned by Mr. Corvi to coach and meet with Mr. Ojomoh weekly, noticed the error even though both were to be following the requirements of the CAP.

Mr. Dawson, as Mr. Ojomoh's assigned coach or mentor was required to review lesson plans, meet with Mr. Ojomoh every Tuesday, and to conduct weekly walk throughs. Although Mr. Dawson did conduct frequent walk throughs and coaching and reviewed Mr. Ojomoh's plans on at least a bi-weekly basis, he did not conduct weekly meetings or a weekly review of lesson plans with Mr. Ojomoh. Had those meetings occurred, greater discussion of the goals of the CAP might have disclosed the drafting errors.

Mr. Dawson's failure to conduct weekly meetings with Mr. Ojomoh constitutes a significant failure to comply with the terms of the CAP that he and Mr. Corvi established and implemented for Mr. Ojomoh. Pursuant to N.J.A.C. 6A:10-2.5(e)(3), the CAP shall "[i]nclude responsibilities of the evaluated employee and the school district for the plan's implementation." This requires that both the teacher and the supervisor(s) meet their responsibilities under the terms of the CAP. The District's failure to provide required guidance to Mr. Ojomoh as provided in the CAP constitutes "failure to adhere" to the evaluation process. In this instance, the District provided, but did not comply with its responsibilities under the

CAP. It is not enough to provide the teacher with a CAP. Both the employee and the District are required to fulfill their responsibilities as stated in the CAP.

When the District's failure to provide Mr. Ojomoh with a pre-observation conference during the 2014-2015 school year, and the late mid-year evaluation are coupled with its failure to take due care in creating a CAP that applied to Mr. Ojomoh and its failure to meet its stated responsibilities pursuant to the CAP, I find that the District failed "to adhere substantially to the evaluation process." When these defects in the evaluation process, including substantial errors in the drafting and implementation of the CAP are taken together with the likely lack of a pre-observation conference and the delayed mid-year evaluation, I find the deviation from the required evaluation process is substantial.

Accordingly, I turn to the question of whether the District's failure to "adhere substantially" to the evaluation process "materially" affected the outcome of the evaluation. In other words, I must determine if Mr. Ojomoh's ratings were materially affected by the District's failure to follow the required processes.

I find the District's errors and omissions did not materially affect the outcome of Mr. Ojomoh's evaluation. TEACHNJ creates a two-way street designed to improve teachers' performance. To that end, TEACHNJ imposes significant substantive and procedural requirements on school districts designed to assist poorly performing teachers to improve their teaching skills. That two-way street also requires the affected teacher to make significant efforts to improve his or her skills. In this instance, the record demonstrates that Mr. Ojomoh was cooperative and attempted to follow coaching instructions provided by Mr. Dawson. However, the record also reflects that Mr. Ojomoh repeatedly sought to deflect responsibility for his inability to control the class to outside forces, including equipment problems, a poorly heated classroom, recent return from a trip to Africa for a funeral and a new class where he did not know the students. While any teacher can have a bad day, and consequently a poor observation, Mr. Ojomoh was observed by five different supervisors over the course of two years and received consistent comments from them over the course of those two years. Those consistent comments demonstrate that Mr. Ojomoh must bear the responsibility for his consistent poor performance.

Further, at his post-observation conference with Dr. Foley, in February of 2014, she advised him to review videos on TeachScape and to seek out a mentor. She also indicated that she would recommend that Mr. Thompson send him to workshops. Mr. Thompson did not do so, but there is no evidence that Mr. Ojomoh sought a mentor, watched the training videos or followed up with Mr. Thompson. Likewise, despite attending repeated workshops sponsored by both the District and the NJEA, Mr. Ojomoh professed not to understand that the series of observations and the CAP could culminate in these tenure charges of inefficiency.

In sum, Mr. Ojomoh did not demonstrate his commitment to improving his teaching skills by following up on suggestions provided by those supervisors who observed his classes. Rather, he suggested a variety of excuses for consistent poor performance. Under these circumstances, including Mr. Ojomoh's limited efforts to improve his teaching performance and his failure to follow suggestions and direction that would have provided him with additional guidance, I do not find that the District's failure to strictly adhere to evaluation processes and CAP requirements materially affected Mr. Ojomoh's teaching performance.

Accordingly, I find that the District has established just cause for inefficiency charges. The charges of inefficiency against Respondent Daniel Ojomoh are substantiated.

## AWARD

The charges of inefficiency against Respondent Daniel Ojomoh are substantiated.

Dated: February 25, 2016
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 25th day of February, 2016, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

WILLIAM T. HEANEY
NOTARY PUBLIC OF NEW JERSEY
ID # 2421775
My Commission Expires 6/11/2017

91-16

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|---|---|---|
| CLAUDINE HAYES | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured teacher in respondent's school district – challenged the District's decision to terminate her services and put her on unpaid leave following a psychological evaluation performed by a licensed doctor of psychology. Petitioner furnished proof of her recovery and sought reinstatement with back pay. The District found petitioner's proofs to be unsatisfactory and declined to reinstate her to the classroom. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:16-2(a) provides that "The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health;" the District determined that such evidence existed based on actions of the petitioner during her employment in 2012 and 2013, and that this evidence was sufficient to require an examination pursuant to *N.J.S.A.* 18A:16-2(a); such examination was conducted in 2014 by Jonathan Mack, Psy.D., who provided an expert medical report; Dr. Mack concluded that petitioner "is at unacceptable risk for inappropriate behavior with her students when under stress;" accordingly, pursuant to *N.J.S.A.* 18A:16-4, this expert medical report formed the basis for the District to deem petitioner unfit for further service until satisfactory proof of recovery was submitted; and the documents subsequently offered by petitioner – namely, one page letters from two osteopathic doctors advising that petitioner was mentally fit for duty, provided that previously requested accommodations were provided – were not deemed to be acceptable proof of recovery. The ALJ concluded that the District properly exercised its right to request a mental health examination of petitioner, and that the District's rejection of petitioner's proof of recovery was reasonable. Accordingly, the ALJ granted summary decision in favor of the respondent, and dismissed the petition.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

Issued 2/19/16

AL DKT. NO. EDU 9343-15
AGENCY DKT. NO. 122-6/15

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|---|---|---|
| CLAUDINE HAYES | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and respondent's reply thereto.

Upon full consideration of the controversy and all submissions, the Commissioner concurs with the Administrative Law Judge's recommendation to dismiss the petition since petitioner failed to demonstrate that the District's determination was arbitrary, capricious or unreasonable. *Thomas v. Morris Tp. Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965). Here, the record supports a finding that the District's rejection of petitioner's proof of recovery – which consisted of one-page letters from two practitioners – was reasonable. Indeed, neither letter references the multiple diagnoses made by Dr. Mack,[1] nor do the letters describe petitioner's recovery efforts and/or any treatment regimen in place to address Dr. Mack's

[1] *N.J.S.A.* 18A:16-2 specifically permits the Board to require "psychiatric or physical examinations" of its employees under certain circumstances. Because the parties failed to address whether a psychological evaluation satisfies this statutory provision, the Commissioner declines to decide that issue herein.

concerns.[2] Both letters merely provide conditional recommendations that petitioner be permitted to return to work – with certain parameters in place, *e.g.*, that she only be permitted to teach certain grade levels and student populations. Under the law, student safety must be the District's paramount concern. *See Gish v. Paramus Bd. of Educ.*, 145 *N.J. Super.* 96, 104-105 (App. Div. 1976).[3]

The Commissioner is unpersuaded by petitioner's exceptions, which do not warrant reversal of the ALJ's conclusion. Initially, the merits of this controversy were properly addressed by the ALJ[4], who did not act with partiality. The Commissioner agrees with the District that petitioner's arguments[5] and citations to irrelevant case law lack merit. To the extent that petitioner now claims disputed issues of fact exist – despite the fact that she moved for summary decision – and that certain factual findings made by the ALJ are inaccurate, any such factual discrepancies are immaterial and bear no impact upon this matter's final determination.[6]

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[2] Significantly, petitioner fails to address Dr. Mack's recommendation that she be mandated to undergo weekly psychological counseling and be evaluated for medication by a psychiatrist – and provides no proof that same has occurred.

[3] Because the District has not filed tenure charges against petitioner, this matter is not governed by *N.J.S.A.* 18A:6-8.3 or *N.J.S.A.* 18A:6-10. Until petitioner submits satisfactory proof of recovery, the District is not required to pay her during the period of ineligibility. *N.J.S.A.* 18A:16-4; *Chambers v. Board of Education of the City of Pleasantville*, EDU 8498-97, Initial Decision at 13 (May 1, 1998), adopted, Comm'r. June 18, 1998.

[4] Regarding the ALJ's finding as to the appropriateness of requiring petitioner to be evaluated, said finding – even if unnecessary, since that issue was not contested – does not detract from the ALJ's ultimate conclusion on the merits.

[5] While petitioner denies that she suffers from any mental abnormality and contests the District's interpretation of Dr. Mack's report, she failed to provide any evidence in support of her position. Instead, premised upon her redaction of the majority of the 45-page report, petitioner engages in a semantic exercise – citing certain sentences from the report out of context. The Commissioner finds petitioner's approach to be unpersuasive, and notes that the District appropriately reviewed the entire, unredacted report when rendering its determination.

[6] Petitioner is correct in asserting that the record reflects it was respondent – not petitioner – that moved for emergent relief, and that petitioner obtained her doctors' notes in March, not May. Nevertheless, errors in the Initial Decision concerning this information are immaterial. The courts have established the longstanding principle that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 529 (1995) (quoting *Judson v. Peoples Bank and Trust Co.*, 17 *N.J.* 67, 75 (1954)).

Finally, the ALJ's reference to the net opinion rule[7] was harmless, as the rule was not invoked to bar consideration of petitioner's documents as inadmissible; rather, the ALJ reviewed petitioner's proof of recovery and referenced the rule when considering the proofs' content to illustrate that the two doctor's letters, in his view, lacked a sufficient factual basis to justify the conclusions offered therein.

Accordingly, for the reasons stated therein, the Initial Decision of the OAL is adopted as the final decision in this matter. The District's motion for summary decision is granted, petitioner's motion for summary decision is denied, and the petition is hereby dismissed in its entirety.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/16

Date of Mailing: 3/01/16

[7] The net opinion rule "requires an expert 'to give the why and wherefore' of his or her opinion, rather than a mere conclusion." *Rosenberg v. Tavorath*, 352 *N.J. Super.* 385, 401 (App. Div. 2002) (quoting *Jimenez v. GNOC Corp.*, 286 *N.J. Super.* 533, 540 (App. Div.), *certif. denied*, 145 *N.J.* 374 (1996).

[8] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), in accordance with applicable court rules.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 09343-15
AGENCY DKT. NO. 122-6/15

**CLAUDINE HAYES,**
Petitioner,
v.
**CITY OF CAMDEN, STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY,**
Respondent.

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**Morrison Kent Fairbairn**, Esq., for petitioner (Michael A. Armstrong and Associates, LLC, attorneys)

**Louis R. Lessig**, Esq., for respondent (Brown & Connery, LLP, attorneys)

Record Closed: November 30, 2015 Decided: January 4, 2016

BEFORE **JOSEPH A. ASCIONE**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Claudine D. Hayes (Hayes) challenges the March 3, 2015, action of respondent State-Operated School District of the City of Camden (SOSD-C) terminating petitioner from her teaching position. Respondent deemed petitioner ineligible for

service due to mental unfitness. Petitioner opposed the respondent's position, and on June 1, 2015, brought this action to the Commissioner of Education seeking reinstatement with back pay. Administrative Law Judge Elia Pelios denied petitioner's related application for emergent relief to allow her medical expert to perform the psychological evaluation of petitioner. The parties agreed to a mental/neurological evaluation by Dr. Jonathan H. Mack, Psy.D. This evaluation became the basis for the SOSD-C's action. On March 31, 2015, petitioner submitted two one-page letters to the SOSD-C from two doctors of osteopathic medicine, one professional allegedly providing mental-health assistance to petitioner, the other being petitioner's primary physician. These documents were submitted as alleged evidence that petitioner was mentally fit to return to work. Both documents were rejected by the SOSD-C as insufficient to satisfy the requirements to restore petitioner to her position. Petitioner's pay terminated on May 3, 2015. Previously, petitioner had been relieved of her duties and placed on paid administrative leave on December 13, 2013.

On June 24, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. The petitioner moved for summary decision, seeking restoration to her position. Respondent opposed said motion and cross-moved for summary decision. Petitioner has voluntarily limited her presentation to the reasonableness of the SOSD-C's termination based upon Dr. Mack's report and the absence of the SOSD-C's acceptance of petitioner's doctors' subsequent correspondences. Petitioner also confirmed that other actions are pending in other venues related to the events in question.

## DISCUSSION

Initially, I note that no certifications or affidavits have been provided in support of the motions by the parties in this matter. Counsel submitted certifications confirming service of papers, and identifying many documents, most of which they did not create or participate in creating. The latter documents are all hearsay, and while hearsay may be acceptable evidence in this administrative proceeding, if otherwise relevant, it must be supported by a residuum of competent testimony or evidence. Accordingly, I advise

counsel to consider submission of certifications in further proceedings before this office and this administrative law judge, so they are not surprised by the denial of admission of similar evidence in the future. For the purpose of these motions, where counsel has not disputed the authenticity of a proffered document in their opposition to the motions, I will view the documents as satisfying the residuum rule.

## FACTS

The following facts are not disputed, and I **FIND**:

1. Hayes is a tenured teacher who had been employed by the SOSD-C for approximately twelve years.

2. Hayes's standard teaching certificate is Teacher of the Handicapped. She also holds a Teacher of Preschool through Grade 3 certificate. A portion of Hayes's teaching career included teaching the high-school autistic population.

3. On March 16, 2012, Hayes requested an immediate transfer from her position of teaching autistic sixth- and seventh-grade students for her "own mental wellbeing and physical safety," and "due to circumstances beyond [her] control." (Lessig Cert., Exhibit D.) The SOSD-C granted that request and placed Hayes at the Forest Hill School teaching handicapped students.

4. Hayes submitted a medical-leave-of-absence request for February 18, to March 31, 2013, based upon her inability to perform her job due to excessive stress. (Lessig Cert., Exhibit E.)

5. On April 23, 2013, shortly after Hayes's return from the medical leave of absence, an incident occurred with a student. That incident occasioned an investigation by the Institutional Abuse Investigation Unit (IAIU). The investigation concluded on or about June 18, 2013, with a finding that Hayes had restrained a student, but the IAIU made a finding of no establishment of abuse. (Lessig Cert., Exhibit F.)

6. Hayes received a written reprimand for her April 23 restraint of the student in violation of school policy to have school security solely conduct student restraints.

7. In the 2013–2014 school year, the SOSD-C assigned Hayes to teach the behavioral-development-handicapped student population in the third through fifth grades.

8. On November 15, 2013, at 10:00 a.m., Hayes abandoned a continuing-education seminar on classroom management of behavioral-disabilities students, scheduled to run from 8:30 a.m. to 3:00 p.m. (Lessig Cert., Exhibit G.)

9. On December 11, 2013, Hayes experienced an incident where she exhibited stress, and was taken to Our Lady of Lourdes Medical Center by ambulance. Her students were transferred to another teacher.

10. The SOSD-C placed Hayes on paid administrative leave on December 13, 2013.

11. The SOSD-C required Hayes to undergo a mental-fitness-for-duty examination. After various issues raised by Hayes, she submitted to a mental-fitness-for-duty examination on May 28, and May 29, 2014. (Lessig Cert., Exhibit C.)

12. Various tests were administered to Hayes, and the examination resulted in a forty-four-page medical report and opinion of Jonathan H. Mack dated August 11, 2014. (Lessig Cert., Exhibit C.)

13. The examiner concluded to a reasonable degree of psychological and neuropsychological scientific certainty that "Hayes is at unacceptable risk for inappropriate behavior with her students when under stress." (Lessig Cert., Exhibit C at CCSD 50.)

14. On May 16, 2015, Chris F. Colopinto, D.O., and on May 18, 2015, Safeer Ansari, D.O., issued one-page documents advising that Hayes was mentally fit for duty provided that Hayes's previously requested accommodations were provided. Dr. Ansari also opined that the accommodations requested were reasonable.

15. The SOSD-C did not accept those opinions.

## LEGAL DISCUSSION

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for deciding motions for summary decision are contained in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there is no "genuine issue" of "material fact." The determination as to whether genuine issues of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" issues of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses on the analytical procedure for determining whether a

purported issue of material fact is "genuine" or is of an "insubstantial nature." Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary-decision motions. "[T]he essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). In searching the proffered evidence to decide the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. Id. at 535 (citation omitted). Here, the petitioner's proofs are severely lacking in evidential value.

Dr. Colopinto's and Dr. Ansari's letters are not acceptable as medical-expert reports, as each is a net opinion without any established basis for the writer's opinion. Dr. Ansari's opinion regarding the reasonableness of Hayes's requested accommodation is also disregarded as outside the scope of his alleged medical opinion. This tribunal will accept no testimony from either doctor based upon the materials provided in this application for summary decision. This tribunal also takes note of the limited submission of petitioner regarding Dr. Mack's medical-expert report, which is accepted. This tribunal also takes note of the attempt of petitioner to prevent access to her medical history, as well as her determination not to present all of her claims cognizable in this forum.

N.J.S.A. 18A:16-2(a) provides, "The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an

employee shows evidence of deviation from normal, physical or mental health." Here the SOSD-C determined that such evidence existed from Hayes's actions in 2012 and 2013. Sufficient evidence existed to require the examination. The examination occurred in 2014, and Dr. Mack provided an expert medical report. Dr. Mack concluded, "Hayes is at unacceptable risk for inappropriate behavior with her students when under stress." (Lessig Cert., Exhibit C at CCSD 50.) This expert medical report allowed the SOSD-C, pursuant to N.J.S.A. 18A:16-4, to deem Hayes unfit for further service until such time as proof of recovery, satisfactory to the SOSD-C, is furnished. The SOSD-C, pursuant to that section, determined that Hayes's submission is deficient in proof of recovery.

## CONCLUSION

I **CONCLUDE** that the SOSD-C properly exercised its right to request a mental-health examination of Hayes based upon others' observations of her conduct. I **CONCLUDE** that the SOSD-C's action in rejecting Hayes's offered proof of recovery, the one-page notes of Dr. Colopinto and Dr. Ansari, was reasonable. When balancing a teacher's ability to teach against the safety of the student population, a reasonable person would err on the side of the safety of the student population. Accordingly, the SOSD-C action of rejecting the offered proof of recovery is legally sufficient.

## ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision is **DENIED**.

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**, and petitioner's petition is **DISMISSED and DENIED** in all respects. This Initial Decision disposes of all issues in controversy in this matter.

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

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

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

1/4/16
DATE

**JOSEPH A. ASCIONE**, ALJ

Date Received at Agency: 1/14/15

Date Mailed to Parties: 1/7/16

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# APPENDIX

## LIST OF WITNESSES

**For Petitioner:**

None

**For Respondent:**

None

## LIST OF EXHIBITS

**For Petitioner:**

- Motion for summary decision with support certification and documentation, dated August 7, 2015
- Opposition to cross-motion for summary decision, dated September 15, 2015

**For Respondent:**

- Opposition to motion for summary decision and cross-motion for summary decision with supporting certification and documentation, dated August 28, 2015

92-16

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|---|---|---|
| CALAIS SCHOOL, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner – a private school for students with disabilities – appealed the final determination of the respondent – the Office of School Finance (OSF) – to disallow the salaries and fringe benefits of two Calais School (Calais) employees for the 2007-2008 school year, which determination was issued by letter dated January 9, 2015. OSF contended that, based on an audit of financial statements submitted by Calais, the salary and fringe benefits for the two employees at issue were non-allowable costs because the individuals lack proper certifications; therefore, these costs would not be reimbursed. The Calais School filed its petition of appeal on June 17, 2015. Respondent OSF filed a motion to dismiss the petition as untimely.

The ALJ found, *inter alia,* that: the OSF issued a written determination denying reimbursement of the salary and fringe benefits for the two employees at issue in April 2013; Calais filed a timely appeal from the findings of the April 2013 letter in June 2013; OSF subsequently issued its final decision in the matter via a letter dated January 9, 2015; pursuant to *N.J.A.C.* 6A:3-1.3(i), an appeal before the Commissioner must be filed no more than ninety (90) days from receipt of notice of a final ruling; the instant appeal was filed on June 17, 2015, which is one hundred fifty-nine (159) days after petitioner's receipt of the OSF's final decision, or sixty-nine (69) days beyond the expiration date for the filing of an appeal in the instant matter; petitioner's argument that the January 2015 final determination letter was not legitimate as it was not written by an agency or agency head is without merit; petitioner's contention that the ninety-day rule should be relaxed because Calais' legal counsel sent the 2015 final determination to the email of the school's former business manager – who had been terminated in 2013 – is also without merit; Calais bears the responsibility for its failure to take due care to transfer the business manager's workload to someone else who was competent to do the work; and petitioner's attempt to apply the "square corners" doctrine is without merit as petitioner offers no proof that OSF consciously delayed the disposition of this matter to gain an "unfair litigational advantage". The ALJ concluded that petitioner's appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i), and ordered the petition dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein.

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

March 1, 2016

OAL DKT. NO. EDU 12782-15
AGENCY DKT. NO. 130-6/15

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|---|---|---|
| CALAIS SCHOOL, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE, | : | DECISION |
| RESPONDENT. | : | |

The record and Initial Decision of the Office of Administrative Law (OAL), along with petitioner's exceptions and respondent's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been carefully reviewed.

Having determined that the instant Petition of Appeal was filed 69 days after expiration of the 90-day filing deadline mandated by *N.J.A.C.* 6A:3-1.3(i), the Administrative Law Judge (ALJ) granted respondent's motion to dismiss the petition as untimely and declined to relax the timely filing requirement set forth in the regulation.

In its exceptions, petitioner argues that *N.J.A.C.* 6A:3-1.3(i) is inapplicable because "it was far from clear" that Director Dehmer's written determination represented final agency action. (Petitioner's Exceptions at 2-3) Petitioner also asserts that the "square corners" doctrine should excuse petitioner's delay in filing its appeal, or that – even if said doctrine is inapposite – relaxation of the 90-day rule is appropriate under the circumstances. (*Id.* at 3)

Conversely, respondent supports the ALJ's determination that *N.J.A.C.* 6A:3-1.3(i) is applicable, and that no compelling reason exists to relax the 90-day rule. (Respondent's

reply at 2-3) As to the "square corners" doctrine, respondent maintains it is inapplicable since petitioner failed to demonstrate that the Department "delayed concluding its investigation into the non-allowable costs" at issue in this case "to gain an advantage over the petitioner." (*Id* at 3).

Upon review, the Commissioner finds petitioner's exceptions to be without merit. First, the concluding paragraph of Director Dehmer's January 9, 2015 written determination provides "unmistakable notice of its finality" – thereby activating the 90-day timeframe cited in *N.J.A.C.* 6A:3-1.3(i) for the filing of a timely petition of appeal:

> The above shall be considered the final review of this matter. Please notify the school that in order to certify its rate for the 2007-2008 school year, OSF requires submission of a revised audited financial statement to account for the above-detailed non-allowable costs. OSF will follow up with the School directly within thirty-five (35) days from the date of this letter, should it not receive the necessary revisions. (Petition of Appeal, exhibit C, at 3)

*In re CAFRA Permit No. 87-0959-5*, 152 *N.J.* 287, 299 (1997). Second, the ALJ correctly declined to apply the "square corners" doctrine because the record contains no proof that respondent sought to gain an "unfair litigational advantage" by delaying its investigation. *See CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd.*, 414 *N.J. Super.* 563, 586-587 (App. Div. 2010); (Initial Decision at 6) Finally, the Commissioner finds that petitioner has not presented any compelling reason or exceptional circumstance which would warrant relaxation of the timely filing requirement.

Upon full consideration of the record and the parties' submissions, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and respondent's motion to dismiss the petition is granted.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/16

Date of Mailing: 3/01/16

[1] This final determination of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable court rules.

OAL DKT. NO. EDU 12782-15
AGENCY DKT. NO. 130-6/15

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|---|---|---|
| CALAIS SCHOOL, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE, | : | DECISION |
| RESPONDENT. | : | |

The record and Initial Decision of the Office of Administrative Law (OAL), along with petitioner's exceptions and respondent's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – have been carefully reviewed.

Having determined that the instant Petition of Appeal was filed 69 days after expiration of the 90-day filing deadline mandated by *N.J.A.C.* 6A:3-1.3(i), the Administrative Law Judge (ALJ) granted respondent's motion to dismiss the petition as untimely and declined to relax the timely filing requirement set forth in the regulation.

In its exceptions, petitioner argues that *N.J.A.C.* 6A:3-1.3(i) is inapplicable because "it was far from clear" that Director Dehmer's written determination represented final agency action. (Petitioner's Exceptions at 2-3) Petitioner also asserts that the "square corners" doctrine should excuse petitioner's delay in filing its appeal, or that – even if said doctrine is inapposite – relaxation of the 90-day rule is appropriate under the circumstances. (*Id.* at 3)

Conversely, respondent supports the ALJ's determination that *N.J.A.C.* 6A:3-1.3(i) is applicable, and that no compelling reason exists to relax the 90-day rule. (Respondent's

reply at 2-3) As to the "square corners" doctrine, respondent maintains it is inapplicable since petitioner failed to demonstrate that the Department "delayed concluding its investigation into the non-allowable costs" at issue in this case "to gain an advantage over the petitioner." (*Id* at 3).

Upon review, the Commissioner finds petitioner's exceptions to be without merit. First, the concluding paragraph of Director Dehmer's January 9, 2015 written determination provides "unmistakable notice of its finality" – thereby activating the 90-day timeframe cited in *N.J.A.C.* 6A:3-1.3(i) for the filing of a timely petition of appeal:

> The above shall be considered the final review of this matter. Please notify the school that in order to certify its rate for the 2007-2008 school year, OSF requires submission of a revised audited financial statement to account for the above-detailed non-allowable costs. OSF will follow up with the School directly within thirty-five (35) days from the date of this letter, should it not receive the necessary revisions. (Petition of Appeal, exhibit C, at 3)

*In re CAFRA Permit No. 87-0959-5*, 152 *N.J.* 287, 299 (1997). Second, the ALJ correctly declined to apply the "square corners" doctrine because the record contains no proof that respondent sought to gain an "unfair litigational advantage" by delaying its investigation. *See CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd.*, 414 *N.J. Super.* 563, 586-587 (App. Div. 2010); (Initial Decision at 6) Finally, the Commissioner finds that petitioner has not presented any compelling reason or exceptional circumstance which would warrant relaxation of the timely filing requirement.

Upon full consideration of the record and the parties' submissions, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and respondent's motion to dismiss the petition is granted.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/16

Date of Mailing: 3/01/16

[1] This final determination of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable court rules.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION-**
**DISMISSAL**

OAL DKT NO. EDU 12782-15
AGENCY DKT. NO.: 130-6/15

**CALAIS SCHOOL,**

Petitioner,

**v.**

**NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,**

Respondent.

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**David B. Rubin**, Esq., for petitioner

**Kyle E. Gruber**, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Motion Filed: August 24, 2015 Motion Decided: January 20, 2016

BEFORE: **JOHN P. SCOLLO**, A.L.J.

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Calais School ("Calais" or "Petitioner") is a private school for students with disabilities. This case involves a dispute over the disallowance of the salaries and fringe benefits of two Calais School employees for the School Year 2007-2008. The New Jersey Department of Education, Office of School Finance ("DOE" or "the Department" or "OSF" or "Respondent") conducted an audit of financial statements submitted by the Calais School and found that certain salary and fringe benefit reimbursement requests (notably, those of Susan Ragonese and Patti Russo), were non-allowable costs and, therefore, would not be reimbursed.

On November 6, 2009, letter the DOE's Office of Fiscal Policy and Planning ("OFPP") determined that due to Ragonese's and Russo's lack of proper certifications [under N.J.A.C. 6A:23A-18.4 (a) (22)], their salaries and fringe benefits were considered non-allowable costs [under N.J.A.C. 6A:23A-18.5 (6)].

On April 11, 2013, the DOE issued a written determination (the "Elise Sadler-Williams letter" denying re-imbursement of: (1) salary and fringe benefits of Susan Ragonese's entire salary and fringe benefits from July 1, 2007 through June 30, 2008; and (2) salary and fringe benefits of Patti Russo from July 1, 2007 through January 31, 2008).

The Calais School filed a timely Appeal from the findings of the Elsie Sadler-Williams letter) on June 10, 2013. The DOE issued its "final decision" / "final response" / "final review" of the Calais School's Appeal in a letter dated January 9, 2015 (the "Kevin Dehmer" letter) affirming the rulings made on April 11, 2013, contained in the Elise Sadler-Williams letter.

The subject Appeal followed when David B. Rubin, Esq., counsel for the Calais School, on June 16, 2015, filed a Verified Petition in appeal of the DOE's January 9, 2015 final decision (the Kevin Dehmer letter).

On August 13, 2015, the DOE filed a Motion in Lieu of Answer with the Acting Commissioner of Education seeking dismissal of the Petitioner's June 16, 2015 Appeal. However, the case was transmitted to the Office of Administrative Law on August 18, 2015. Respondent's Motion at bar is the one filed with the Acting Commissioner of Education.

## FINDINGS OF FACT

Having had the opportunity to review the parties' Outlines of Facts and Issues, the Motion and its attachments, and the Opposition and its attachments, and having participated in a Status Conference with legal counsel for both parties on December 31, 2015, I make the following **FINDINGS OF FACT**:

(1) On April 11, 2013, the DOE issued a written initial determination (the "Elise Sadler-Williams letter), which disallowed the salary and fringe benefits of two Calais school employees, Susan Ragonese and Patti Russo for the 2007-2008 school year as non-allowable costs because the employees did not possess the required certifications from the DOE to perform their assigned duties.

(2) On June 10, 2013, Calais School through its legal counsel filed a written appeal from the April 11, 2013 written determination.

(3) On January 9, 2015, the DOE issued its final written determination (the "Kevin Dehmer letter") affirming its initial determination of April 11, 2013.

(4) Pursuant to N.J.A.C. 6A:3-1.3 (i), a Petitioner has no more than ninety (90) days from the date of receipt of the notice of a final ruling to file a Petition of Appeal. I **FIND** that there is no dispute that the DOE sent its January 9, 2015, final written decision in a timely manner to the Petitioner. I **FIND** that the ninetieth day after January 9, 2015 was April 9, 2015. I **FIND** that the filing date of the Petition of Appeal was June 17, 2015, and I further **FIND** that June 17, 2015 was one hundred fifty-nine (159) days

after January 9, 2015 and sixty-nine (69) days after April 9, 2015. I **FIND** that the Petition of Appeal was filed sixty-nine (69) days late.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:3-1.3 (a) provides that in order to initiate an appeal a Petitioner must file a Petition of Appeal with the Commissioner of Education, Bureau of Controversies and Disputes, serve copies of same on each respondent along with Proof of Service. N.J.A.C. 6A:3-1.3 (i) sets forth the time limit in which a Petition of Appeal must be filed. That time limit is ninety days from the date of receipt of the final order, ruling or other action of the agency (i.e. the DOE).

There is no dispute about the filing date of the subject Petition of Appeal. It was filed on June 17, 2015, which is one hundred fifty-nine days after the issuance of the January 9, 2015 final written decision and sixty-nine days after the April 9, 2015 expiration date of the ninety-day time period allowed for the filing of Petitions of Appeal. I **CONCLUDE** that the Petition of Appeal was filed beyond the ninety-day period allowed and I **CONCLUDE** that it was filed late.

Counsel for Petitioner's first argument is that the ninety-day filing period has not begun to run in this case because the January 9, 2015 Kevin Dehmer letter was not a letter written by an agency or agency head. Petitioner presented no proof to establish that Director Kevin Dehmer did not have the authority to act on behalf of the DOE. I **CONCLUDE** that Director Kevin Dehmer, had the authority to act on behalf of the DOE and was indeed legitimately acting on behalf of the DOE when he wrote his January 9, 2015 final written determination.

Counsel for Petitioner does not deny that he received actual notice of Kevin Dehmer's final written determination on January 9, 2015. There is no doubt that he immediately sent Dehmer's determination to his client, the Calais School, by e-mailing it to Donald Dohm, the Calais School's Business Manager. Counsel offered the November 4, 2015 Certification of David Leitner in which Leitner states that Donald Dohm was terminated from his position by the Calais School on June 27, 2013, about a

year and a half before Kevin Dehmer's final written determination. Counsel states that he did not know that Dohm was no longer serving as Business Manager when he sent his e-mail on January 9, 2015, containing Kevin Dehmer's final written determination. Counsel then argues (his second argument) that if Calais did not receive actual notice of Dehmer's final written decision because Dohm was no longer part of the Calais School, then the ninety-day period has not begun to run. Missing from this fact pattern is the answer to the questions: (1) "Who at Calais was monitoring Dohm's e-mail after his termination?" and "Why didn't Calais, after terminating Dohm, exercise due care to ensure that all correspondences sent to Dohm were properly routed to his successor?" The argument presented is predicated upon the assumption that once Dohm was gone the Calais School bore no continuing responsibility for receiving its business and legal correspondence that was being sent to its former employee, Dohm. This assumption makes no sense. What does make sense is that a business which chooses to terminate an employee has a duty - in the interest of its own self-preservation - to make sure that it properly transfers the workload of a terminated employee to a competent, responsible person and to make sure that steps are taken to assure that its vital communications with other people and entities remain uninterrupted.

There is another noteworthy point, one not presented in the papers, but nonetheless relevant to the case at bar. There can be little doubt that legal correspondence sent by the DOE to the attorney handling a specific case for Calais, who acknowledges actual receipt of same, is deemed actually received by the client, Calais.

I **CONCLUDE** that Calais received actual notice of the January 9, 2015 final written determination (the "Kevin Dehmer letter") on January 9, 2015. I **CONCLUDE** that having received actual notice, the Calais School's Petition of Appeal should have been filed by April 9, 2015.

Petitioner's third argument is that there is good cause for relaxing the ninety-day rule set forth in N.J.S.A. 6A:3-1.3(i) because the delay in filing the Petition of Appeal was due to the inattentiveness of a sick employee, who neglected to alert his superiors of the initial determination rendered on April 11, 2013. As noted above, the Calais

School, having decided to terminate Dohm, bore the responsibility to take due care to transfer Dohm's workload to someone else who was competent to do the work in order to protect its own interests.

The Calais School bears the responsibility for its failure to take this common sense precaution. I **CONCLUDE** that the above-cited regulation setting forth a ninety-day filing period cannot be set aside when there is no presentation of good cause for doing so.

Petitioner's fourth argument is that under the "square corners doctrine" the State is required to set its standards of conduct so as to be beyond reproach. This, of course, is true. The allegation made in the Petitioner's argument is that the State is taking unfair advantage of the Petitioner and that it rendered its final written determination on January 9, 2015, regarding monies claimed by the Petitioner from the school year 2007-2008. The argument implies, but does not offer proof for the proposition that the State consciously delayed the disposition of this matter. There is no proof offered to prove the proposition that the State tried to exploit litigational or bargaining advantages. No such advantages are demonstrated. No exploitation is demonstrated. I **CONCLUDE** that the "square corners doctrine", while an interesting and somewhat unique doctrine, is inapplicable in this instance.

## ORDER

Based upon the foregoing, it is on this Twentieth (20 th) day of January, 2016 **ORDERED** that the Petition of Appeal, having been filed beyond the time limits set forth in N.J.A.C. 6A:3-1.3 (i), is hereby dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 20, 2016
DATE

John P. Scollo
**JOHN P. SCOLLO**, ALJ

Date Received at Agency: January 20, 2016

Date Mailed to Parties: January 20, 2016

db

93-16

OAL DKT. NO. EDU 9496-14
AGENCY DKT. NO. 106-4/14

| | | |
|---|---|---|
| N.S., on behalf of minor child, M.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS CAMDEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, the Commissioner approves the settlement terms to the extent that they fall within the Commissioner's jurisdiction, and adopts the Initial Decision as the final decision in this matter.* The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/16
Date of Mailing: 3/01/16

* A related due process petition was filed with the Office of Special Education and the Settlement Agreement contains provisions that pertain directly to that matter.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 9496-14
AGENCY DKT. NO. 106-4/14

**N.S. ON BEHALF OF MINOR CHILD, M.S.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,**
Respondent.

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**Hillary D. Freeman**, Esq., for petitioner (Freeman Law Offices, LLC, attorneys)

**Sanmathi Dev**, Esq., for respondent Board of Education of the Borough of Haddon Heights (Capehart & Scatchard, P.A., attorneys)

Record Closed: December 16, 2015 Decided: January 13, 2016

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 25, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and assigned to John F. Russo, Jr., ALJ. Upon Judge Russo's assigned to Ocean County Superior Court, the matter was reassigned to me.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

January 13, 2016
DATE

**EDWARD J. DELANOY, JR.**, ALJ

Date Received at Agency: 1/19/16

Date Mailed to Parties: 1/19/16

/mel/mph

CAPEHART & SCATCHARD, P.A.
8000 Midlantic Drive, Suite 300S
Mount Laurel, New Jersey 08054
(856) 234-6800
Attorneys for Haddon Heights Board of Education

| | | |
|---|---|---|
| M.S. and N.S. o/b/o M.S.,<br><br>Petitioners,<br><br>vs.<br><br>HADDON HEIGHTS BOARD OF EDUCATION AND LAWNSIDE BOARD OF EDUCATION,<br><br>Respondents. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>OAL Docket No. EDU 09496-2014<br>Agency Reference No. 106-4/14<br><br>OAL Docket No. EDS 06746-2015<br>Agency Reference No. 2015-22509<br><br>**SETTLEMENT AGREEMENT AND GENERAL RELEASE** |

This Settlement Agreement and General Release ("Agreement") dated November ____, 2015 is entered into by and among Maceo Shealey, Sr. ("M.S., Sr."[1]), Nicole Shealey ("N.S."), and Maceo Shealey, Jr. ("M.S.") (hereinafter collectively referred to as the "Petitioners"); the Haddon Heights Board of Education ("Haddon Heights"); and the Lawnside Board of Education ("Lawnside") in order to resolve and settle any and all outstanding issues involved among the Petitioners, Haddon Heights, and Lawnside (the "Parties").

**WHEREAS**, at the time of this Agreement, M.S. is an eighteen-year-old (DOB: 4/26/1997) male residing at 331 F.D.R. Terrace, Lawnside, New Jersey 08045 in Camden County with his father, M.S., Sr., and mother, N.S.; and

**WHEREAS**, Haddon Heights is a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices at 316-A Seventh Avenue, Haddon Heights, New Jersey 08035 in Camden County; and

[1] Since the student and his father share the same name and initials, the student shall be referred to as "M.S." and the father as "M.S., Sr."

**WHEREAS**, Lawnside is a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices at 426 East Charleston Avenue, Lawnside, New Jersey 08045 in Camden County; and

**WHEREAS**, Lawnside was M.S.'s school district of residence; and

**WHEREAS**, Haddon Heights and Lawnside maintained send-receive agreements for the 2011-2012, 2012-2013, 2013-2014, and 2014-2015 school years whereby students domiciled and residing in Lawnside attended Haddon Heights High School of the Haddon Heights Board of Education for grades nine through twelve; and

**WHEREAS**, prior to his ninth grade school year (2011-2012 school year), M.S. attended school at Lawnside; and

**WHEREAS**, M.S. attended Haddon Heights High School for his ninth through twelfth grade school years (2011-2012, 2012-2013, 2013-2014, and 2014-2015 school years) pursuant to send-receive agreements between Haddon Heights and Lawnside; and

**WHEREAS**, M.S. was eligible for special education and related services pursuant to the Individuals with Disabilities Education Improvement Act and Title 6A of the New Jersey Administrative Code when he was student at Haddon Heights High School; and

**WHEREAS**, on or about November 25, 2013, M.S. was suspended from school for a year for conduct violating Haddon Heights' sexual harassment policy; and

**WHEREAS**, on or about January 10, 2014, the Haddon Heights Board of Education placed M.S. on homebound instruction until January 8, 2015; and

**WHEREAS**, on or about April 23, 2014, the Petitioners filed a *pro se* Petition of Appeal to the New Jersey Commissioner of Education (OAL Docket No. EDU 09496-2014, Agency

Reference No. 106-4/14) (hereinafter referred to as the "Petition of Appeal") disagreeing with Haddon Height's decision to place M.S. on homebound instruction until January 8, 2015; and

**WHEREAS**, on or about June 23, 2014, Haddon Heights filed an Answer and Affirmative Defenses to the Petition of Appeal, denying, *inter alia*, any and all allegations that the decision to place M.S. on homebound instruction until January 8, 2015 was improper or inappropriate; and

**WHEREAS**, on or about March 24, 2015, Petitioners, through their legal counsel, Freeman Law Offices, LLC, filed a Petition for Mediation and Due Process with the New Jersey Office of Special Education Programs (OAL Docket No. EDS 06746-2015, Agency Reference No. 2015-22509) (hereinafter referred to as the "Due Process Petition") seeking, *inter alia*, a finding that the district did not provide a free appropriate public education ("FAPE") and M.S. requires an appropriate out-of-district placement meeting his substantial needs; compensatory education for the one year that M.S. was placed on home instruction; and a finding that M.S. is entitled to transition services until age twenty-one (21); and

**WHEREAS**, on or about July 1, 2015, Haddon Heights filed an Answer and Affirmative Defenses to the Due Process Petition, denying, *inter alia*, any and all allegations that M.S. did not receive a free appropriate public education ("FAPE") for the time period M.S. was a student at Haddon Heights and that M.S. is entitled to special education and related services until age twenty-one (21); and

**WHEREAS**, M.S. graduated from Haddon Heights in June 2015; and

**WHEREAS**, M.S. Sr. and N.S. enrolled M.S. in a diesel technician program, which commenced on July 14, 2015, through Pennco Tech – Blackwood ("Pennco Tech"), located at 99 Erial Road, Blackwood, New Jersey 08012; and

**WHEREAS**, the Petition of Appeal and Due Process Petition were transmitted to the Office of Administrative Law for a hearing; and

**WHEREAS**, Petitioners did not name Lawnside as a respondent/defendant in either the Petition of Appeal or Due Process Petition matter; and

**WHEREAS**, Lawnside has been apprised of and involved in various discussions relating to the Petition of Appeal and/or Due Process Petition; and

**WHEREAS**, the Parties recognize and agree that Lawnside is an indispensable party to the Petition of Appeal and/or Due Process Petition and mutually agree to Lawnside's inclusion in this Agreement;

**WHEREAS**, on September 11, 2015, the Honorable Lisa James-Beavers, A.L.J. entered a Consent Order formally joining Lawnside as an additional Respondent to the case bearing OAL Docket Number 06746-2015 and Agency Reference Number 2015-22509;

**WHEREAS**, after extensive negotiations among counsel and in order to resolve any and all disputes among the Parties without continuing with time-consuming and costly litigation, the Petitioners, Haddon Heights, and Lawnside have agreed to a full and final settlement of all claims and matters asserted and any and all claims that could have been asserted in a state or federal court proceeding that relate directly or indirectly to M.S.'s education and/or claims asserted in Petitioners' Petition of Appeal and Due Process Petition through the date of full execution of this Agreement; and

**WHEREAS**, the Parties have, in resolving these matters, also agreed to a broad General Release and Waiver provision which, without limitation, covers all educational and monetary damage claims which have been brought and/or could have been brought by the Petitioners, as more fully described in Paragraph 8 below; and

**WHEREAS**, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability by Haddon Heights, Lawnside, or their present and former board members, officers, employees, agents and servants, said liability being expressly denied.

**NOW, THEREFORE,** in consideration of the mutual promises and agreements contained herein, the Petitioners, Haddon Heights, and Lawnside **AGREE AS FOLLOWS**:

1. **Disenrollment**: The Parties agree that M.S. is immediately disenrolled from Haddon Heights and/or Lawnside upon M.S. Sr., N.S., and M.S.'s execution of this Agreement. M.S. shall remain disenrolled from the Haddon Heights School District and/or Lawnside School District. The Parties further recognize and agree that Haddon Heights and/or Lawnside has not and will not offer and/or develop an IEP for M.S. for the 2015-2016, 2016-2017, 2017-2018 school years and beyond, including any extended school year program.

2. **Contribution Toward Pennco Tech**: Lawnside shall contribute a total amount of thirty thousand dollars ($30,000) for the educational program and placement of M.S. at Pennco Tech in the diesel technician program as follows:

   a. Within twenty (20) school days of full execution of this Agreement, Lawnside shall pay directly to Pennco Tech $6905.43 for the cost of tuition and materials from July 14, 2015 through December 14, 2015.

   b. Lawnside shall pay five thousand five hundred dollars ($5,500) directly to Great Lakes Higher Education Corporation, located at 2401 International Lane, Madison, Wisconsin 53704, which represents the full amount of M.S.'s student loan from July 14, 2015 through December 14, 2015. Additionally, Lawnside

shall pay an amount not to exceed $150 for interest that accrued from July 14, 2015 through December 14, 2015 upon proof of interest accrued by Petitioners.

c. Beginning January 2016, Lawnside shall commence monthly payments by the 14th of each month to Pennco Tech for the educational program and placement of M.S. at Pennco Tech until (1) M.S. graduates from the Pennco Tech Program, (2) the total contribution by Lawnside equates to $30,000, or (3) September 20, 2016 – whichever comes first. Specifically, the payment for January 14, 2016 will be $3867.28, payments between January 20, 2016 and July 20, 2016 will be $1,799.71, and payments between July 21, 2016 and September 20, 2016 will be $2,099.50 until the $30,000 is exhausted.

d. The Parties understand that interest and tuition shall not exceed the $30,000.

e. Petitioners will act in good faith and will use and/or exhaust all reasonable and available means in the pursuit of earning credits for M.S.'s graduation from Pennco Tech with a certificate as a diesel technician by September 20, 2016.

f. It is anticipated that M.S. will receive the requisite educational credits to earn a certificate as a diesel technician pursuant to the credit completion requirements of Pennco Tech by September 20, 2016. Upon achieving sufficient credits for graduation, Lawnside will have no further obligation to contribute to M.S.'s placement at Pennco Tech or in any other program or placement for M.S. Furthermore, after September 20, 2016, Lawnside will have no further obligation to contribute to M.S.'s placement at Pennco Tech or in any other program or placement for M.S, subject to Paragraph 3 of this Agreement.

g. The payments set forth immediately above in Paragraphs 2(a) through (d) reflect Lawnside's total contribution to the educational costs of Pennco Tech. The aforesaid payments shall be in full and final settlement of all claims for tuition reimbursement, residential costs, medical services, mental health services, behavior intervention services, health and nursing services, social worker services, parental counseling/training, related services, compensatory education, evaluation fees, attorney fees, expert witness fees, ESY services, transportation costs, and/or any other costs or fees arising from or associated with M.S.'s attendance at Pennco Tech for the time period beginning July 14, 2015 and ending September 20, 2016, as more fully set forth in Paragraph 8 below.

h. Lawnside's contribution toward the educational costs as set forth immediately above in Paragraphs 2(a) through (d) will be paid directly to Pennco Tech or Great Lakes Higher Education Corporation. Petitioners will cooperate in good faith to allow open communication between Lawnside and Pennco Tech to confirm M.S.'s continued attendance and progress, and Petitioners shall execute the necessary releases to allow the sharing of education and financial records of Pennco Tech with Lawnside.

i. Lawnside's obligations towards Pennco Tech regarding Petitioners as described in this Paragraph 2 shall end if M.S. is no longer domiciled; does not reside on a continuous basis within the Lawnside School District pursuant to N.J.S.A. 38-1; or if M.S. withdraws from the Pennco Tech program. Petitioners shall notify the Superintendent of Schools of both Lawnside and Haddon Heights of any change

in M.S.'s domicile, residence, or enrollment status at Pennco Tech within two (2) business days.

3. **Contribution Toward Educational Costs**: Provided that Petitioners comply with all of the obligations set forth in Paragraph 2 of this Agreement, if M.S. does not complete, is dismissed from, or withdraws from the diesel technician certification program at Pennco Tech prior to September 20, 2016, Lawnside shall contribute toward educational services for M.S. in the amount of thirty thousand dollars ($30,000) minus the amount paid by Lawnside pursuant to Paragraph 2 ("the remaining balance") as follows:

   a. The remaining balance shall be strictly used for only educational services, including but not limited to speech-language therapy, occupational therapy, physical therapy, community based instruction, academic instruction and/or remediation, behavioral interventions and services, counseling, and social and emotional skills development.

   b. Lawnside shall make payments under this Paragraph 3 directly to the providers of the educational services described in Paragraph 3(a) upon sufficient proof of services rendered, such as an invoice.

   c. The remaining balance shall not be used for payment of attorneys' fees or for services not educational in nature, such as, but not limited to, medical services and recreational/leisure activities.

   d. Petitioners agree that Lawnside is in no way responsible for payment of educational services under this Paragraph 3 after September 20, 2016.

e. Petitioners agree that Lawnside is in no way responsible for payment of educational services after Petitioners have exhausted remaining balance set forth in this Agreement.

f. Lawnside's obligations as described in this Paragraph 3 shall end if M.S. is no longer domiciled or does not reside on a continuous basis within the Lawnside School District. In this eventuality, Lawnside's settlement obligations will be deemed to have been fully paid, and the Release provisions as set forth in Paragraph 8 below will remain in effect. Petitioners shall notify the Superintendent of Schools of both Lawnside and Haddon Heights of any change in M.S.'s domicile or residence within two (2) business days.

4. **No FAPE Obligation**: Except for the payments described in Paragraphs 2 and 3 above, Haddon Heights and Lawnside shall not be responsible, financially or otherwise, for any other cost or obligation with respect to provisions of FAPE for M.S. from the beginning of time through the 2015-2016 school year. This includes, but is not limited to, any cost for special education or related services, supplies, evaluations, tutoring, counseling, treatment, residential costs, books and school supplies, extracurricular activities, transportation costs, any costs arising out of a change in placement, and attorney's fees. The Petitioners shall have full responsibility for any other such items and costs. This provision shall not be construed to limit any rights or obligations as set forth in Paragraph 9 herein.

5. **No Prevailing Party Status**: The Petitioners, Haddon Heights, and Lawnside agree that no party to this Agreement shall be deemed a "prevailing party."

6. **Dismissal of Petition of Appeal and Due Process Petitions**: Upon full execution of this Agreement, the Petition of Appeal (OAL Docket No. EDU 09496-2014, Agency Reference No. 106-4/14) and Due Process Petition (OAL Docket No. EDS 06746-2015, Agency Reference No. 2015-22509) shall be dismissed with prejudice.

7. **Release and Waiver of Claims between Haddon Heights and Lawnside**: Haddon Heights and Lawnside mutually agree to waive and release any and all claims that were or could have been brought against each other regarding M.S.'s education, including any allegation or claim asserted in the Petition of Appeal or Due Process Petition and any claim for compensatory education, tuition, services, transportation, monetary damages, costs and attorneys' fees through the date of full execution of this Agreement.

8. **Release and Waiver of Claims against all Parties**: The Petitioners, on behalf of themselves and on behalf of M.S., as well as both Respondent Boards agree to the following **RELEASES AND WAIVERS:**

   a. In consideration of their obligations under Paragraphs 1-7 of this Agreement, and for other good and valuable consideration, the Parties **RELEASE, WAIVE AND FOREVER DISCHARGE** each other (includes former, present and future board members, officers, employees, agents, and servants) from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to M.S.'s education, special education program, placement, proposed placements, IEP, related services, discipline, counseling, safety, and/or attendance within the Haddon Heights School District, Lawnside School District, and any

out-of-district placement. This Release and Waiver shall run from the beginning of time through the date of full execution of this Agreement. This Release and Waiver includes, but is not limited to: (a) any and all claims asserted or which could have been asserted in the Petitioners' Petition of Appeal or Due Process Petition; (b) any and all claims that M.S. is entitled to special education and/or related services beyond the 2014-2015 school year; (c) compensatory education; (d) reimbursement of any medical, behavioral, or education evaluations; (e) transportation; (f) expert witness fees; and/or (g) attorney's fees, except as set forth in Paragraphs 2-3 of this Agreement.

b. By way of further illustration, this Release and Waiver also includes, but is not limited to, any claim relating to the education of M.S. during the time period set forth above in Paragraph 8(a) concerning and/or alleging a denial of FAPE, entitlement to special education and/or related services beyond the 2014-2015 school year, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, attorneys fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education, including N.J.A.C. 18A:46-1 et seq. and N.J.A.C. 6A:14 et seq., the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 et seq., the American with Disabilities Act, 42 U.S.C. § 12101 et seq., the New Jersey Anti-Bullying Bill of

Rights Act, N.J.S.A. 18A:37-13.2 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. § 1983, § 1985, and § 1988, the New Jersey Civil Rights Act, and the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq.

c. This Release and Waiver does not limit any rights or obligations under Paragraph 8 herein or bar an action to enforce the terms of this Agreement.

9. **Confidentiality:** The terms of this Agreement shall be kept confidential to the fullest extent permitted by law. The Petitioners shall not disclose the terms of or existence of this Agreement with any third party, except as necessary to implement same or as required by law. In making any permitted disclosure, the Petitioners shall inform the person to whom they are making the permitted disclosure that the existence and substance of this Agreement, the settlement giving rise to this Agreement, and the sum of money paid pursuant to this Agreement are to be held strictly confidential to the fullest extent permitted by law. The Parties reserve all remedies, including but not limited to equitable relief, in the event of a breach.

10. **Miscellaneous:**

a. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable.

b. This Agreement shall be governed and construed under the laws of the State of New Jersey.

c. This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto respecting the subject matter hereof and supersedes and cancels all previous negotiations, agreements, commitments and writings in

connection herewith. The Releases and Waivers contained in this Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner orally or otherwise, except by an instrument in writing of concurrent or subsequent date signed by a duly authorized officer or representative of each of the Parties hereto. The Parties agree that they waive the rule of construction against the drafter of this Agreement.

d. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

e. The Parties expressly reserve the right to enforce this Agreement in a court of competent jurisdiction.

f. The Parties hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of their choosing and option. The Parties did consult with counsel and acknowledge that they were represented by competent counsel that assisted them in entering into this settlement agreement and that they fully understood the contents of this Settlement Agreement and General Release, including the waiver and general release set forth in Paragraphs 7-8.

**BY THEIR SIGNATURES TO THIS AGREEMENT, MACEO SHEALY, SR., NICOLE SHEALEY, AND MACEO SHEALEY, JR. ACKNOWLEDGE THAT THEY EACH HAVE READ THIS RELEASE AND WAIVER, AND ACCEPT AND AGREE TO THE PROVISIONS THEY CONTAIN. MACEO SHEALEY, SR., NICOLE SHEALEY,**

**AND MACEO SHEALEY FURTHER ACKNOWLEDGE THAT THEY EACH ARE EXECUTING THIS RELEASE AND WAIVER VOLUNTARILY, BOTH IN THEIR INDIVIDUAL CAPACITY AND ON BEHALF OF MACEO SHEALEY, WITH THE FULL UNDERSTANDING OF THE CONSEQUENCES, THAT THEY HAVE OBTAINED THE ADVICE OF COUNSEL WITH RESPECT TO THE RELEASES AND WAIVERS, AND ARE SATISFIED WITH THE REPRESENTATION THEY HAVE RECEIVED FROM THEIR COUNSEL, CURRENT AND FORMER. MACEO SHEALY SR., NICOLE SHEALEY, AND MACEO SHEALEY FURTHER REPRESENT THAT THEY POSSESS THE LEGAL AUTHORITY TO ENTER INTO THIS AGREEMENT TO PROVIDE THE RELEASES AND WAIVERS CONTAINED HEREIN.**

Maceo Shealey Sr., individually and on behalf of M.S., Father — Date: 11/22/15

Nicole Shealey, individually and on behalf of M.S., Mother — Date: 11/22/15

Maceo Shealey — Date: 11/22/15

Rebecca Kitchmire, Board President
Haddon Heights Board of Education — Date: 12/08/15

Sabrina Forrest, Board President
Lawnside Board of Education — Date: 11/12/15

**MINUTES OF THE BOARD OF EDUCATION**
**December 8, 2015**

Mrs. Sheilds moved, seconded by Mr. Quinn, and approved by unanimous voice vote to adjourn to executive session at 8:05 p.m. to discuss a student hearing and settlement agreement 06746. Returned from executive session at 8:45 p.m.

Mrs. Long moved, seconded by Mrs. Sheilds, to approve, by unanimous vote, to permit student # 176310 to return to school following the completion of the suspension. Student #176310 is also required to attend counseling sessions twice a month for the remainder of the 2015-2016 school year.

Roll Call Vote:

YESES: Mrs. Alexander, Mrs. Gentile, Mrs. Long, Mr. Lucia, Mr. Quinn, Mrs. Sheilds, Mrs. Shissler, Ms. Stuart, Mrs. Kitchmire

NOES: None

ABSTAINS: None

Mrs. Shissler, moved, seconded by Mrs. Long, to approve, by unanimous vote, the execution of settlement agreement 06746 related to a special education matter.

Roll Call Vote:

YESES: Mrs. Alexander, Mrs. Gentile, Mrs. Long, Mr. Lucia, Mr. Quinn, Mrs. Sheilds, Mrs. Shissler, Ms. Stuart, Mrs. Kitchmire

NOES: None

ABSTAINS: None

On the motion of Mr. Quinn, seconded by Mrs. Sheilds, the meeting was adjourned at 8:50 p.m.

I certify that this is a copy of the original Board of Education meeting minutes of December 8, 2015.

Mark J. Stratton

Mark J. Stratton, Bus. Administrator

# Board Resolution

The Lawnside Board of Education approved the following motion on November 12, 2015:

To approve and authorize the execution of settlement agreement 06746 related to a special education matter as discussed in Executive Session.

Motion moved by Amy Pierce, seconded by Ronald DeAbreu

Motion carried; 7 yes 2 absent.

I, Dawn Leary, Secretary of the Board of Education of the Borough of Lawnside, do hereby certify that this is a true copy of the minutes recorded at a meeting held on November 12, 2015.

Dawn Leary

Dawn Leary, RSBA
School Business Administrator/Board Secretary

94-16

OAL DKT. NO. EDU 12781-13
AGENCY DKT. NO. 175-8/13

| | | |
|---|---|---|
| WILFREDO ROMERO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/01/16

Date of Mailing: 3/01/16

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 12781-13
AGENCY DKT. NO. 175-8/13

**WILFREDO ROMERO,**
Petitioner,
v.
**ELIZABETH BOARD OF EDUCATION,**
**UNION COUNTY**
Respondent.

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**Gregory T. Syrek,** Esq. for petitioner (Bucceri and Pincus, attorneys)

**John G. Geppert,** Esq. for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: January 7, 2016 Decided: January 14, 2016

BEFORE **CARIDAD F. RIGO**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 9, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

January 14, 2016
DATE

**CARIDAD F. RIGO**, ALJ

Date Received at Agency: 1-21-16

Mailed to Parties: JAN 21 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CFR/lr

Schwartz Simon
Edelstein & Celso LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
(973) 301-0001
Attorneys for Elizabeth Board of Education

| | |
|---|---|
| WILFREDO ROMERO,<br>Petitioner,<br><br>v.<br><br>ELIZABETH<br>BOARD OF EDUCATION,<br>Respondent. | BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION<br><br>ADMINISTRATIVE ACTION<br><br>AGENY REF. NO 175-8/13<br>DOCKET NO. EDU 12781-2013 N |

This Agreement and General Release (the "Agreement") is made this ____ day of _____ 2015, by and between the Elizabeth Board of Education (the "Board") and Wilfredo Romero ( "Romero") (collectively, the "Parties").

**WHEREAS**, Wilfredo Romero is employed by the Board as a tenured teaching staff member; and

**WHEREAS**, on or about May 6, 2013, Dr. Olga Hugelmeyer notified Romero that Petitioner would not be reemployed for the 2013-2014 due to a reduction in force; and

**WHEREAS**, a dispute arose as to the reduction in force and later order of recall in the 2013-2014 school year, and

**WHEREAS**, the Elizabeth Education Association ("the Association") filed a Petition of Appeal (the "Association") on behalf of Romero on or about August 2, 2013; and

**WHEREAS**, World Language Teacher positions became available on or about September 1, 2013 and Romero was reappointed to a World Language Teacher position on or about November 19, 2013; and

**WHEREAS**, the parties to this Agreement wish to resolve this matter amicably;

**NOW THEREFORE**, in consideration of the mutual covenants contained herein and for good and other valuable consideration, the sufficiency of which is hereby acknowledged and agreed to by all parties hereto, Romero and the Board do agree as follows:

1. The Board shall pay Romero the sum of eight thousand five hundred dollars ($8,500.00) in back pay.

2. In addition, the Board shall reimburse the State Department of Labor for unemployment benefits paid to Romero for the period of September 1, 2013 through mid November 2013 in the approximate amount of nine thousand three hundred and sixty dollars ($9,360.00), subject to verification of said unemployment payment by the State Department of Labor.

3. The Board will provide Romero with seniority credit for the entire 2013-2014 school year.

4. The Board will provide Romero with sick leave credit for the entire 2013-2014 school year.

5. Upon the full execution of this Settlement Agreement and Release as well as the approval of same by the Elizabeth Board of Education, the above referenced Petition of Appeal will be withdrawn with prejudice.

6. Nothing contained in this Agreement shall constitute an admission of wrongdoing by any party. Instead, this Agreement is reached to resolve the pending dispute.

7. Romero agrees not to initiate or process any further grievances, charges, petitions and/or litigation against the Board with regard to any disputes relating to the above referenced Petition of Appeal, up to the date of the execution of this Agreement.

8. Romero specifically waives and releases any and all claims against the Board, its members, agents and employees, which were or could have been raised in the above-referenced Petition of Appeal.

9. This Agreement constitutes the entire agreement between these parties and constitutes full and final settlement as identified herein. The terms of this Agreement shall be interpreted in accordance with the laws of the State of New Jersey.

10. The parties each affirm and represent that they had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and they are entering in to this Agreement and Release voluntarily and with full understanding of its meaning.

11. This Agreement is subject to the approval by the Elizabeth Board of Education. This Agreement will be submitted to the Board of Education for consideration of approval at the Board's regular monthly meeting.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this Settlement Agreement and Release as of the dates indicated.

Wilfredo Romero — Dated: 12/07/15

Witness — Dated 12/7/15

**FOR THE ELIZABETH BOARD OF EDUCATION:**

Date: 1/7/2016

HAROLD E. KENNEDY, BUSINESS ADMIN/BD SEC.

*ATTEST:*

Date: 1/7/2016

SUPERVISING GENERAL COUNSEL/BOARD ATTORNEY

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**BOARD OF EDUCATION**

**RESOLUTION**

**BE IT RESOLVED** that the Elizabeth Board of Education hereby approves the Settlement Agreement and Release with employee Wilfredo Romero; and

**BE IT FURTHER RESOLVED** that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Settlement Agreement and Release on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Settlement Agreement and carry out this action of the Board.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **December 17, 2015**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
December 17, 2015

15-113

98-16

**Pursuant to Referral By the Commissioner of Education**
**State of New Jersey**
**Before Timothy J. Brown, Esquire**

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**In the matter of:**

| | | |
|---|---|---|
| **The Tenure Hearing of** | : | |
| **Alexander Gonzalez** | : | |
| | : | **Agency Docket No. 264-9/15** |
| **State Operated School District of the** | : | |
| **City of Newark, Essex County** | : | |

## Decision and Award

**Appearances:**

**On behalf of the State Operated School District of the City of Newark, Essex County:**
Brenda C. Liss, Esquire
Fiona E. Cousland, Esquire
Riker Danzig Scherer Hyland & Perretti, LLP
One Speedwell Ave.
Morristown, NJ 07962-1981

**On behalf of Alexander Gonzalez:**
Charles I. Auffant, Esquire
Stuart Ball, LLC
661 Franklin Avenue
Nutley, NJ 07110

### Introduction

This matter arises from tenure charges submitted on September 11, 2015 by the State Operated School District of the City of Newark (the School District or the District) based upon inefficiency pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A6-17.3 against Alexander Gonzalez (Respondent) and a September 28, 2015 referral of the tenure

charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant *to P.L. 2012, c. 26, as amended by P.L. 2015, c. 109.*

The hearing in the matter was conducted on November 12 and 23, 2015, December 8 and 16, 2015 and January 5 and 11, 2016 in Newark, New Jersey. At the hearing all parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. A transcript was taken of the hearing. Respondent was present for the entire hearing and testified on his own behalf. At the close of the hearing on January 11, 2016 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on February 15, 2016 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including my observation of the demeanor of all witnesses.

## Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing by a preponderance of the evidence the truth of its tenure charges against Respondent, and if not, what is the appropriate remedy?

## The Tenure Charge

The tenure charge in this matter are based upon inefficiency pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A6-17.3 and states:

## TENURE CHARGE: INEFFICIENCY

Respondent has been rated ineffective in two consecutive annual summative evaluations, as follows:

1. Respondent was rated INEFFECTIVE in his 2013-14 annual summative evaluation.
2. Respondent was rated INEFFECTIVE in his 2014-15 annual summative evaluation.
3. Respondent has failed to effectively perform the duties of a teacher.
4. Respondent has failed to effectively use individual standard-aligned lessons to build on previous lessons and on students' prior knowledge.
5. Respondent has failed to effectively use standard-aligned lesson components to move students toward mastery of an objective that is aligned to objective...standards.
6. Respondent has failed to clearly and accurately communicate content and instruction effectively.
7. Respondent has failed to effectively use lesson plans that are standard aligned, grade-level appropriate, and reflect work toward annual student achievement goals.
8. Respondent has failed to use lesson objectives that fit into a larger coherent sequence that leads to student mastery of the appropriate standards.
9. Respondent has failed to effectively tailor instruction to move all students toward mastery.
10. Respondent has failed to effectively use questions and tasks to ensure student comprehension and ask for application, analysis, and/or synthesis.
11. Respondent has failed to effectively anticipate and respond to student reactions and misunderstandings by adjusting instructional strategies.
12. Respondent has failed to effectively require precision and evidence in tasks and responses from students and himself.
13. Respondent has failed to effectively demonstrate that student work included revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.
14. Respondent has failed to effectively demonstrate that students express satisfaction in solving problems and mastering new material.
15. Respondent has failed to effectively demonstrate that students show persistence in confronting demanding concepts and tasks.

16. Respondent has failed to effectively demonstrate that his strategies and routines capture and maintain student attention on learning.
17. Respondent has failed to effectively demonstrate that he fosters a classroom culture that is consistently one of high expectations and hard work.
18. Respondent has failed to effectively demonstrate that students hold themselves and their peers accountable for learning and supporting the culture of the classroom.
19. Respondent has failed to consistently check for understanding effectively.
20. Respondent has failed to effectively demonstrate that he and his students give and receive timely, specific, and constructive feedback.
21. Respondent has failed to effectively demonstrate students know more at the end of the year than they did at the start.
22. Respondent has failed to effectively track assessment data to understand each student's progress toward mastery and that she (sic) uses results to guide planning instruction.
23. Respondent has failed to effectively articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not, what s/he still needs to learn.
24. Respondent has failed to effectively demonstrate that data reflects that students are mastering the objectives of the focus areas, leading toward mastery of grade-level standards.
25. Respondent has failed to effectively demonstrate that he accurately self assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and pursues his own growth and development.

**Respondent**

Respondent was certified by the State of New Jersey as a "Teacher of Spanish" in 2006, began teaching Spanish in the District in the 2005-2006 school year and from that time through the 2012-2013 school year, taught Spanish in three District high schools. He testified that throughout his time in the District he was never subject to any significant discipline and prior to the two years at issue herein always received his increment. For the 2012-2013 school year, Respondent taught at Newark Vocational High School and received an "Ineffective" in his annual evaluation. In the spring of 2013 Respondent

sought a transfer from Newark Vocational and during the summer of 2013 sought a teaching position in other schools within the District as well as other school districts; a search that did not result in a teaching position for Respondent. By letter from the District's Chief Talent Officer dated August 31, 2013, Respondent was informed that he had been assigned as an additional support staff member for the 2013-2014 school year in an "Educator Without Placement Site" (EWPS) status, and was directed to report to Park Elementary school on September 3, 2013.

At Park Elementary principal Sylvia Esteves assigned Respondent to teach World Language (Spanish) because her school's permanent World Language teacher was going out on leave. As the school's World language teacher, Respondent taught classes to 1st, 2nd, 4th and 5th grade students including special education and bilingual students. Due to his prior year's annual evaluation (for school year 2012-2013) Respondent was subject to a Corrective Action Plan (CAP) at Park Elementary.

**Respondent's Observations and Evaluations**

During school year 2013-2014 Respondent was observe and evaluated pursuant to the District's 2013-2014 "Framework for Effective Teaching" and received:

(1) A scheduled Long Observation by Park Elementary Vice Principal Theresa Empirio on October 10, 2013 (including a pre-observation conference and later post-observation conference) in which he received an overall "Ineffective" rating;

(2) A Short Observation on November 19, 2013 (including a later post-observation conference) by Park Elementary Vice Principal Maria

Rosendary-Donaldson, in which he received an overall "Ineffective" rating;

(3) An unscheduled Long Observation by Empirio on December 19, 2013 (including a later post-observation conference) in which he received an overall "Ineffective" rating;

(4) A Mid Year Review on February 14, 2014 by Empirio in which he received an "Ineffective" rating;

(5) An unscheduled Long Observation by Empirio on March 19, 2014 (including a later post-observation conference) in which he received an overall "Ineffective" rating (and on which Respondent wrote: "I am signing, but I am not agree at all. Since Sept/13 -> 2/14/14 I was teaching a subject area with no license on it";

(6) An unscheduled Short Observation by Empirio on April 24, 2014 (including a later post-observation conference) in which he received an overall "Ineffective" rating;

(7) An Annual Evaluation on April 9, 2014 by Empirio in which he received an "Ineffective" rating and

(8) An unscheduled Short Observation by Theresa Empirio on April 24, 2014 (including a later post-observation conference) in which he received an overall "Ineffective" rating.

By memorandum dated May 23, 2014, Park Elementary principal Sylvia Esteves recommended tenure charges against Respondent for failing to meet required standards

for effective instruction. The District did not pursue the tenure charge recommendation of Esteves.

Respondent again held EWPS status for the 2014-2015 school year and was assigned to the Roberto Clemente elementary school. For that year Respondent was again subject to a CAP and was again assigned to teach World Language (Spanish). As in the previous year, Respondent was required to travel from classroom to classroom throughout the school to teach different grade levels of students.

During school year 2014-2015 Respondent was observe and evaluated pursuant to the District's 2014-2015 "Framework for Effective Teaching" and received:

(1) An announced Long Observation by Vice Principal Sheila Laurenceau on September 28, 2014 (including a pre-observation conference and later post-observation conference) in which he received an overall "Partially Effective" rating;

(2) A Short Observation on November 5, 2014 (including a later post-observation conference) by Laurenceau in which he received an overall "Partially Effective" rating;

(3) A Short Observation on January 23, 2015 (including a later post-observation conference) by Principal Yolanda Mendez in which he received an overall "Ineffective" rating;

(4) A February 2, 2015 Mid Year review by Mendez in which he received a rating of "Ineffective";

(5) A Long Observation on March 24, 2015 (including a later post-observation conference) by school Innovation Officer Claudio

Barbaran in which Respondent received a rating of "Partially Effective";

(6) A Long Observation on May 7, 2015 (including a later post-observation conference) by Pier Validator Gina Wells in which he received a rating of "Ineffective" and

(7) An Annual Evaluation by Mendez, Barbaran and Laurenceau on May 8, 2015 in which he received an overall rating of "Ineffective."

In post observation conferences, semi-annual evaluations and annual evaluations throughout both years at issue, administrators continually evaluated Respondent's applicable CAP and Respondent's progress under the CAP and made recommendations and offered assistance to Respondent for his successful attainment of the improvements in his performance required by the CAP. In this regard, in addition to the consistent testimony of principals Esteves and Mendez, the various observation conference records and evaluations admitted into the record establish that Respondent was given repeated "CAP Reflection" feedback by administrators wherein his progress and lack of progress in addressing his performance issues were addressed, recommendations made and action steps by both Respondent and the administrators identified.

**Efficiency Tenure Charges and Arbitral Authority**

Because Respondent was rated Ineffective in two consecutive annual summative evaluations the District filed its charge of inefficiency Pursuant to Section 25 of TEACHNJ, N.J.S.18A:6-17.3 (2).[1] In such circumstances, TEACHNJ (the Act) provides

[1] As provided by N.J.S.18A:6-17, only evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-

that in rendering a decision on the tenure charges the arbitrator shall only consider whether or not:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

The Act further provides that:

> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.
>
> d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

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117 et al.) may be relied upon by the District for purposes of such efficiency tenure charges. I find that the District's 2013-2014 and 2014-2015 rubrics (as contained in the District's 2013-14 and 2014-15 *"Framework for Effective Teaching"*) were "approved by the commissioner" as required by statute. Respondent asserts herein that the District failed to comply with various requirements of the District's rubric(s),

## Respondent's Theory of the Case

Respondent argues that the two annual summative evaluations relied upon by the District as basis for the tenure charges are not valid because: (1) the District failed to substantially adhere to the evaluation process by failing to comply with statutory mandates regarding Corrective Action Plans (CAPs) and Student Growth Objectives (SGOs) in evaluations, (2) the District's conduct was retaliatory and (3) the District's conduct was arbitrary and capricious. As a result, the Respondent asserts, the tenure charges should be dismissed. Each of the Respondent's arguments are considered below.

### Respondent's Claim that the District Failed to Substantially Adhere to the Evaluation Process, Including Providing a Corrective Action Plan

Respondent asserts that the District failed to substantially adhere to the evaluation process by failing to comply with statutory minimal requirements for Corrective Action plans. In this regard, Respondent argues that the 2013-2014 and 2014-2015 CAPs produced by the District for Respondent were defective and thereby did not meet the minimal standards to qualify as "adhering substantially to the evaluation process." In support of its argument Respondent maintains that each of the CAPs was not completed in a timely manner, each lacked timelines for corrective action, and each contained only "specific demonstrable goals" that were entirely unattainable under circumstances where, as here Respondent asserted, Respondent was; (i) never provided with a District approved curriculum, (ii) was never provided Spanish language text books or workbooks, (iii) was required to teach outside of his certification and (iv) was not provided adequate class instructional time to attain such goals. Nor did the CAPs include the required SGOs and "action steps" tailored to remedy perceived deficiencies, Respondent maintained.

**Respondent's 2013-2014 and 2014-2015 Corrective Action Plans**

Respondent was initially required to have a Correction Action Plan (CAP) for the 2013-14 school year because he received an annual rating of "Ineffective" for the 2012-13 school year. A CAP is the product of collaboration between the involved teacher and the teacher's supervisor. Respondent's 2013-14 CAP identified certain World Language, Common Core State Standards in response to the CAP question; "what are the standards you want all students to master this year?" The CAP went on to provide how Respondent would determine "student starting points" and provided that such would include –

> running records to track student growth toward mastery,
> informal assessment to gain understanding of the students' Spanish Language ability, and
> informal assessment to gain understanding of the students' Spanish culture

and then provided how Respondent would determine "student end points" to establish whether students had met their learning goals, including:

> Guided teaching questions to measure students understanding,
> running records to track student growth toward mastery,
> informal assessment and
> completion of class work.

The CAP also identified instructional tools and resources for Respondent including visiting exemplary classrooms to observe best practices, attending PLC[2] meetings, utilizing specific books on teaching, discussions with direct supervisor, pre and post observation assessments and the Common Core website. The CAP additionally provided

[2] PLCs (Professional Learning Communities) are weekly meetings of related teaching staff members in the school where teaching-related issues are explored and addressed. For Respondent, the community included other teachers of "specials."

a "Professional Growth Plan" wherein Respondent identified various "action steps" he would take to improve his teaching practice in identified indicator areas and steps the Administration would take to assist Respondent in improving. The steps listed for the administration included; "PLC," "Pre-Conference," "Post-Conference," "Pre & Post Assessment," "Long/Short Observation," "Administrative Monitoring," "Make opportunities for teacher to view an exemplary teacher instruct" and "Model lessons."

In 2014-15 Respondent's CAP set two Student Learning Goals, also known as Student Growth Objectives (or SGOs) for the school year. The first SGO focused on 12 Fourth Grade students to be measured over the course of the school year. Respondent identified the New Jersey Common Core Curriculum Standards as that to be used, identified a pre-test made by the World Language Department as the starting point assessment tool, and as the ending point assessment tool the CAP identified "Teacher made tests and post-test made by World Language Department NPS (Test will be modified for elementary students by teacher)". The CAP stated that based upon the starting assessment; "7 of 11 need support in writing and applying vocabulary, grammar, and sentence structure skills in the Spanish." The CAP described the Goal for Student Performance for the first SGO as; "Most (at least 70% to 90%) students will be able to write at least one cohesive paragraph with proper vocabulary, grammar and sentence structure skills in the Spanish language."

Respondent's second SGO in the 2014-15 CAP related to a class of third Grade students and offered similar means of pre and post assessments. The CAP stated that based upon assessments administered to students in that class "14 of 15 need support in writing and applying vocabulary, grammar, and sentence structure skills in the Spanish."

The CAP established an end of the year goal that; "At least 75% of students will be able to write at least one paragraph in Spanish with proper grammar, vocabulary and sentence structure." District witnesses testified that the SGO's in Respondents 2014-2015 CAP were narrowly drawn and limited to only two classes to give Respondent a good chance of succeeding in meeting the goals in the SGOs.

The record establishes that CAPs are uploaded to the District's on-line records site "Bloomboard," and that only the teacher, not the supervisor/administrator, may upload a CAP. Consequently, the teacher subject to the CAP bears significant responsibility to assure that the CAP is completed in full and within the time periods established by regulation. As a consequence, where as here, a teacher is claiming a school district failed to substantially comply with the evaluation process because one or more CAP was not timely or adequately completed, such a claim should be strictly scrutinized to determine whether the District exercised such attention and good faith in the process as to satisfy the "substantial compliance" standard and/or whether the alleged untimeliness of the CAP was caused by the teacher.

Contrary to the argument of Respondent, I find sufficient evidence to conclude that in both school years at issue the District received extensions of time from the Department of Education for completion of CAPs, that Respondent's CAPs were completed within the timeframes provided and that the terms of the CAPs were adequate. Although the 2013-14 CAP is not dated, the District offered testimony I credit by the responsible Park Elementary School Principal that the CAP was completed by the extended deadline approved by the Department of Education for that year. Similarly, the evidence establishes that the 2014-2015 CAP was submitted prior to the extended filing

deadline granted the District. In any event, the record further establishes that for both school years 2013-2014 and 2014-2015 Respondent was lackadaisical in his efforts to complete his CAPs and that District school administrators spent significant time and attention on encouraging and facilitating his compliance with requirements for timely completion of the CAPS. Notwithstanding Respondent's own lack of enthusiasm for the process, the administrations here did not let the matter go unaddressed and, instead, followed-up on the CAPs with Respondent and worked collaboratively with the teacher to assure that the CAPs were completed. There was no delay caused by the District and I find that Respondent's 2013-2014 and 2014-2015 Corrective Action Plans were timely filed. Moreover, considering the content of the CAPs, Respondent's shared responsibility for the plans and record evidence establishing that the requirements of the CAP were consistently reviewed with Respondent by District school administrators, that Respondent was provided ongoing feedback on his progress relating to the CAPs and Respondent was provided continuing and varied support designed and tailored to help him succeed under the CAPs, I find the CAPs were; (i) adequate and (ii) adhered substantially to the evaluation process.

**The District otherwise Adhered Substantially to the Evaluation Process**

In the two school years involved Respondent was presented with a daunting task and I do not discount the challenges he faced in adjusting to teaching elementary students where he had only previously taught high school students. However, under circumstances presented here, where Respondent is certified to teach the grades involved and has years of teaching experience, I find that the nature of the challenges facing Respondent are not enough, standing alone, to support either a claim that Respondent was set-up-to-fail or a

claim that evaluations of a teacher under such circumstances cannot reasonably be found to substantially adhere to the evaluation process. Instead, based upon the record as a whole, I find that as to each school year 2013-2014 and 2014-2015 the administration of Respondent's schools made substantial, good faith efforts to provide Respondent with the opportunities and tools to learn how to adjust his teaching to meet the needs of his students. In each school year the respective school administration offered Respondent support in meeting the goals outlined in the CAPs, conducted classroom observations to collect evidence of Respondents progress towards goals, provided Respondent opportunities and guidance on how to access and participate in professional learning opportunities throughout the year, and gave Respondent clear and regular feedback about his development. Respondent was provided coaching, pre and post observation conferences, access to peer groups, lesson plan reviews, recommendations of appropriate books, web-based resources, opportunities to observe other accomplished teachers and assistance of other teachers in the classroom.

Considering the number of observations and evaluations of Respondent conducted each year, and the varied identities of those conducting the observations, the CAPs applied to Respondent and the fact that an arbitrator is without authority to review the determinations as to the quality of an Respondent's classroom performance made by District evaluators, I find that during each school year at issue the respective administrations of Respondent's schools – and therefore the District - complied

substantially with the District's applicable evaluation processes; processes approved by the Commissioner of Education.[3]

**Retaliation /Arbitrary and Capricious Conduct**

Respondent asserts that the tenure charges are in retaliation for his response to an assault by a student in December in of 2012. In this regard, Respondent testified that when he was speaking with a student in the hallway on or about December 7, 2012 he was hit with a water bottle thrown by another student, that he filed a report with the school, had to seek medical treatment and that when the school removed the offending student from his classroom only for one day, he filed a report with the local police department. Respondent argued that because the school disapproved of his having gone to the police, his school principal at the time threatened him by stating that his "life is going to change." Respondent argues that the instant tenure charge is the realization of the threat he received in December 2012 and the manner in which the District intended his life was "to change."

Consistent with its threat, Respondent asserted, his life was changed by the District when he was designated an Employee Without Placement Site, effectively removing him from his school, and the District thereafter assigning Respondent to the elementary school level rather than the high school level at which Respondent had successfully taught for years. In addition to such, Respondent argued, the District set Respondent up for sure failure when it; (1) failed to provide him with a curriculum for his elementary students, (2) refused to provide him text books, (3) refused to provide him

[3] As discussed above, the District's evaluation rubrics are contained in each year's *"Framework for Effective Teaching"* publication. In regard to the number of minimal observations and conferences for teachers on a CAP, the Framework incorporates controlling sections of the New Jersey Administrative Code.

workbooks and (4) instead of recognizing the principles for effective learning of a language contained in the New Jersey Common Core Standards for World Languages and scheduling students for a minimum of three class periods per week, the District scheduled most of his students for only one class period a week. Considering many of his students were special needs or bi-lingual students and that he was not certified to teach either bi-lingual classes or special needs students, Respondent maintained, it is clear that the District not only acted in an arbitrary and capricious manner by setting Respondent up to fail, but that it also retaliated against Respondent for exercising his right to report an assault to the police.

**The Evidence is Insufficient to Support a Finding of Retaliation**

I am not persuaded by Respondent's argument that he was subject to retaliation for conduct in which he engaged in December 2012. Contrary to Respondent's argument, the evidence established that Respondent was not transferred out of Newark Vocational High School against his will, but rather that he requested transfer from the High School toward the end of the 2012-2013 school year. Additionally, the comment relied upon by the Respondent to show a retaliatory intent – that his life would change if he sought a transfer - is ambiguous at best and could easily be interpreted as stating the obvious; a teacher changing schools will likely experience change. In any event, there is no evidence that any observation or evaluation of Respondent during the two school years at issue was completed by any individual with knowledge of any aspect of Respondent's alleged December 2012 student-assault. Nor, for that matter, is there any evidence in the record sufficient to establish animus toward Respondent by any supervisor or administrator during the 2013-2014 or 2014-2015 school years.

**Curriculum, Textbooks, Workbooks and Class Time**

Contrary to the argument of Respondent, I find based upon the evidence, including testimony I credit by administrator Barbaran, that Respondent was provided a copy of the District's world language curriculum. Although it may be true that textbooks and workbooks were not provided Respondent because of the District's then recent transition to the Common Core Standards, the evidence establishes that Respondent was directed to specific web addresses containing extensive, relevant online teaching materials. Nor am I persuaded that because the New Jersey Core Curriculum Standards state that data has shown that programs "offering a minimum of 440 hours of particular instruction in classes that meet at least three times a week throughout the academic year produce a majority of students who can speak at novice, high proficient level or higher" requires a finding that a school's evaluation of a teacher who meets with students for fewer hours or fewer times per week must necessarily be arbitrary of capricious. In the instant matter there is no evidence that Respondent was singled out and given a more onerous schedule than the world language teachers he replaced, that the school's scheduling of Respondent's classes were inconsistent with the resources available to the schools, that the Respondent's CAPs were calibrated to a level of instructional time inconsistent with that provided Respondent, or that the goals set for Respondent – such as having his students progress to a point of being able to write a single paragraph with correct grammar – were so wholly unrealistic as to controvert the very legitimacy of the goals.

**Respondent's Certification**

Consistent with the argument of Respondent, the evidence establishes that Respondent is neither certified in "special education" or in "bilingual education," and that during both years at issue Respondent was required to teach bilingual classes and classes containing special needs students.[4]

District witnesses, including Park Elementary Principal Esteves, Roberto Clemente Principal Mendez and Roberto Clemente Administrator Barbaran, offered testimony that "specials" teachers in their respective schools who are certified to teach in the subject of their specialty course are qualified to teach bilingual and special needs students. Although Respondent disputed that the three District-witnesses had the authority and expertise to offer such testimony, the three witnesses testified based upon their years of experience and I credit their testimonies. The fact is, Respondent is certified and as stated in his state Certification; "is authorized to serve in the public schools of New Jersey as... Teacher of Spanish." There is nothing on the face of Respondent's teaching certification that otherwise restricts his certification or would render him unqualified as a "Teacher of Spanish" to students in New Jersey Pubic Schools who were bilingual of special needs.

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[4] As a World Language teacher Respondent taught what is referred to as a "special" class. "Specials" include such subjects as art, music, physical education and other subjects that students are taught one or two periods a week by teachers other than the student's regular classroom teacher. The teaching of such "specials" should not be confused with teaching of "special needs" students. As for the bilingual education reference, the record establishes that all bilingual classes taught by Respondent primarily consisted of students who spoke the Spanish language.

## Conclusion

Under the circumstances presented, I find that the evidence is insufficient to support a finding that Respondent's annual evaluations were in any part motivated by a desire to retaliate against him or that additionally, in rating Respondent "Ineffective" in his annual summative evaluations the District actions were otherwise arbitrary or capricious. The District's administrators did not set Respondent up to fail, but rather the administrators made substantial, good faith efforts to address Respondent's performance issues and support the teacher. Notwithstanding such efforts, complying substantially with its applicable evaluation processes, the District rated Respondent Ineffective in school years 2013-2014 and 2014-1015.

Based upon the record as a whole and my consideration of all claims, theories and argument offered by the parties, I find that the District has met its burden of establishing by a preponderance of the evidence the truth of its efficiency tenure charges.

The tenure charges are sustained.

Dated: March 3, 2016

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket case No. 264-9/15 relating to tenure charges against Alexander Gonzalez on Thursday, March 3, 2016.

Timothy J Brown

99-16

***SETTLEMENT AGREEMENT AND GENERAL RELEASE***

WHEREAS, RYAN TIRRELL (hereinafter "TIRRELL") has been employed by the PENNS GROVE - CARNEYS POINT REGIONAL BOARD OF EDUCATION, COUNTY OF SALEM (hereinafter "BOARD")(TIRRELL and the BOARD are sometimes hereinafter referred to jointly as "the Parties" or severally as a "Party") as a tenured teaching staff member; and

WHEREAS, TIRRELL and BOARD mutually desire to terminate amicably TIRRELL's employment and/or affiliation with BOARD as of February 16, 2016 through TIRRELL's resignation on that date, and to settle and terminate any and all disputes between them by executing this SETTLEMENT AGREEMENT AND GENERAL RELEASE ("AGREEMENT");

IT IS HEREBY AGREED by and between TIRRELL and the BOARD, as follows:

1. TIRRELL agrees that he shall resign and no longer be employed by the BOARD effective February 16, 2016. TIRRELL further agrees that his signature on this AGREEMENT constitutes an acknowledgment that he is relinquishing any and all present and future rights to employment with the BOARD as of February 16, 2016. TIRRELL specifically waives his tenure rights, his right to a tenure hearing and any claim to back pay and benefits. TIRRELL hereby tenders his letter of resignation as part of an opinion and award of Arbitrator Ruth Moscovitch in the form attached hereto as Exhibit A.

2. In full consideration of the mutual execution of this AGREEMENT, and the mutual agreement to be legally bound by its terms, and in recognition that TIRRELL's

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waiver of his tenure rights, his right to a tenure hearing and any claim to back pay and benefits represents good and valuable consideration, the BOARD:

(a) agrees not to contest any application by TIRRELL for unemployment benefits. The BOARD will respond truthfully to any inquiry by the Department of Labor and Workforce Development, Division of Unemployment Compensation that TIRRELL resigned at a time when faced with imminent layoff or discharge;

(b) will provide a neutral letter of reference in the form attached hereto as Exhibit B upon request to employers of TIRRELL, which shall be limited to the period of TIRRELL's employment by BOARD and positions held;

(c) will additionally provide neutral references upon request to prospective employers of TIRRELL, which shall include such information as the period of TIRRELL's employment by BOARD, positions held, and date of resignation. The Board will make every effort to refer any prospective employer who inquires as to TIRRELL's employment history to the Superintendent of Schools or her designee who will provide the neutral reference set forth above;

(d) agrees that TIRRELL will receive the required notifications for continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA"), 29 *U.S.C.* §§ 1161-1168, should he elect such coverage. The receipt of COBRA benefits shall be at TIRRELL's sole expense and is in no way the responsibility of the BOARD.;

(e) will report this matter to the New Jersey Board of Examiners by forwarding a copy of the arbitrator's Opinion and Award, the Statement of Tenure Charges, the Statement of Evidence, and TIRRELL's Answer to the Tenure Charges. Thereafter, the BOARD will respond truthfully to any inquiry by the Examiners;



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(f) agrees that upon execution of this AGREEMENT that TIRRELL is deemed to have satisfied any and all contractual and statutory notice requirements related to resignation.

3. It is expressly agreed and understood that BOARD does not have and will not have any obligation to provide TIRRELL at any time in the future with any payments.

4. TIRRELL hereby agrees and recognizes that his employment relationship with BOARD will be permanently and irrevocably severed effective February 16, 2016, and that BOARD does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ him in the future. TIRRELL hereby waives any rights to seek any position, paid or unpaid, with the BOARD, and specifically promises not to apply for any position with the BOARD. TIRRELL agrees that any attempt to obtain a position with the BOARD will constitute a breach of this agreement and the BOARD and may rely on the breach in rejecting the application or refusing to employ, reemploy, appoint, nominate, or contract with BOARD.

5. TIRRELL agrees and acknowledges that the agreement by BOARD described herein and the settlement and termination of any claims against BOARD its heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them are not and shall not be construed to be an admission of any violation of federal, state or local statute or regulation, or of any duty owed by BOARD to him. TIRRELL further agrees and acknowledges that he has consented to his termination of his employment with BOARD through resignation effective February 16, 2016 and to the execution of the AGREEMENT to provide an amicable conclusion of his employment relationship with BOARD. In addition, TIRRELL makes no admissions of any kind by signing this AGREEMENT.



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6. The Parties agree that this AGREEMENT shall act as a release of any and all claims each may have against each other, their respective heirs, shareholders, directors, officers, members, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them (the "Released Parties"), each release the other and their respective Released Parties from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which they now have, claim to have, own, hold or which they at any time heretofore had, held, or claimed to have, relating in any manner whatsoever to: (i) any employment relationship between TIRRELL and the BOARD, and (ii) any other relationship by, among, and/or between TIRRELL and the BOARD. The Parties further understand, covenant, and agree that neither of the Parties will enter, permit to be entered or cause to be entered, directly or indirectly, any suit or other claim against each other or any of the Released Parties related to the foregoing. The Parties represent and warrant that they have not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against each other or the Released Parties. The Parties' release and discharge also includes, without limitation, any contract or tort claim or potential claim, and any claim arising under common law, such as claims for breach of contract, defamation, breach of implied covenant of good faith and fair dealing, misrepresentation, libel, slander, invasion of privacy, negligence, interference with advantageous relations, infliction of emotional distress, loss of consortium, discrimination, or wrongful termination, including but not limited to any claims that TIRRELL may have brought pursuant to federal or state civil rights laws including but not limited to:



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- 42 *U.S.C.* § 1983 *et seq*;
- Title VII of the Civil Rights Act of 1964 (42 *U.S.C.* ¶ 2000(e), *et seq*);
- The Americans With Disabilities Act (42 *U.S.C.* ¶ 12101, *et seq)*;
- The Age Discrimination in Employment Act (29 *U.S.C.* ¶ 621, *et seq);*
- The Rehabilitation Act of 1973 (29 *U.S.C.* ¶ 701 *et seq*);
- The Fair Labor Standards Act (29 *U.S.C.* ¶ 201 *et seq);*
- The New Jersey Law Against Discrimination (*N.J.S.A.* 10:5-1 *et seq*);
- The New Jersey Civil Rights Act (*N.J.S.A.* 10:6-1 *et seq)*;
- The Conscientious Employee Protection Act (*N.J.S.A.* 34:19-1 *et seq*);
- The Wage Payment Law (*N.J.S.A.* 34:11-4.1 *et seq*);
- The New Jersey Equal Pay Act (*N.J.S.A.* 34:11-56.1 *et seq);* and
- The New Jersey Wage Act (*N.J.S.A.* 34:11-57 *et seq).*

This release shall not apply to any claim arising out of (a) the enforcement of this agreement; (b) any claim that arises after the date of this agreement; or (c) claims that may not lawfully be released, discharged, or waived. This release specifically excludes claims arising under the New Jersey Workers' Compensation Act and claims arising from the breach of this Agreement. TIRRELL is unaware of any factual basis for such claims.

7. It is expressly understood that the settlement memorialized by this AGREEMENT is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the BOARD.

8. Should TIRRELL have certain personal property on BOARD premises, he and his designated representative shall be permitted, on notice to school administration, and at a mutually convenient day and time, to come onto school property, and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate which property belongs to him and remove his personal property. The BOARD will cooperate in this regard.

9. By signing this AGREEMENT, the Parties certify that they have had the opportunity to discuss this AGREEMENT with counsel. They are fully satisfied with the services



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of their counsel with respect to both this AGREEMENT and all other aspects of this case and they enter into this AGREEMENT knowingly, willingly and without any coercion or improper inducements.

10. Should any provision of this AGREEMENT be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the Parties will make reasonable efforts to reform that provision to be legal, valid and enforceable. Should the provision remain illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this AGREEMENT.

11. This AGREEMENT, and all matters arising out of or relating to this AGREEMENT, shall be interpreted under the laws of the State of New Jersey. Any action to enforce this AGREEMENT, or matters arising out of or relating to this AGREEMENT, shall be brought in the federal or state courts of the State of New Jersey. The Parties irrevocably consent to the personal jurisdiction of such courts.

12. This Agreement sets forth the entire agreement between TIRRELL and the BOARD. Any other prior agreements between some or all of them are hereby terminated and shall have no other force or effect. The Parties acknowledge and agree neither of the Parties nor have the Released Parties made any promises to each other other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement executed by the Parties. Because counsel for all Parties had a full opportunity to review this Agreement with the Parties before they signed it, the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.



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13. This AGREEMENT is subject to approval of the BOARD.

14. By signing this AGREEMENT, each signatory represents that she or he is a Party and has been duly authorized by a Party to sign on that Party's behalf.

15. The parties agree that this AGREEMENT may be signed in counterparts and that scans or facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, the Parties execute the foregoing AGREEMENT this 18 day of FEBRUARY, 2016.

WITNESS:

RYAN TIRRELL

WITNESS:

BOARD SECRETARY

BOARD PRESIDENT

| | | |
|---|---|---|
| **IN THE MATTER OF THE TENURE CHARGES AGAINST RYAN TIRRELL AND THE PENNS GROVE-CARNEY'S POINT REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION** | : | BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY<br><br>DOCKET NO. 14-1/16<br><br>***OPINION AND AWARD*** |

Before: Ruth Moscovitch, Esquire
ARBITRATOR

APPEARANCES

FOR THE BOARD

Jeffrey R. Caccese, Esquire, Comegno Law Group, P.C.

FOR THE RESPONDENT

Keith Waldman, Esquire, Selikoff & Cohen, P.A.

**AWARD**

Based on the foregoing case law and N.J.A.C. 6A:2-5.6, I hereby accept the Letter of Resignation signed by Ryan Tirrell, effective February 23, 2016, and Order that the tenure charges against Ryan Tirrell be dismissed as moot. (See attached).

February 23, 2016

Ruth Moscovitch, Esq.
Arbitrator

[EXHIBIT A]

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## BACKGROUND

In accordance with N.J.S.A. 18A:6-11 as amended, by letter dated January 4, 2016, the Penns Grove Carney's Point Regional District Board of Education ("Board") filed Tenure Charges against respondent, Ryan Tirrell. The Board Certificate of Determination approving the Tenure Charges and suspension of Mr. Tirrell without pay, dated January 19, 2016, was filed pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.2(a). The respondent was charged with conduct unbecoming a teacher, incapacity and other just cause as the reason for the tenure charges.

On February 16, 2016, the tenure charges were referred to the undersigned pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c.26. Prior to the commencement of the hearing, the respondent submitted a unilateral, voluntary and irrevocable resignation.

Given the respondent's unilateral resignation, in the Arbitrator's opinion, the approval of the Commissioner of Education would not be necessary pursuant to N.J.A.C. 6A:3-5.6, namely a "Withdrawal, settlement or mooting of tenure charges." The case of State-Operated School District of the City of Jersey City, Hudson County v. Deborah Robinson, Docket No.: 403-11/03 (2004) would seem applicable to the instant case. In Robinson, the respondent submitted a letter of resignation, indicating that she was "retiring on an ordinary disability pension." ALJ Sandra Ann Robinson of the Office of Administrative Law ("OAL") held: " An issue is 'moot' when a determination is sought on a matter, which, when rendered, cannot have any practical effect on the existing controversy since there remains no conflict between the parties."

Similarly, In the Matter of the Tenure Hearing of Bernard Saez, State Operated School District of the City of Newark, Essex County, OAL DKT. NO. EDU 11306-05 (2006), ALJ Robert J. Giordano held:

> "Against this backdrop, the disposition of the case is made. I CONCLUDE that given his unilateral resignation as a tenured teacher ... the tenure charges against the respondent are rendered moot. HE is no longer employed by the school district. He has no claim for back pay which could be resolved by the disposition of the charges here. The petitioner has no other legitimate interest arising out of the instant matter. I thus CONCLUDE the tenure charges certified by petitioner Bernard Saez should be dismissed."

[EXHIBIT A]

2-18-2016 RT

RYAN TIRRELL
141 Billows Drive
Mount Royal, NJ 08061
February 16, 2016

Zenaida Cobian, Ed.D., Superintendent
Penns Grove - Carneys Point Regional Board of Education
101 Iona Avenue
PENNS GROVE, NJ 08069-2057

Re: Resignation Effective February 16, 2016

Dear Ms. Cobian:

Please be advised that I am resigning from my position as a tenured teaching staff member in the Penns Grove - Carneys Point Regional School District effective February 16, 2016.

Thank you.

Sincerely,

Ryan Tirrell

[EXHIBIT A]

[ON BOARD LETTER HEAD]

Re: RYAN TIRRELL

To Whom It May Concern:

Please be advised that Ryan Tirrell was employed by the Penns Grove - Carneys Point Regional School District as a teaching staff member until his resignation effective February 16, 2016

Sincerely,

PENNS GROVE - CARNEYS POINT
REGIONAL SCHOOL DISTRICT

By:_____
Superintendent of Schools

[EXHIBIT B]

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For all of the foregoing reasons, I hereby approve the Settlement Agreement between the parties and order this case dismissed.

Ruth Moscovitch, Arbitrator

Dated: November 16, 2015

**ACKNOWLEDGMENT**

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

On March 9, 2016, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Order in the above-captioned matter.

Notary Public
My Commission expires 05/16/2019

ANDRIY STEFANYSHYN
Notary Public - State of New York
NO. 01ST6241104
Qualified in Richmond County
My Commission Expires May 16, 2019

100-16

OAL DKT. NO. EDU 00080-15
AGENCY DKT. NO. 341-11/14

| | | |
|---|---|---|
| M.C. AND L.C., ON BEHALF OF MINOR CHILD, A.C., | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOL OF TECHNOLOGY, HUDSON COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter, the proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, it is noted that Paragraph 1 of the Settlement Agreement makes reference to actions intended to be taken on or before December 18, 2015 and January 19, 2016, respectively – dates which precede the Commissioner's consideration of the Settlement Agreement. Therefore, the parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Subject to the foregoing, the Commissioner approves the parties' Settlement Agreement and adopts the Initial Decision as the final decision in this matter – which is hereby dismissed subject to compliance with the terms of the Agreement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/08/16

Date of Mailing: 3/09/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 00080-15
AGENCY DKT. NO. 341-11/14

**M.C. AND L.C. ON BEHALF OF A.C.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOL OF TECHNOLOGY, HUDSON COUNTY,**
Respondent.

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**Matthew A. Stoloff**, Esq., for petitioners (Jardim, Meisner & Susser, P.C., attorneys)

**Matthew Posada**, Esq., for respondent (Netchert, Dineen, Hillman, attorneys)

Record Closed: February 3, 2016 Decided: February 5, 2016

BEFORE **CARIDAD F. RIGO**, ALJ:

On December 31, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

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

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

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

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

February 5, 2016
DATE

**CARIDAD F. RIGO, ALJ**

Date Received at Agency: 2-10-16

Mailed to Parties: FEB 10 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CFR/lr

## SETTLEMENT AGREEMENT

**THIS SETTLEMENT AGREEMENT** ("Agreement"), made and entered into to be effective as of this 19th day of January 2016, by and between M.C. and L.C. o/b/o A.C. ("Petitioners") and Hudson County Schools of Technology Board of Education ("Board"); and

**WHEREAS**, on November 24, 2014, Petitioners filed a petition with the New Jersey Commissioner of Education entitled "M.C. and L.C. o/b/o A.C. v. Hudson County Schools of Technology," Agency Reference No. 341/11-14; and

**WHEREAS**, the New Jersey Commissioner of Education transmitted Petitioners' petition to the New Jersey Office of Administrative Law for a contested hearing, bearing OAL Docket No. EDU 00080-2015N; and

**WHEREAS**, on July 30, 2015, one day of hearing was held before Administrative Law Judge Caridad F. Rigo at the New Jersey Office of Administrative Law, 33 Washington Street, Newark, NJ 07102; and

**WHEREAS**, on December 14, 2015, a second day of hearing was scheduled to take place. However, on that day, the parties reached an agreement to avoid the risk, delay and expense of protracted litigation.

**NOW, THEREFORE,** Petitioners and the Board agree to the following terms and conditions:

1. Permanent Removal ("Expungement") of Suspension and HIB Records. The Board agrees to permanently remove ("expunge") A.C.'s suspension and HIB records from A.C.'s records effective immediately and not later than December 18, 2015. The Board shall direct the appropriate school staff to permanently remove ("expunge") A.C.'s suspension and HIB records from A.C.'s records immediately and not later than January 19, 2016.

2. Interchangeability of Terms and Broad Meaning of Terms. "Permanent removal" and "expungement" shall be used interchangeably. "Suspension records" shall include, but are not limited to, the number of days suspended, all letters relating to the suspension, and the appeal decision by the Board. "HIB Records" shall include, but are not limited to, the investigation notes; statements by all students and administrative staff; as well as any and all legal documents relating to the suspension, including but not limited to the Petitioners' Petition and attorney correspondences. "A.C.'s records" shall be interpreted broadly, including, but not limited to "educational records" within the meaning of the Family Educational Rights and Privacy Act ("FERPA"). Notwithstanding this paragraph, the Board's counsel may retain any and all privileged communications between the Board and its counsel in the law firm's office files, and these communications shall remain confidential.

3. Transcript is a Record. Transcripts are part and parcel of A.C.'s record. If A.C.'s suspension and/or HIB record is indicated in A.C.'s transcripts, it shall be expunged from A.C.'s transcripts.

4. A.C.'s Record Includes Electronically Stored Media and Other Medium. If A.C.'s suspension and HIB records are stored electronically or in other mediums, the Board shall ensure that all information in Paragraphs 1-3 is expunged from such mediums.

5. Confirmation of Expungement. A.C.'s current Principal shall copy and paste the body of the letter set forth in Exhibit "A" on official school letterhead. The Principal shall enter his office telephone number and email address where indicated. There shall be a block signature line for the Principal's signature. Below the block signature line shall indicate the Principal's full name and title. The Principal shall sign this letter.

6. Delivery of Confirmation of Expungement. The signed letter referenced in Paragraph 5 shall be scanned and emailed simultaneously to Board's counsel and Petitioners' counsel at matt@jmslawyers.com **immediately and not later than January 19, 2016**. The Principal shall then mail the original copy of his signed letter to Petitioners at the address indicated in the letter **immediately and not later than January 19, 2016**.

7. Failure to Comply with Obligations. Time is of the essence. The failure of the Board and its employees to comply with any one or more of its obligations as set forth in Paragraphs 1 through 6, even by one day, shall constitute a breach of this Agreement. In such instance, the Board shall be liable for all attorneys' fees and costs that Petitioners incurred in connection with this litigation as well as to enforce this Agreement.

8. Verification by Petitioners. After Petitioners have received the letter referenced in Paragraph 5, Petitioners have the right, but are not required, to visit A.C.'s school during regular school hours to inspect A.C.'s records to verify the contents of the Principal's letter.

9. Initial Settlement Decision. Within fourteen (14) calendar days from the date of execution of this Agreement, and not later than February 2, 2016, Petitioners' counsel shall submit a copy of this fully executed Agreement, together with a copy of the signed confirmation letter as described in Paragraph 5, to Judge Caridad F. Rigo to draft an Initial Settlement Decision. A copy of same shall be sent to the Board's counsel via email and regular mail.

10. This Agreement Not Part of A.C.'s Record. Neither this Agreement, nor the confirmation letter, nor the Initial Settlement Decision, nor any legal documents shall be included or referenced in A.C.'s records in any medium.

11. No Effect on Petitioners' Right to Inspect Records in Future. This Agreement does not alter Petitioners' right to inspect A.C.'s records or request copies of A.C.'s records at any time within the meaning of the Family Educational Rights and Privacy Act ("FERPA") or other applicable federal and state laws governing parental and student access to student records.

12. No Retaliation. The Board and its employees shall not retaliate against Petitioners or A.C. for having pursued this matter or for entering into this Agreement.

13. Enforcement of Agreement. This Agreement shall not bar Petitioners and A.C. from seeking to enforce the terms of this Agreement. If enforcement of this Agreement is necessary, the Board shall be liable for Petitioners' attorneys' fees and costs.

14. Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which taken together shall constitute the same instrument.

15. Amendments, Modifications, Waiver, and Termination. No provisions of this Agreement may be amended, modified, waived or terminated unless each party hereto consents in writing.

16. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof. This Agreement supersedes all prior agreements that the parties may have entered into, oral or otherwise.

17. Authority to Enter Agreement. Each signatory hereto represents that he or she has full and proper authority to sign and enter into this Agreement.

Matthew P. Posada, Esq.
On behalf of the Respondent,
Hudson County Schools of Technology

Matthew A. Stoloff, Esq.
On behalf of the Petitioners,
M.C. and L.C. o/b/o A.C.

# EXHIBIT A

Our School, Our Vision.
**High Tech**
high school

**2014 U.S. News & World Report Best High Schools Award - Top 5%**

Joseph A. Giammarella, Ph.D., Principal
Allyson Krone, Assistant Principal
Michael Ra, Assistant Principal

2000 85th Street North Bergen, NJ 07047
P: 201.662.6804 F: 201.854.2149

January 19, 2016

Mr. and Mrs. Callejas
304 40th Street
Union City, NJ 07087

**RE: Expungement of Antonio Callejas' suspension and HIB records**

Dear Mr. and Mrs. Callejas:

Today, I inspected Antonio Callejas' student records. I confirm that Antonio's suspension and HIB records have been permanently removed (i.e., "expunged") from his student records.

A copy of this letter will **not** be included in Antonio's file. However, you may wish to retain this letter for your personal files. You are also welcome to visit our offices at any time to inspect Antonio's records.

If you have any questions, please do not hesitate to contact me. My telephone number is 201-662-6801 and my email address is jgiammar@hcstonline.org.

Sincerely,

Joseph A. Giammarella, Ph.D.



NONDISCRIMINATION NOTICE
It is the policy of the Board of Education of the Hudson County Schools of Technology not to discriminate in employment or educational opportunity against any person by reason of race, color, national origin, ethnicity, age, sex, affectional or sexual orientation, membership in, activity for service in the Armed Forces of the United States, or physical handicap, status or disability of any individual, in employment or in educational opportunities. Further state and federal protection is extended on account of creed, sex, social or economic status, pregnancy, childbirth, pregnancy-related disabilities, actual or potential parenthood, [illegible] Inquiries regarding affirmative action, discrimination (including Title IX requirements), sexual harassment or equity should be directed to: Abbie Abraham, Affirmative Action Officer/504 Officer/Title IX Coordinator, Hudson County Schools of Technology, 50 Tonnele Avenue, North Bergen, NJ 07047, 201-662-6724 or for all: aabraham@hcstonline.org

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|---|---|---|
| BRENDA MILLER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – formerly employed in various secretarial/clerical positions with the respondent school district – challenged the District's decision to terminate her employment on August 15, 2014, contending that she had acquired tenure in accordance with *N.J.S.A.* 18A:17-2 and that the termination violated her tenure and seniority rights. Further, petitioner alleged that the termination of her employment was carried out by an individual who is neither the State District Superintendent nor someone to whom that duty had been appropriately delegated. The District asserted that petitioner was an unclassified employee within a school district that adheres to the Civil Service Act (Act), and as such she was not entitled to tenure or seniority under the Tenure Act; rather, petitioner was afforded only the rights conferred by the Act. The respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact in this matter, and the case is ripe for summary decision; there is no dispute that the District has opted to be a Civil Service jurisdiction covered by the Act, *N.J.S.A.* 11A:1-1 *et seq.*; petitioner served under several Civil Service clerical titles during her employment with the District; in June 2012, petitioner's position was reclassified from a Secretarial Assistant-Confidential to the unclassified titled of Confidential Assistant, and she was advised that as a result of the transfer, "there was a change in (her) employment status from non-instructional (governed by NJ Civil Service Commission) to unaffiliated; petitioner was also advised that her employment record would reflect a resignation from her civil service title effective June 30, 2012, and that she would no longer be afforded Civil Service rights; *N.J.S.A.* 18A:28-2 provides that no person who is in the classified service of the civil service of the state pursuant to Title 11 shall be affected by any provisions of Chapter 28 of Title 18A; conversely, it appears that if someone such as petitioner is not in the classified service, she is then subject to Title 18A. The ALJ concluded that the District is not entitled to summary decision on the claim that the Civil Service Commission (CSC) alone has jurisdiction to govern petitioner's rights; rather, where petitioner's rights under Title 11A ended when the District made her an unclassified employee outside the jurisdiction of the CSC, she then became entitled to rights under Title 18A consistent with *N.J.S.A.* 18A:28-2. Accordingly, the ALJ granted summary decision in favor of petitioner and ordered that she be reinstated to a full-time position or assignment as appropriate to her tenure, together with back pay and benefits.

Upon comprehensive review, the Commissioner rejected the Initial Decision, finding, *inter alia*, that petitioner could not have earned tenure under *N.J.S.A.* 18A:17-2 because she did not satisfy the conditions of the statute, as she was employed in her unclassified title for less than the three years required to accrue tenure; accordingly, she could not have accrued tenure under Title 18A. The matter was remanded to the OAL for adjudication of Count Two of the petition, regarding whether petitioner's termination was carried out by an appropriately delegated individual.

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

Issued 3/08/16

OAL DKT. NO. EDU 15475-14
AGENCY DKT. NO. 301-10/14

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|---|---|---|
| BRENDA MILLER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the State-Operated School District of the City of Newark (District) and petitioner's reply thereto.

In this action, petitioner challenges the District's decision to terminate her employment on August 15, 2014, contending that she had earned tenure in her secretarial or clerical position in accordance with *N.J.S.A.* 18A:17-2. Petitioner also alleges – in Count Two of the petition – that the individual who terminated her employment had not been appropriately delegated the authority to make personnel determinations on behalf of the State District Superintendant. Count Two was not briefed by the parties or addressed in the Initial Decision.

By way of background, petitioner was hired by the District in May 1998 as a Provisional Clerk, Typing. As the District is a Civil Service jurisdiction covered by the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*,[1] the Civil Service Commission (CSC) granted her

[1] Pursuant to *N.J.S.A.* 11A:3-1, the Civil Service Act creates three classifications of employees: career service, senior executive service, and unclassified service. *N.J.S.A.* 11A:3-5 provides that "[t]he political subdivision unclassified service shall not be subject to the provisions of this title unless otherwise specified." Specifically,

permanent status as a Clerk 1 in January 2000. Petitioner held several other titles – including Technical Assistant 3 Provisional, Senior Clerk, and Secretarial Assistant Typing – through June 2012. Effective July 1, 2012, petitioner's position was reclassified from a classified position to the unclassified title of Confidential Assistant, and petitioner was informed by the District that she would no longer be afforded Civil Service rights. The District terminated petitioner's employment on August 15, 2014.

Petitioner filed an appeal of her termination with the Commissioner.[2] Subsequently, the District filed a motion for summary decision. Upon review, the Administrative Law Judge (ALJ) denied the District's motion, granted summary judgment in favor of petitioner, and ordered the District to reinstate petitioner to a full-time position as appropriate to her tenure.

In its exceptions, the District argues that the Administrative Law Judge (ALJ) erred in finding that the Commissioner has jurisdiction over the petitioner's claims because, as a Civil Service employee, the CSC has exclusive jurisdiction over her claims. (District's exceptions at 4-7). Specifically, the District argues that employees who fall under Civil Service and those who are tenured pursuant to Title 18A have separate disciplinary paths. (*Id.* at 6-7). The District emphasizes that by allowing petitioner to seek an appeal with the CSC and a tenure hearing from the Commissioner, petitioner is being afforded two bites at the apple. (*Id.* at 4-5).

Further, the District contends that the ALJ erred in finding that any secretarial or clerical position is eligible for tenure. (*Id.* at 8-9). The District explains that although

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"teaching staff, as defined in N.J.S.A. 18A:1-1, in the public schools and county superintendants and members and business managers of boards of education" are included in the unclassified service. *N.J.S.A.* 11A:3-5.

[2] Petitioner also appealed her termination with the CSC. The CSC determined that petitioner was not entitled to an appeal before the CSC because it does not have jurisdiction to review the termination of an unclassified employee, in accordance with *N.J.S.A.* 11A:2-6 and *N.J.A.C.* 4A:2-2.1. Petitioner appealed the CSC decision to the Appellate Division, which is currently pending.

*N.J.S.A.* 18A:17-2 provides tenure to any person holding any secretarial or clerical position in a school district after three consecutive years of employment, employees are not eligible to receive double tenure protections under both Title 11A and Title 18A because *N.J.S.A.* 18A:28-2 excludes persons who are in the classified service of the civil service from obtaining tenure under Title 18A. (*Id.* at 9). Additionally, the District argues that the ALJ erred when he found that petitioner became eligible for tenure when her Civil Service rights ended. (*Id.* at 10-13). The District maintains that even though petitioner's Civil Service rights ended when she resigned from her classified title, she remained in a school district that was exclusively governed by the CSC. (*Id.* at 11).

Finally, the District contends that the ALJ erred in finding that petitioner held tenure in a secretarial position when her title was Confidential Assistant. (*Id.* at 14-17). The District points out that the Initial Decision fails to address when and in what capacity petitioner obtained tenure rights. (*Id.* at 14). Alternatively, the District argues that "even if the extinguishing of Title 11A tenure rights allowed [petitioner] to begin accruing tenure rights under Title 18A, she would not have achieved tenure in this position until three years after June 30, 2012, or July 1, 2015," and petitioner was terminated one year shy of the statutory minimum set forth in *N.J.S.A.* 18A:17-2. (*Id.* at 15).

In reply, petitioner argues that the ALJ properly found that petitioner acquired tenure pursuant to *N.J.S.A.* 18A:17-2. (Petitioner's reply at 7). As tenure laws are construed in favor of employees, petitioner argues that Title 11A did not apply to her as she was unclassified, and that she met the requirements of *N.J.S.A.* 18A:17-2. (*Id.* at 7-12). Specifically, petitioner reiterates that there is no doubt that she acquired tenure under *N.J.S.A.* 18A:17-2(b) because she worked in a secretarial or clerical position since she received a permanent status appointment on

January 1, 2000, more than a decade prior to her termination. (*Id.* at 12). Petitioner contends that there are no exceptions to *N.J.S.A.* 18A:17-2 and "nothing which states that individuals employed in a school district who are able to attain tenure under Civil Service laws are more limited in their right to acquire tenure than those school district employees who can acquire tenure under the education laws." (*Id.* at 12). Petitioner also argues that her job duties, rather than her title, entitle her to tenure under N.J.S.A. 18A:17-2. (*Id.* at 6). However, if the District is raising this issue now, then petitioner contends that the matter should be remanded to the OAL for a factual hearing as to petitioner's job duties and what position, if any, petitioner is entitled to upon reinstatement. (*Id.* at 5-7).

As a preliminary matter, the Commissioner finds that pursuant to *N.J.S.A.* 18A:6-9, the Commissioner has jurisdiction over controversies and disputes arising under New Jersey's school laws. Accordingly, the Commissioner has jurisdiction to hear the claims alleged in the petition as they arise under Title 18A.

Upon a comprehensive review of the record in this matter, the Commissioner agrees with the District that petitioner could not have earned tenure under *N.J.S.A.* 18A:17-2 because she did not satisfy the conditions of the statute. Pursuant to *N.J.S.A.* 18A:17-2(b), tenure is granted to "any person holding any secretarial or clerical position or employment under a board of education" after "the expiration of a period of employment of three consecutive calendar years in the district." However, pursuant to *N.J.S.A.* 18A:28-2, "[n]o person, who is in the classified service of the civil service of the state pursuant to Title 11, Civil Service, of the Revised Statutes, shall be affected by any provisions of this chapter." Petitioner was employed in a classified Civil Service title from the beginning of her employment with the District through June 30, 2012. Accordingly, during that period, petitioner could not have accrued tenure under

Title 18A because she was in the classified service, and – pursuant to N.J.S.A. 18A:28-2 – Title 18A's tenure provisions did not apply to her.

Even if petitioner became eligible for tenure under Title 18A when she became an unclassified employee – an issue which the Commissioner need not reach – she did not accrue tenure because she was only employed in that position from July 1, 2012 through August 15, 2014, approximately one year less than the three years required under *N.J.S.A.* 18A:17-2. Petitioner is not permitted to combine the time she worked in several classified titles to the time she worked as a Confidential Assistant. *See Diana Giardina v. Board of Education of the Township of Pequannock, Morris County,* Commissioner Decision No. 124-05, decided April 4, 2005, at 2 (finding that petitioner "may not combine the time she was employed in the position of office aide to the time she was employed as a ten-month secretary for purposes of accruing tenure in the position of secretary, nor may she tack the time she was employed as a ten-month secretary to the time she was employed as an office aide for the purpose of accruing tenure in a clerical position").

Accordingly – for the reasons expressed herein – the Initial Decision is rejected and the matter is hereby remanded to the OAL for adjudication of Count Two of the petition.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/08/16

Date of Mailing: 3/09/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 15475-14
AGENCY REF. NO. 301-10/14

**BRENDA MILLER**,

Petitioner,

v.

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

Respondents.

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**Nancy I. Oxfeld**, Esq for petitioner (Oxfeld, Cohen, attorneys)

**Ramon E. Rivera**, Esq. for respondent (Scarinici Hollenbeck, attorneys)

Record Closed: October 7, 2015 Decided: December 9, 2015

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

## STATEMENT OF THE CASE

Petitioner, Brenda Miller, contends that the State-Operated School District of the City of Newark (District) improperly terminated her despite her tenure and seniority while retaining persons who were non-tenured and/or were tenured but with less seniority than her in positions for which she had acquired tenure and seniority. She also

contends that the person who terminated her had not properly had such duties delegated to her by the State District Superintendent. The District contends that Miller was an unclassified employee within a school district that adheres to the Civil Service Act. As such, she is not entitled to tenure or seniority under the Tenure Act (Title 18A); rather she is afforded only those rights conferred by the Civil Service Act (Title 11A).

## PROCEDURAL HISTORY

On October 10, 2014, petitioner filed a Petition of Appeal. After the District filed a timely Answer, the Department of Education's Office of Controversies & Disputes transmitted the matter, pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, to the Office of Administrative Law (OAL), which filed it for hearing and determination as a contested case on November 26, 2014. After two adjournments requested by the parties, I received a Motion for Summary Decision from the District on August 4, 2015. Miller filed papers in opposition.

## BACKGROUND

The following facts are set forth in the District's filing:

The District adheres to the Civil Service Act with regard to its support staff.

The July 17, 2015, Final Administrative Action of the Civil Service Commission (CSC) from Miller's appeal there disclosed the following history: Miller began her employment with the District as a Provisional Clerk, Typing in May 1998; the CSC granted her permanent status as a Clerk 1 with the District on January 1, 2000; she served as a Technical Assistant 3- Provisional from March 25, 2002 to March 31, 2004; she served in permanent status as a Senior Clerk from April 1, 2004 to July 22, 2007; she served in permanent status as a Secretarial Assistant, Typing from July 23, 2007, to June 15, 2012. Secretarial Assistant, Typing was subsequently renamed Secretarial Assistant effective June 16, 2012.

In June 2012, Miller's position was reclassified from a Secretarial Assistant-Confidential to the unclassified title of Confidential Assistant, and she was so advised. On or about November 18, 2013, through Chief Talent Officer, Vanessa Rodriguez, the District notified Miller as follows regarding her employment record:

> This will confirm your reassignment from your position of Secretarial Assistant Typist Confidential to that of Confidential Assistant that was effective July 1, 2012.
> As a result of this transfer, there was a change in your employment status from non-instructional (governed by NJ Civil Service Commission) to unaffiliated. Therefore, be advised that your employment record will reflect a resignation from your civil service title of Keyboarding Clerk 1 effective June 30, 2012. In that regard, you will no longer be afforded Civil Service rights.

Miller did not file an appeal of this employment action with the CSC.

The District notified Miller in an August 15, 2014, letter that, "[a]s an unaffiliated, at-will employee the [Newark School District was] exercising it right to terminate [her] services as a Confidential Assistant, effective the close of business [on] Friday, August 15, 2014." This action, indeed, occurred on that date. Although her "unaffiliated" status had been made clear to her, Miller filed an appeal on September 3, 2014, of her termination with the CSC. CSC records reflect that when Miller resigned in good standing from her Secretarial Assistant position on July 1, 2012, she had "Accepted unclassified position." In 2014, the CSC advised Miller that since she was serving in an unclassified title and did not appear to have taken a leave of absence from her permanent title, she was not entitled to appeal to the CSC. She, however, pursued her appeal, which led to the above-referenced July 17, 2015, CSC Final Administrative Action. In that appeal before the CSC, Miller raised the same arguments she makes in this proceeding: namely that she had retained her permanent status; and that the District failed to follow layoff procedures. The CSC concluded that the CSC does not have jurisdiction to review the termination of an unclassified employee and that Miller's remedy was to be placed on a regular reemployment list to be consulted for appointment until June 30, 2016, under Civil Service law.

At the same time that Miller filed her 2014 appeal to the CSC, she also filed this Petition of Appeal alleging that the District violated N.J.S.A. 18A:28-5 et. seq. by employing either non-tenured or less senior staff in positions for which she had acquired tenure and seniority and claiming that she is entitled to such positions.

## ANALYSIS AND LEGAL CONCLUSIONS

Petitioner argues that the District improperly terminated her despite her tenure and seniority while retaining persons who were non-tenured and/or were tenured but with less seniority than her in positions for which she had acquired tenure and seniority. The District argues that since the District has opted into the Civil Service Act, the CSC alone, rather than the Commissioner of Education, has the jurisdiction to determine the rights of certain of the District's employees. This matter involves the interaction between N.J.S.A. 18A:17-2, the section of the Education Laws which grants tenure to "[a]ny person holding any secretarial or clerical position or employment under a board of education of any school district or any officer thereof . . ." after being employed for specified periods of time, and Title 11A of the Civil Service Act, which does not grant tenure rights to employees in the "unclassified service." This matter appears to be one of first impression.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, i.e. 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Id. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

I **CONCLUDE** that this matter is ripe for summary decision under the applicable standard.

There is no dispute that the District has opted to be a Civil Service jurisdiction covered by the Civil Service Act (Act). N.J.S.A. 11A:1-1 et seq. The Act creates three classifications of employees: (1) career service, (2) senior executive service and (3) unclassified service. N.J.S.A. 11A:3-1. N.J.S.A. 11A:3-5 provides that the political subdivision unclassified service shall not be subject to the provisions of this title unless otherwise specified. That section then provides an inclusive list of such unclassified

positions without designating the list as exclusively inclusive. That list, for the purpose of school districts, includes, "Teaching staff as defined in N.J.S.A. 18A:1-1, in the public schools and county superintendents and members and business managers of boards of education." N.J.S.A. 11A:3-5.g. Additionally the list includes, "[i]n school districts organized pursuant to N.J.S.A. 18A:17-1 et seq., the executive controller, public information officer and executive directors of board affairs, personnel, budget, purchasing, physical facilities, data processing, financial affairs and internal audit." N.J.S.A. 11A:3-5r. The District has determined, apparently without objection by the CSC as indicated in the CSC's July 17, 2015, Final Administrative Action, that Miller's title was unclassified[1] as a Confidential Assistant. In other words, it added to the list of unclassified school district personnel set forth in the Civil Service Act. Not only does the District's November 18, 2013, letter (R-4) advise Miller that she would "no longer be afforded Civil Service rights," the CSC's July 17, 2015, decision (R-7 p. 5) states that, "[p]ursuant to N.J.S.A. 11A:2-6 and N.J.A.C. 4A:2-2.1, the Commission does not have jurisdiction to review the termination of an unclassified employee." [emphasis supplied] In light of the CSC's clearly articulated position to the contrary, the District's argument is unpersuasive that, since the District has opted into the Civil Service Act, the CSC alone, rather than the Commissioner of Education, has the jurisdiction to govern the rights of certain of the District's employees such as Miller. This is not a case, as the District contends, where a party is looking for two bites of the apple or where a party should have made an election of forum where a grievance could be addressed in either forum. See, Winters v. N. Hudson Reg. Fire and Rescue, 212 N.J. 67 (2012). The CSC has clearly concluded that Miller gets no bite of its apple because it considers Miller to be an unclassified employee.

N.J.S.A. 18A:28-2 provides that no person, who is in the classified service of the civil service of the state pursuant to Title 11[2] shall be affected by any provisions of Chapter 28 of Title 18A. Conversely and logically, it appears that, if someone such as Miller is not in the classified service, then she is subject to Title 18A. Accordingly, I **CONCLUDE** that the District is not entitled to Summary Decision on the claim that the CSC alone has jurisdiction to govern the rights of Miller. Instead, I **CONCLUDE** that,

[1] The District used the term "unaffiliated" rather than "unclassified" in its November 18, 2013, letter to Miller.
[2] Now Title 11A.

whereas Miller's rights under Title 11A ended when the District made her an unclassified employee outside the jurisdiction of the CSC, she then became entitled to rights under Title 18A consistent with N.J.S.A. 18A:28-2.

Our courts have long held that "the widest range should be given to the applicability of the [tenure statutes] law." Sullivan v. McOsker, 84 N.J.L. 380, 385 (E. & A. 1913). Also see, Barnes v. Bd. of Educ. of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964). Because of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends. Spiewak v. Bd. of Educ. of Rutherford, 74-75 (1982). Anything but a liberal interpretation of the interplay between the above statutes would leave Miller with no remedy.

N.J.S.A. 18A:17-2 provides that any person holding any secretarial or clerical position or employment in a school district, after the expiration of a period of employment of three consecutive years in the district or a shorter period as may be fixed by the Board, shall hold the position or employment under tenure during good behavior and efficiency.

By reading N.J.S.A. 18A:17-2, N.J.S.A. 18A:28-2, and the Final Determination of the CSV in pari materia, I **CONCLUDE** that Miller is entitled to the tenure protections of Title 18A as the holder of a secretarial position. The District concedes that Miller received a permanent status appointment in January 2004 and had served through August 15, 2014. Although the tenure provisions of Title 11A do not apply to certain individuals in the unclassified service, there is nothing that suggests that employees denied tenure under Title 11A are thereby not entitled to tenure under Title 18A where such protections are denied only to employees in the classified service under Title 11A.

## ORDER

It is **ORDERED** that the District's Motion for Summary Decision be **DENIED.**

It is further **ORDERED** that Summary Decision be **GRANTED** in favor of Miller.

It is further **ORDERED** that the District reinstate Miller to a full-time position or assignment as appropriate to her tenure, together with back pay and benefits.

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

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

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

December 9, 2015
DATE

Jesse H. Strauss
**JESSE H. STRAUSS**, ALJ

Date Received at Agency:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: DEC 11 2015

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#102-16S

AGENCY DKT. NO. 42-2/16

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| IN THE MATTER OF THE TENURE | : | |
| HEARING OF ROSLYN TURNER-INCE, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE TOWNSHIP | : | ORDER |
| OF IRVINGTON, ESSEX COUNTY. | : | |

Upon review of the tenure charges and answer filed in the above-captioned matter, the Commissioner notes that the charges reference an investigation by the Department of Children and Families ("DCF"), as well as DCF's investigative report (Disciplinary Charges, Paragraph A4; Statement of Evidence, Paragraphs 6 and 9).

*N.J.A.C.* 6A:3-1.3(g) provides as follows:

> Consistent with the provisions of *N.J.A.C.* 1:10A-14, where a petition, or tenure charge pursuant to *N.J.A.C.* 6A:3-5, is filed in a matter involving allegations of child abuse and neglect reported to or investigated by the Department of Children and Families (DCF), the record of the matter shall be sealed to the extent necessary, pending further action...to protect all DCF records and reports regarding such abuse and neglect.

Accordingly, the above-referenced tenure charges, along with any related DCF records and reports referred to therein, are hereby SEALED pending further action by the assigned arbitrator and the arbitrator's determination of respondent's motion to dismiss the tenure charges.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/10/16
Date of Mailing: 3/10/16

103-16

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| CATHERINE BUONANNO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – formerly employed as a teacher of English in respondent's school district – challenged the District's decision to non-renew her contract for the 2011-2012 school year. Her appeal alleged, *inter alia*, that: she had been subjected to an illegal prior restraint on her freedom of speech; her poor evaluations were in retaliation for exercising her First Amendment rights; the respondent Board violated the New Jersey Law Against Discrimination (LAD) by creating a hostile work environment; she was the target of defamation; the Board's teacher observation methods were improper; her employment contract was breached; and the Board's decision not to renew said contract was arbitrary and capricious in violation of *N.J.S.A.* 18A:27-4.1. By Order dated May 3, 2013, as amended June 18, 2013, partial summary decision was granted on behalf of the Board as to those issues regarding jurisdiction to hear petitioner's claims of violation of the LAD, defamation, and breach of contract. At the conclusion of petitioner's case, the Board filed a motion for involuntary dismissal, which was granted on behalf of the Board on the issues of alleged personal bias or improper motive, and on the issue regarding petitioner's First Amendment claims. Involuntary dismissal was denied on behalf of the Board on the issue of whether the Board acted arbitrarily and capriciously in failing to renew petitioner's contract.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:27-4.1 provides that a board of education shall renew an employment contract only upon recommendation of the chief school administrator and a majority vote of the full membership of the board, and renewal shall not be withheld for arbitrary and capricious reasons; the petitioner bears the burden of proving that the underlying reasons for the board's actions were improper; in the instant matter, the Board strictly complied with the statutory requirements for teacher evaluations, and petitioner failed to prove that the Board acted improperly in conducting her evaluations; although petitioner had excellent reviews during her first two years of teaching honors students, her reviews declined in her third year when she was required to teach non-honors students; petitioner admitted that she had difficulty with behaviorally-challenged students, characterized as "trade students"; the Gloucester County Institute of Technology is a vocational school, with a student population of both vocational, or trade, students and college-bound pupils; the respondent Board had valid reasons to consider the petitioner's problems in teaching classes with students of differing abilities; unsatisfactory classroom performance is a valid reason for a Board to conclude that tenure should not be granted. The ALJ concluded that the Board did not act in an arbitrary or capricious manner in failing to renew the petitioner's contract. Accordingly, the ALJ affirmed the Board's actions, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

Issued 3/10/16

OAL DKT. NO. EDU 11786-11
AGENCY DKT. NO. 218-8/11

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|---|---|---|
| CATHERINE BUONANNO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Catherine Buonanno.[1]

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the Board's decision to non-renew the petitioner for the 2011-2012 school year was not arbitrary capricious or unreasonable. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/10/16
Date of Mailing: 3/10/16

[1] The petitioner's exceptions consisted of a copy of her written closing argument, which was filed at the OAL and previously considered by the ALJ.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 11786-11
AGENCY DKT. NO. 218-8/11

**CATHERINE M. BUONANNO,**
Petitioner,
v.
**GLOUCESTER COUNTY**
**VOCATIONAL SCHOOL DISTRICT**
**BOARD OF EDUCATION,**
**GLOUCESTER COUNTY,**
Respondent.

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**Christopher M. Manganello,** Esq., for petitioner Catherine M. Buonanno

**Michael Pattanite,** Esq., for respondent Gloucester County Vocational School District Board of Education, (Lenox, Socey, Formidoni, Brown, Cooley & Casey, attorneys)

Record Closed: November 4, 2015 Decided: January 27, 2016

BEFORE **EDWARD J. DELANOY, JR.,** ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges her failure to receive tenure status as a teacher of English. On August 3, 2011, petitioner filed a petition alleging that she was subjected to an illegal prior restraint on her freedom of speech; that the poor evaluations she received were in retaliation for exercising her First Amendment rights; that the Gloucester County Institute of Technology (hereinafter Board or GCIT) violated the New Jersey Law Against Discrimination (hereinafter LAD), N.J.S.A. 10:5-1 to -49, by creating a hostile work environment; defamation; breach of contract; that the Board's teacher observation methods were improper; and that the Board's decision not to renew her contract was arbitrary and capricious in violation of N.J.S.A. 18A:27-4.1. The Board filed an answer on September 29, 2011, and the contested case was transmitted to the Office of Administrative Law, where it was filed on September 29, 2011. On June 13, 2012, an Order striking the Board's Answer for failure to provide discovery was entered. On September 10, 2012, an Order reinstating the Board's Answer was entered.

Thereafter, the Board moved for summary decision on grounds that the Office of Administrative Law (hereinafter OAL) did not have jurisdiction over the First Amendment, defamation, LAD, or breach of contract claims; that petitioner failed to state a cause of action under the LAD or common law defamation; to bar any evidence that the respondent's teacher evaluation method was improper; and to dismiss petitioner's claim that respondent's decision was arbitrary and capricious. By Order dated May 3, 2013, as amended on June 18, 2013, partial summary decision was granted on behalf of the Board as to those issues regarding jurisdiction to hear petitioner's claims of violation of the LAD, defamation, and breach of contract. Conversely, partial summary decision was denied on behalf of the Board on the issue of allegations of personal bias or improper motive, and regarding the procedure used by the Board in conducting evaluations. An evidentiary hearing was scheduled to establish if personal bias or improper motive existed, and regarding the procedure used by the Board in conducting evaluations. In addition, evidence was permitted to be presented regarding petitioner's First Amendment claims to the extent necessary to determine whether the respondent violated N.J.S.A. 18A:27-4.1. Any First Amendment issues

raised beyond that limited scope were dismissed for a lack of jurisdiction. Hearings were held on September 23, 2013, January 6, 2014, January 14, 2014, and July 22, 2015.

At the conclusion of petitioner's case, respondent filed a motion for involuntary dismissal. By order dated February 19, 2015, involuntary dismissal was granted on behalf of the Board on the issue of allegations of personal bias or improper motive, and involuntary dismissal was granted on behalf of the Board on the issue regarding petitioner's First Amendment claims. Involuntary dismissal was denied on behalf of the Board on the issue regarding the procedure used by the Board in conducting evaluations, and involuntary dismissal was denied on behalf of the Board on the issue regarding whether the Board acted arbitrarily and capriciously in failing to renew petitioner's contract. Those two issues remain to be decided. Written summations of the parties were received on November 4, 2015, and on that date the record closed. On December 18, 2015, an Order of Extension was entered, extending the time for filing the Initial Decision until February 4, 2016.

## FACTUAL DISCUSSION

### Testimony

**Michael Dicken** was the assistant superintendent of the Board's schools during the time of petitioner's employment, and he was responsible for recommending contracts for teachers. At that time, policy and regulation 3221 entitled, "Evaluation of Non-tenured Teaching Staff Members" were in effect at GCIT. (P-55; P-56.) Dicken first learned that petitioner had an issue with the alleged relationship between supervisor Christine Deeck and teacher Krystal Sloan on or about May 3, 2011. Dicken used the Professional Annual Performance Report in analyzing petitioner's performance with the Board. (P-34.) After numerous conversations, all administrators were in agreement regarding the non-renewal of petitioner's contract. This was based on the drop-off in her performance during her third year. Petitioner did not request a meeting with Dicken and Dicken did not meet with petitioner prior to making the decision not to renew her

contract. Dicken reviewed petitioner's evaluations and observations before coming to his decision on petitioner.

Petitioner's professional growth plan from April 27, 2011, contained no new information for Dicken to consider. (P-30.) Dicken had all necessary information regarding petitioner, and on May 3, 2011, Dicken forwarded to petitioner a letter recommending non-renewal of petitioner's contract. (P-35.) A statement of reasons prepared by administrator Brian Shakespeare on May 4, 2011, concluded that the petitioner met the Board standard on 123 of 201 indicators observed, or 61 percent. (P-36.) This letter did not contain any new information. Dicken would not, and has never, recommended a teacher for tenure with a 61 percent qualification level. Shakespeare was incorrect on the dates of the first and second observations. (P-36.)

On the basis of this data and the recommendation of the superintendent, the Board voted not to renew the petitioner's contract based on her performance at its meeting on May 11, 2011. (P-37.) On May 25, 2011, Dicken provided a letter to petitioner again outlining the reasons for her non-renewal. (P-38.) Petitioner was deficient in approximately twenty-three areas. (P-38.) The letter provided the same reasons as outlined by Shakespeare to Dicken on May 4, 2011. (P-36.) Dicken was not clear on what a sufficient passing percentage would be, but he was certain that 61 percent was not acceptable. Upon testifying during respondent's case, Dicken stated that a teacher should have at least an 80 percent qualification level.

**Catherine Buonanno** received her provisional teaching certificate as a teacher of English in September 2008. (P-7.) She was employed as an English teacher at GCIT on September 23, 2008 (P-8), for the 2008-2009 school year (P-11), and continuing for the 2009-2010 and 2010-2011 school years. On October 2, 2008, petitioner was certified as a "Highly Qualified Teacher." (P-10.) During the 2008-2009 school year, petitioner improved in ten areas between her ten- and twenty-week evaluations (P-12; P-13), and she completed twenty-four hours of professional development. (P-14.) In June 2009, petitioner was approved in her summative evaluation by Dr. Gina Mateka, principal, of GCIT. (P-16.) In August 2009, petitioner received her standard certificate as

a teacher of English. (P-17.) During the 2009-2010 school year, petitioner completed twenty-one and a half-hours of professional development (P-18), and she met or exceeded all Board requirements as determined by teacher observations, and end-of-year reviews.

At the beginning of the 2010-2011 school year, petitioner was assigned to teach three English classes a day, each ninety minutes long, with approximately thirty students in each class. Some of petitioner's students had section 504 plans, and some were special education students. Petitioner was located in a new classroom—a single classroom separated by a material screen, with two classes being taught concurrently in the same room. Krystal Sloan, also a third-year teacher up for tenure review, was assigned to share the space with petitioner.

During the early part of October 2010, Sloan's classroom was being taught by a substitute teacher. Petitioner was administering a standardized test. Sloan's class was very noisy, and petitioner called the substitute teacher and requested that she quiet her students down. When the noise continued, petitioner repeated her request to the substitute. After again receiving no relief, petitioner called the front office and requested assistance, which was provided.

On the following day, petitioner apologized to Sloan for involving the front office. Sloan was unhappy, and several days later, she called the front office to report that petitioner's class was being disruptive. Petitioner was requested to quiet her class down. Several weeks later, Sloan again called the front office to report that petitioner's class was being disruptive. Petitioner spoke to Sloan about the issue, and Sloan advised petitioner that, "You put a black mark on my record when you called the office, I'm putting a black mark on your's."

On October 21, 2010, petitioner received an e-mail from the English department coordinator, Theresa Wilson, regarding the incident, alerting petitioner and Sloan to the fact that "It is a tenure year for both of you," and that both teachers should avoid "making it an administrative issue." (P-21.) Wilson did not evaluate petitioner.

On the following morning, Dr. Mateka called petitioner to her office. Supervisor Christine Deeck was present, and Mateka asked petitioner if she wanted a union representative present. Petitioner declined, and the issue regarding Sloan was discussed. Petitioner was concerned because Deeck and Sloan seemed to have a close relationship or friendship at the school. Mateka was an intimidating presence to petitioner. Mateka advised petitioner not to speak to anyone in the English department, as they did not have petitioner's best interests in mind. After petitioner became upset, Mateka advised petitioner to go home for the day.

On October 26, 2010, petitioner received her first classroom observation/evaluation of her Senior British Literature class by Christine Deeck. (P-22.) Petitioner did not meet Board standards. Specifically, Deeck found that petitioner met the Board standard on only 37 of the 68 indicators observed, or 54 percent. Many of the criticisms about petitioner had never been raised in the prior two years. Petitioner prepared a rebuttal and discussed it with Deeck. Deeck was concerned about the special education students. Petitioner did not file a grievance concerning this review.

On November 2, 2010, petitioner was advised by Mateka to seek professional development opportunities related to various topics. (P-23.) Petitioner pursued those suggestions.

On November 19, 2010, petitioner's period 3-4 disruptive classroom was observed by Mateka (P-24.) Petitioner again did not meet Board standards. Mateka found that petitioner met Board standards on 42 of the 68 indicators observed, or 62 percent. Petitioner did not prepare a rebuttal or file a grievance concerning this review. At this time, petitioner was beginning to hear rumors that her replacement had been hired. Between November 3, 2010, and December 7, 2010, petitioner accrued twenty-seven hours of professional development on her own time. (P-25.)

On December 9, 2010, Mateka held a "pizza party" with petitioner's senior British Literature class, however the petitioner was not invited to attend. Suggestions from the students were given to petitioner. (P-26.)

On January 21, 2011, and February 9, 2011, petitioner's classroom was observed by administrator Brian Shakespeare. (P-28.) On February 28, 2011, the petitioner received her third and final classroom observation by Shakespeare (P-27), and a post-observation conference based on all three of the Shakespeare observations was to be held on March 10, 2011. Petitioner again did not meet Board standards. Shakespeare found that petitioner met the Board standards on 44 of the 68 indicators observed, or 65 percent. On April 27, 2011, petitioner met with Shakespeare, and she was given a Professional Growth Plan based on a Professional Annual Performance Report for June 2011 through June 2012, despite not being recommended for renewal of her contract for the 2011-2012 school year. (P-30; P-33; P-34.) The Professional Annual Performance Report utilized a numbering system that was new to the district. Petitioner was concerned because 77 percent was considered a level 2 for demonstrating knowledge of content and pedagogy, and because despite receiving 100 percent for the utilization of technology, petitioner received only a level 3 rating out of 4. (P-33.)

The petitioner requested a statement of reasons from the Board on April 27, 2011 (P-31), and wrote a rebuttal to Shakespeare on April 29, 2011. (P-32.) Overall, the statement of reasons prepared by Shakespeare on May 4, 2011, concluded that the petitioner met the Board standard on 123 of 201 indicators observed, or 61 percent. (P-36.) Shakespeare was incorrect on the dates of the first and second observations. (P-36.) On May 3, 2011, petitioner received a letter recommending non-renewal of petitioner's contract from Michael Dicken, the Interim Superintendent of Schools at GCIT. (P-35.) On the basis of this data and the recommendation of the superintendent, the Board voted not to renew the petitioner's contract at its meeting on May 11, 2011. (P-37.) On May 25, 2011, Dicken provided a letter to petitioner again outlining the reasons for her non-renewal. (P-38.) Petitioner was deficient in approximately twenty-three areas. (P-38.) The letter provided the same reasons as outlined by Shakespeare

to Dicken on May 4, 2011. (P-36.) Petitioner was never advised what an acceptable percentage of indicators would have been to allow her to keep her job.

On June 6, 2011, the petitioner requested a Donaldson hearing before the Board. (P-39.) The hearing was held on July 5, 2011 (P-41.), at which time petitioner read her statement into the record. (P-43.) Petitioner also provided the Board a PowerSchool comprehensive analysis of her CP English IV Class. The purpose of this document was to provide the Board data on petitioner's classroom and students, and to prove that the decision not to renew her contract was incorrect. (P-57.) On July 20, 2011, after reviewing the evidence, the Board affirmed the superintendent's decision not to renew petitioner's contract for the 2011-2012 school year. Petitioner never received tenure status at GCIT. Petitioner agreed that she was never advised by any administrator that she and Sloan were competing for a single position.

**Dr. Gina Mateka** received her Ph.D. in 2001 and was the principal of GCIT during the 2010-2011 school year. She has performed over 200 observation reports in her career. Mateka encouraged petitioner to apply for a job at GCIT and as a result of a satisfactory interview with Mateka, petitioner was hired. During petitioner's first teaching year of 2008-2009, Mateka allowed petitioner a chance to settle into her job. Mateka did not undertake any observations of petitioner that year. Petitioner performed well that year, and no meetings were needed to discuss her performance.

During the 2009-2010 school year, petitioner also did relatively well. Mateka observed petitioner, and petitioner met or exceeded the district standards in most categories. (P-68.)

During the 2010-2011 school year, Mateka initially became aware of an issue between Sloan and petitioner on or about October 20, 2010. The two teachers had words in the hallway, and Sloan went to Mateka with the problem. On October 21, 2010, Mateka addressed the issue with petitioner, who was upset that Sloan went to Mateka. Petitioner complained that she was getting resistance from some students, that she had no aide for her period 3-4 class, and that some children did not like her.

The petitioner was concerned with loud noise issues in the classroom, but she did not want to "throw Sloan under the bus." The petitioner called the front office about Sloan's classroom when a substitute teacher was working there. (P-70.) Mateka advised petitioner not to have conversations with other employees regarding Sloan. Mateka did not recall stating that other members of the department did not have petitioner's best interests at heart. Mateka was not aware that department coordinator Wilson had written to both teachers with regard to the incident. (P-21.)

During a teacher's tenure year, multiple evaluations are considered. Mateka was concerned with a problem with petitioner when she reviewed petitioner's first observation by Deeck of October 26, 2010. (P-22.) Deeck reported that there was a lack of continuity in the classroom, that topics were not being fully developed, that the class was fast paced and that behavior issues were not being addressed.

On November 2, 2010, the post-observation review was held. A union representative was present on behalf of petitioner. At that meeting petitioner was angry and emotionally unstable. Petitioner was upset that she was being ignored by other employees, and she was concerned that she was always being assigned reluctant students who were a challenge. Petitioner was upset that her period 9-10 class had eleven children and was difficult. Petitioner asked why things were going wrong after two good years. Mateka responded by advising that in petitioner's first two years she had mostly honors students, and that in her third year, due to a Department of Education change, the petitioner did not have honors students. Nonetheless, district teachers must be able to teach all honors and non-honors trade school students. Mateka offered to assist administratively with petitioner's classroom issues by doing classroom walkthroughs and offering counseling. (P-23.) Petitioner was also offered a professional improvement plan, and she was encouraged to observe other teachers. Mateka did receive the professional development certificates that petitioner earned.

On November 19, 2010, Mateka independently observed the petitioner in her period 3-4 class. Mateka observed the entire ninety-minute class. Although there were technology issues and the internet was down in petitioner's classroom, the petitioner did

not perform well during this observation and did not meet all district standards. (P-24.) Petitioner received satisfactory ratings of "3" on only 62 percent of the indicators. (P-24.) Petitioner's lesson was elementary and below standards for senior level students. Students were copying vocabulary words for half of the period. The expectation was that all indicators in the evaluation should be met. Following this observation, Mateka had concerns regarding petitioner's continued employment. The petitioner did not rebut Mateka's observations. Mateka inquired about the status of the petitioner's personal life and was advised that everything was fine.

The petitioner requested that Mateka speak to her period 3-4 class with regard to their behavior. On December 9, 2010, Mateka spoke to the period 3-4 class during their lunch period. The petitioner had the option to attend but chose not to stay. After discussing their classroom behavior, Mateka requested and received input from students. (P-26.) After receiving this input from the students, petitioner became upset and distraught.

Mateka met with Deeck and Shakespeare toward the end of the year before making a decision on petitioner. Mateka did not recommend petitioner for tenure because petitioner's performance was not improving, and because petitioner was becoming overly emotional and unprofessional. Mateka found this disheartening, and not understandable. Petitioner was not meeting the Board's expectations at a 61 percent overall performance rate. Mateka has never recommended a teacher with a 61 percent performance rating.

Mateka did not consider petitioner's first two years of excellent performance while making this decision. Mateka could not give petitioner additional time to improve because the law allowed for only three years of evaluations. Mateka hired a new teacher with whom she had gone through her doctoral program, but the teacher did not replace petitioner, rather the teacher was hired as an additional English teacher, needed because of school expansion. Although Sloan was rehired, this had no bearing on petitioner's dismissal. Petitioner's classroom type, as well as the classroom divider, was approved by the Department of Education.

**Rita Hale** retired from GCIT in July 2013, after twenty-seven years as an in-class support teacher. Hale had never been an administrator and she was not trained to do performance evaluations. Hale met the petitioner during the 2008-2009 school year, and she was the in-class support teacher for the petitioner during the 2009-2010 school year. Hale agreed that petitioner did an excellent job teaching the students during the 2009-2010 school year. After her retirement, Hale stayed in touch with the petitioner as casual friends.

Hale had heard from several students of petitioner that Mateka had offered them a pizza party. Hale was not present for the party, but the students told Hale that Mateka asked them about what was going on in the classroom, what was being taught, and how was the petitioner performing. The petitioner had advised Hale that petitioner was not invited to the pizza party but was told to wait. Mateka had a reputation for being friends with certain teachers, and care had to be taken when speaking to those friends of Mateka, because the conversations would often get back to Mateka.

Shakespeare was known by the nickname, "The Grim Reaper," because he would destroy a teacher and his evaluations did not contain constructive criticism. Hale was aware that the administration had done certain evaluations and destroyed the observations. Although Hale was not present in the classrooms during the petitioner's 2010-2011 evaluations, Hale did not believe that the petitioner was fairly evaluated during the 2010-2011 school year.

**Brian Shakespeare** has worked in the Gloucester County School District for twenty-three years. Prior to becoming an administrator in 2003, he began his career as a teacher at the middle school where he taught behaviorally challenged children. He is currently the assistant superintendent for curriculum instruction. Part of his responsibility as an assistant superintendent is to conduct performance evaluations. He has performed over 500 evaluations in his career.

All GCIT teachers are given a rubric which informs them of what their performance standards need to be, and such a rubric was provided to the petitioner. (P-58.) During the 2010-2011 school year, Shakespeare observed petitioner on more than three occasions but he authored a written evaluation of petitioner on only one occasion. (P-27.) This evaluation was based only upon the February 28, 2011, observation, but Shakespeare did review Mateka's and Deeck's recommendations prior to doing his evaluation. Shakespeare also prepared a draft evaluation which was based on three observations. (P-28.) This was done because petitioner and her union president objected to numerous observation dates being placed on her evaluation, and Shakespeare agreed to remove the January 21, 2011, and February 9, 2011, observation dates. Shakespeare observed petitioner on more than one occasion because he was hopeful that his recommended changes and ideas would be put in place by petitioner. He did not do written evaluations for the January 21, 2011, and February 9, 2011, observations because petitioner's performance was not good on those dates, and he was attempting to assist petitioner with her performance. Shakespeare did not hold a post-observation conference subsequent to the January 21, 2011, and February 9, 2011, observations, but he did briefly discuss issues and problems with petitioner immediately after each class. Shakespeare believed that he spoke to Mateka about petitioner's difficulties in meeting District standards sometime after his January 21, 2011, observation. In order to assist the petitioner, Shakespeare offered her his office so she could complete a webinar. He also offered recommendations on petitioner's evaluation document (P-27), but he did not follow up on his suggestions.

Shakespeare did not observe petitioner again after February 28, 2011, because of time constraints in attempting to meet an April 30, 2011, deadline for all teacher evaluations. Although Shakespeare felt that petitioner did not approach District standards, he did not give petitioner the corresponding grade of a "1" on her evaluations. Petitioner's lowest grades were "2's."

Shakespeare spoke to petitioner again at her summary evaluation. Petitioner's content was insufficient and progression on the content was too slow. At the completion

of the 2011 year, Shakespeare was concerned about petitioner's tenure because of her low percentage (65 percent) of meeting the 69 required District standards. This was insufficient and Shakespeare has never recommended anyone for tenure with a 65 percent approval rating. Shakespeare compiled a summary of all of petitioner's evaluations. (P-30.) Petitioner met the required standards in only six of twenty-three performance areas. (P-30 at 2.) The District would normally expect a teacher to meet at least 85 percent of level 3 performances in their evaluations. As a result, Shakespeare did not recommend renewing petitioner's contract. At no time did petitioner ever file a grievance due to the failure of the District to undertake a post-observation conference.

**Christine Deeck** became the Director of Guidance for the District in 2008. She has undertaken approximately forty evaluations of third-year teachers in her career. To approve a teacher for tenure, Deeck requires 80 percent of evaluation standards to be "3" or better, and she has never recommended a teacher for tenure who has achieved less that an 80 percent efficiency rate.

Deeck observed petitioner's classroom on October 26, 2010, and recorded notes of her observations. (R-1.) She observed an entire class period consisting of senior year students. Deeck was looking for positive and negative teaching skills. Petitioner had difficulty controlling and managing the students and getting the class started. If petitioner lost control of the class, she would stop what she was doing and move on to a new topic, advising that she was doing so to save time. She did not complete her own expected tasks and she did not correct inappropriate student behaviors. Some in-class assignments were terminated before the students completed their work. Instructions were often confusing, and petitioner seemed to plead with the students for their cooperation. Petitioner was indecisive, unprepared and disorganized. Deeck disagreed that she did not find any positive aspects of petitioner's teaching skills during her observation.

Deeck found that petitioner satisfactorily met 37 of 67 indicators, or 54 percent. (P-22.) Deeck would and could not recommend a teacher with this percentage on her indicators. Deeck advised Mateka and Shakespeare of her findings

## FINDINGS OF FACT

Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following **FACTS**:

Petitioner received her provisional teaching certificate as a teacher of English in September 2008. The school principal, Dr. Mateka, encouraged petitioner to apply for a job at GCIT and as a result of a satisfactory interview with Mateka, petitioner was hired. She was employed as an English teacher at GCIT on September 23, 2008, for the 2008-2009 school year, and continuing for the 2009-2010 and 2010-2011 school years. On October 2, 2008, petitioner was certified as a "Highly Qualified Teacher." During the 2008-2009 school year, petitioner improved in ten areas between her ten- and twenty-week evaluations, and she completed twenty-four hours of professional development. In June 2009, petitioner was approved in her summative evaluation by Mateka. In August 2009, petitioner received her standard certificate as a teacher of English. During the 2009-2010 school year, petitioner completed twenty-one and one-half hours of professional development, and she met or exceeded all Board requirements as determined by teacher observations, and end-of-year reviews.

At the beginning of the 2010-2011 school year, petitioner was assigned to teach three English classes a day, each ninety minutes long, with approximately thirty students in each class. Each class had a different curriculum. While petitioner had previously been teaching honors students, she was assigned non-honors students for the 2010-2011 year. Some of petitioner's students had section 504 plans, and some were special education students. Petitioner was also assigned to a new classroom—a single classroom separated by a material screen, making it in effect a double classroom with two classes being taught concurrently. This classroom type, as well as the classroom divider, was approved by the Department of Education.

Sloan was assigned to share the classroom space with petitioner. The classroom was noisy, and petitioner found her classes to be "challenging" because of

the differing abilities of the students. In early October 2010, Sloan's classroom was being taught by a substitute teacher. Petitioner was attempting to administer a test, and the substitute was permitting Sloan's class to become noisy. Petitioner requested assistance from the principal's office to assist in controlling Sloan's classroom. The following day, petitioner apologized and explained what had occurred to Sloan. Sloan was unhappy, and several days later, she called the front office to report that petitioner's class was being disruptive. Petitioner was requested to quiet her class down. Several weeks later, Sloan again called the front office to report that petitioner's class was being disruptive. Sloan admitted to making this report because, "You placed a black mark on my record, so I am placing a black mark on your record."

Thereafter, petitioner received an e-mail from the English department coordinator, Wilson, regarding the incident, alerting petitioner to the fact that "both teachers are in tenure year" and should avoid "making it an administrative issue." On the following day, petitioner was called into a meeting with Mateka, who advised petitioner not to speak to anyone in the English department about Sloan because those individuals did not have the petitioner's best interests at heart. Classroom management was also discussed at that meeting.

On October 26, 2010, petitioner received her first classroom observation on her Senior British Literature class by Director of Guidance Christine Deeck. Deeck observed an entire class period consisting of senior year students. Deeck was looking for positive and negative teaching skills. Petitioner had difficulty controlling and managing the students and getting the class started. If petitioner lost control of the class, she would stop what she was doing and move on to a new topic, advising that she was doing so to save time. She did not complete her own expected tasks and she did not correct inappropriate student behaviors. Some in-class assignments were terminated before the students completed their work. Instructions were often confusing, and petitioner seemed to plead with the students for their cooperation. Petitioner was indecisive, unprepared and disorganized. Deeck found few positive aspects of petitioner's teaching skills during her observation.

Deeck found that petitioner satisfactorily met 37 of 68 indicators, or 54 percent. Deeck was concerned about the special education students. Many of the criticisms about petitioner had never been raised in the prior two years. Petitioner prepared a rebuttal and discussed it with Deeck. Petitioner did not file a grievance concerning this review. Deeck would and could not recommend a teacher with this percentage on her indicators. Deeck advised Mateka and Shakespeare of her findings. Although petitioner alleges that Deeck had a friendship with Sloan that may have influenced Deeck's review of petitioner, I **FIND** no compelling evidence was presented by petitioner to substantiate those concerns.

On November 2, 2010, a post-observation conference took place with Deeck. On that same day, petitioner met again with Mateka. A union representative was present on behalf of petitioner. At that meeting petitioner was angry and emotional. Petitioner was upset that she was being ignored by other employees, and she was concerned that she was always being assigned reluctant students. Petitioner was upset that her period 9-10 class had eleven children and was a challenge. Petitioner asked why things were going wrong after two good years. Mateka responded by advising that in petitioner's first two years she had mostly honors students, and that in her third year, due to a Department of Education change, the petitioner did not have honors students. Mateka advised that district teachers must be able to teach all honors and non-honors trade school students. Mateka offered to assist administratively with petitioner's classroom issues by doing classroom walkthroughs and offering counseling. Petitioner was also offered a professional improvement plan, and she was encouraged to observe other teachers.

On November 19, 2010, petitioner's entire ninety-minute period 3-4 class was observed by Mateka. Although there were technology issues and the internet was down in petitioner's classroom, the petitioner did not perform well during this observation and did not meet all district standards. Petitioner received satisfactory ratings of "3" on only 42 of the 68 indicators, or 62 percent. Petitioner's lesson was elementary and below standards for senior level students. Students were copying vocabulary words for half of the period. The expectation was that all indicators in the evaluation should be met.

Following this observation, Mateka had concerns regarding petitioner's continued employment. The petitioner did not rebut Mateka's observations. Mateka inquired about the status of the petitioner's personal life and was advised that everything was fine.

On December 9, 2010, Dr. Mateka held a "pizza party" with petitioner's senior British Literature class; however the petitioner was not present. Dr. Mateka asked for input from the students regarding the class. The information gathered was put together in a document and given to petitioner.

On January 21, 2011, and February 9, 2011, petitioner's classroom was observed by Assistant Superintendent Shakespeare. On February 28, 2011, the petitioner received her third and final classroom observation by Shakespeare and a post-observation conference was held on March 11, 2011. Shakespeare's evaluation was based only on the February 28, 2011, observation, and Shakespeare did review Mateka's and Deeck's recommendations prior to doing his evaluation. He did not do written evaluations for the January 21, 2011, and February 9, 2011, observations because petitioner's performance was not good on those dates, and he was attempting to assist petitioner with her performance. Shakespeare did not hold a post-observation conference subsequent to the January 21, 2011, and February 9, 2011, observations, but he did briefly discuss issues and problems with petitioner immediately after each class. In order to assist the petitioner, Shakespeare offered her his office so she could complete a webinar. He also offered recommendations on petitioner's evaluation document but he did not follow up on his suggestions. Shakespeare did not observe petitioner again after February 28, 2011, because of time constraints in attempting to meet an April 30, 2011, deadline for all teacher evaluations. Shakespeare determined that petitioner did not meet District standards. Shakespeare found that petitioner met the District standards on 44 of the 68 indicators observed, or 65 percent. Shakespeare did not recommend renewal of petitioner's contract because he believed petitioner would need to meet approximately 85 percent of the indicators.

Mateka met with Deeck and Shakespeare toward the end of the year before making a decision on petitioner. Mateka did not recommend petitioner for tenure because petitioner's performance was not improving, and because petitioner was becoming overly emotional and unprofessional.

The petitioner requested a statement of reasons from the District on April 27, 2011. Overall, the statement provided by the District to petitioner concluded that the petitioner met the District standard on 123 of 201 indicators observed, or 61 percent. Dicken and Shakespeare expected that a teacher should have at least an 80 percent qualification level. Petitioner was not meeting the Board's expectations at a 61 percent overall performance rate, and Mateka has never recommended a teacher with a 61 percent performance rate.

Mateka did not consider petitioner's first two years of excellent performance while making this decision. Mateka could not give petitioner additional time to improve because the law allowed for only three years of evaluations. Mateka hired a new teacher with whom she had gone through her doctoral program, but the teacher did not replace petitioner, rather the teacher was hired as an additional English teacher, needed because of school expansion. Although Sloan was rehired, this had no bearing on petitioner's dismissal.

On May 3, 2011, petitioner received a letter of non-renewal from Dicken. On the basis of the data and the recommendation of Dicken, the Board voted not to renew the petitioner's contract at its meeting on May 11, 2011. On May 25, 2011, Dicken provided a letter to petitioner again outlining the reasons for her non-renewal. Petitioner was deficient in approximately twenty-three areas. The letter provided the same reasons as outlined by Shakespeare to Dicken on May 4, 2011.

On June 6, 2011, the petitioner requested a Donaldson hearing before the District. The hearing was held on July 5, 2011. On July 20, 2011, after reviewing the evidence, the District affirmed the superintendent's decision not to renew petitioner's contract for the 2011-2012 school year.

## LEGAL ANALYSIS

N.J.S.A. 18A:27-4.1 provides that a board of education shall renew the employment contract of an employee only upon recommendation of the chief school administrator and by a majority vote of the full membership of the board. N.J.S.A. 18A:27-4.1. "The board shall not withhold its approval for arbitrary and capricious reasons." Ibid. "Arbitrary and capricious" means having no rational basis. Bayshore Sewage Co. v. Dep't of Envtl. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Where there is room for two opinions, an action is not arbitrary and capricious when exercised "honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Ibid. Where there is substantial evidence in the record to support more than one result, it is the agency's choice which governs. Dore v. Bedminster Bd. of Educ., 185 N.J. Super. 447, 453 (App. Div. 1982).

The petitioner bears the burden of proving that the underlying reasons for the board's actions are improper. Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 133. Such an allegation requires "substantial proof that the board acted improperly and to the exclusion of all other bona fide reasons." Ibid. (citing Bradley v. Bd. of Educ. of the Borough of Freehold, 1976 S.L.D. 590.) A petitioner's bare allegation of arbitrariness is insufficient to establish grounds for action. Donaldson v. Bd. of Educ. of North Wildwood, 65 N.J. 236, 247 (1974).

A board's determination not to grant tenure "need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board . . . may conclude that tenure should not be granted." Donaldson, supra at 241. The board possesses the "right to reach its conclusion about a non-tenured teacher on a broad base of input received from a variety of people, including members of the public" and "parents of students." El-Hewie v. Bd. of Educ. of the Bergen Cnty. Vocational Sch. Dist., EDU 7673-06, Initial Decision,

(February 27, 2008), adopted, Comm'r, (April 11, 2008) <http://njlaw.rutgers.edu/collections/oal/>.

Although a board may look beyond evaluations in making its decision, where there is evidence of improper motives, personal animosity, or bias, a hearing is needed to determine whether the board acted improperly. See Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (stating that discretionary action of a local board will not be upset unless patently arbitrary or induced by improper motives, and remanding to make findings of fact)[1]; Ruch v. Bd. of Educ. of Greater Egg Harbor Regional High Sch. Dist., 1968 S.L.D. 7 (stating in dicta that a hearing would have been required had there been allegations of personal bias).

In Ruch, the petitioner alleged that the board's failure to renew his tenure was improper, because it was based on inaccurate and prejudicial reports. Ibid. The administrative law judge (ALJ) dismissed the matter because there was "no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias." Ibid. An employee's dismissal for personal reasons does not give a probational teacher the right to a hearing. Ibid. However, a board's employment practices cannot be based on frivolous considerations which have "no relationship to the purpose to be served." Ibid. "Such a modus operandi is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny." Ibid.

## I. Was the procedure used by the Board in conducting evaluations improper?

N.J.S.A. 18A:27-3.1 governs the evaluation process for non-tenured teachers, and provides that:

[1] The Commissioner should not substitute his judgment for those who made the evaluation, but merely determine whether they had a reasonable basis for their conclusions. Kopera, supra at 296. The Kopera court held that "since the proceeding before the Commissioner was the first 'hearing' afforded appellant . . . the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts . . ." Id. at 296-97.

> [e]very board of education in this State shall cause each non-tenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations are to take place before April 30 each year . . .
>
> Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.
>
> [N.J.S.A. 18A:27-3.1]

The statute provides a minimum standard of procedural right that may be further implemented by more definitive procedural safeguards. Bd. of Educ. v. Fair Lawn Educ. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980). Additionally, observations must be followed within a reasonable period of time by a conference between the staff member and the person who conducted the observation and prepared the written evaluation. N.J.A.C. 10:11-1.7(e).

At issue is whether the petitioner has furnished "substantial proof" that her evaluations were conducted improperly. From the proofs submitted, the Board did comply with the letter of the applicable statutes and regulations. As such, the petitioner must establish that the Board acted arbitrarily and capriciously with regard to her other claims concerning her evaluations. "Local boards of education have an almost complete right to terminate the services of a teacher who has no tenure, even if the recommended procedures to be followed for evaluating the teacher are not adhered to." Tuck-Lynn v. State-Operated Sch. Dist. of Newark, EDU 3181-08, Initial Decision, (October 15, 2009), adopted in part, modified in part, Comm'r, (November 20, 2009) <http://njlaw.rutgers.edu/collections/oal/>. In Tuck-Lynn, the appellant did not receive pre- and post-conferences for observations. Tuck-Lynn, supra, at Initial Decision. The appellant argued for reinstatement, on grounds that the State statute was not adhered to. The ALJ determined that because there was no evidence that the non-renewal

violated "legislative policies expressed or fairly to be implied in the statutory scheme administered by the agency," that the board action was not improper.

Similarly in Dore, a non-tenured teacher whose contract was not renewed claimed that the board acted arbitrarily and capriciously by not conducting the requisite three evaluations during the school year. Dore, supra, at 450 (App. Div. 1982). The Appellate Division disagreed, however, and held that "the lack of strict compliance" with the evaluation requirements was not "a sufficient reason to afford petitioner either reinstatement or financial reward." Id. at 455-56.

Here, the petitioner argues that she met or exceeded all district goals in all criteria during both the 2008-2009 and 2009-2010 academic years, and she was never advised of any problem or deficiency in her first two academic years. Petitioner testified that she earned praises on her evaluations during her first two academic years. However, proof of excellent work in the first two years cannot presuppose excellent work in the third year. Petitioner's first observation during her third year of employment, performed by Deeck, occurred on October 26, 2010, five days after petitioner's meeting with Dr. Mateka regarding the Sloan issue. Deeck observed petitioner for the entire ninety-minute class. This resulted in petitioner's first unfavorable evaluation. Notwithstanding the short time period between petitioner's meeting with Mateka on the Sloan issue and her evaluation by Deeck, petitioner has produced no evidence, other than sheer speculation, of any evil intent on the part of Deeck. Petitioner was no longer teaching honors students in her third year, and her work was faltering. Deeck found few positive aspects of petitioner's teaching skills during her observation. However, the fact that Deeck found few positive aspects does not lead to a conclusion that Deeck acted arbitrarily and capriciously. There is no evidence of any impropriety in Deeck's evaluation.

On November 19, 2010, petitioner received her second observation from Dr. Mateka. This resulted in petitioner's second unfavorable evaluation. Petitioner surges that Mateka's use of scores of "2" rather than "1" indicates that Mateka did not understand the evaluation criteria, and prove that petitioner merely needed

improvement instead of immediate action. However, the distinction is practically irrelevant, as petitioner received satisfactory ratings of "3" on only 62 percent of the indicators. Scores of "3" were required to meet District standards. None of petitioner's complaints regarding how Mateka conducted this observation or completed her evaluation rise to a conclusion that Mateka acted arbitrarily and capriciously. Shortly after Dr. Mateka's observation on November 19, 2010, Dr. Mateka promised to do frequent walk-throughs of petitioner's class to assist petitioner. However, although Dr. Mateka testified that she did not know when the walk-throughs occurred and she did not recall the outcome of those walk-throughs, the walk-throughs did occur.

Petitioner's third observation, undertaken by Shakespeare, began on January 21, 2011, and continued on for two more days on February 9, 2011, and February 28, 2011. Petitioner did not receive the evaluation from the Shakespeare observation that first occurred on January 21, 2011, until after February 28, 2011. Although by this time it may have been too late for petitioner to take corrective action to address the concerns in the evaluation, the Board had met its legal requirements for evaluations, and petitioner was not entitled to an additional evaluation. Shakespeare did speak to petitioner briefly after the January 21, 2011, observation, and after the February 9, 2011, observation. Petitioner therefore had knowledge that she had made no improvements in her practice. Shakespeare wrote the evaluation following the third observation because statutorily the Board was running out of time and the third observation had to occur. Shakespeare met with petitioner on April 27, 2011, to review her evaluation. Petitioner urges that it was arbitrary and capricious for Shakespeare to fail to write an evaluation and fail to give petitioner feedback following his first observation of petitioner. However, Shakespeare testified that he did not do written evaluations for the January 21, 2011, and February 9, 2011, observations because petitioner's performance was not good on those dates, and he was attempting to assist petitioner with her performance. Had an evaluation been done for the January 21, 2011, and February 9, 2011, observations, Shakespeare was clear that they would have not been helpful to petitioner. While not the optimal practice, the action of Shakespeare was done in an attempt to assist petitioner, and his actions were not arbitrary and capricious. In fact, the Board had met its legal requirements for evaluations.

By providing three evaluations and subsequent conferences, the Board met the minimum procedural requirements set forth in N.J.S.A. 18A:27-3.1 and N.J.A.C. 10:11-1.7(e). Petitioner claims that the Board erred by not doing more than the minimal procedures required. Therefore, this presents an even easier case than Dore, because here, the Board strictly complied with the statutory requirements for evaluations.

Additionally, N.J.A.C. 10:11-1.7(e) requires a conference be held within a reasonable period after the evaluation. Although petitioner contends that seventeen days was an unreasonable lapse of time, in Tuck-Lynn, the petitioner was denied relief despite the fact that no post-observation conference was held at all.

In order to meet her burden of establishing that the procedure used by the Board in conducting evaluations was arbitrary and capricious, the petitioner must furnish "substantial proof" that the Board acted improperly. However, because the Board complied with the letter of N.J.S.A. 18A:27-3.1 and N.J.A.C. 10:11-1.7(e), it is clear that petitioner cannot prevail on this point. I **CONCLUDE** that the procedures used by the Board in conducting its evaluations of petitioner were not improper.

## II. Did the Board act arbitrarily and capriciously in failing to renew petitioner's contract?

Petitioner asserts that the testimony of Dicken establishes that both he and the Board acted arbitrarily and capriciously in failing to renew petitioner's contract. Dicken agreed in his testimony that he authored the May 3, 2011, correspondence to petitioner in which he stated that he would be recommending non-renewal of petitioner's contract. He further testified that he made the decision to recommend non-renewal "several weeks before the Board meeting," which occurred on May 11, 2011. Dicken also conceded that petitioner's Professional Growth Plan, developed in the 2010-2011 academic year, was created on April 27, 2011. Dicken stated that the Professional Growth Plan was part of his decision-making process in determining whether or not to recommend petitioner's non-renewal to the Board. Petitioner urges that Dicken must

not be believed because he was unclear as to how he could have considered the Professional Growth Plan, authored on April 27, 2011, when making his decision regarding petitioner, if he made his decision "several weeks" prior to the May 11, 2011, Board meeting. Dicken clarified in his testimony that the issue can be explained by his idea of what constitutes "several weeks." He stated that two weeks can constitute several weeks. Certainly, the time period of April 27, 2011, to May 11, 2011, can reasonably be considered as several weeks since it does constitute fourteen days or two weeks. A such, it is not unreasonable to conclude that Dicken considered the Professional Growth Plan, authored on April 27, 2011, when he made his decision regarding petitioner, if he made his decision "several weeks" prior to the May 11, 2011, Board meeting.

Petitioner raises another issue regarding the memorandum sent from Shakespeare to Dicken, dated May 4, 2011. This memo is titled "Report Summary for Catherine Buonanno," and is a summary of petitioner's observation data for the 2010-2011 academic year. However, it was authored one day after Dicken had already sent his letter of May 3, 2011, advising of his non-renewal recommendation to petitioner. Notwithstanding that petitioner had already been terminated when her summary report was produced, this is insufficient proof that the Board's actions were arbitrary and capricious. The Board had sufficient evidence regarding petitioner's performance prior to the issuance of the "Report Summary for Catherine Buonanno," and Dicken was clear that this document contained no new information regarding petitioner's performance.

In addition, Dicken was originally unclear as to what would and would not constitute a "passing grade for reemployment." He stated that there was no set percentage but that in his professional opinion, 62 percent did not meet the standard for employment and that it was a failing percentage. However, when recalled to testify, Dicken stated that a passing percentage would be 80 percent, a much higher mark than what petitioner received. Shakespeare also believed petitioner would need to meet approximately 85 percent of the indicators. As such, the two administrators were in close agreement as to a passing percentage, and an 80 percent passing percentage requirement is not untenable or unreasonable. Therefore, the Board's actions were not

arbitrary and capricious as the Board was legally entitled to set its own benchmark passing percentage.

Finally, petitioner continues to suggest in its written summation, that the Board's decision was based on improper motives. Petitioner has argued that Krystal Sloan, the teacher who shared a classroom with her, made reports to the administrators that petitioner's class was disruptive, and admitted to petitioner that her motive was "to put a black mark" on her record. Further, petitioner asserts that Christine Deeck, the administrator who conducted petitioner's first evaluation, had a "budding friendship" with Sloan. Petitioner alleges that she was shunned by the English Department, was told by the principal that the Department "did not have her best interests in mind," and that she was advised to avoid making her problem with Sloan an administrative issue because both teachers were in tenure year.

Although the issues of bias and improper motive were previously dismissed, I reiterate that petitioner's issues with Sloan were between the two teachers. Sloan's statement regarding putting a "black mark" on petitioner's record had no bearing whatsoever on the outcome of her evaluations by GCIT administrators. There is no evidence that those administrators were even aware that Sloan made the statement. There is also no evidence, other than petitioner's suspicions, that Deeck had a "budding friendship" with Sloan. Even if such a relationship did exist, petitioner has offered no proofs that the relationship played some prejudicial role in petitioner's evaluations. Certainly any relationship between Deeck and Sloan would not have affected Mateka or Shakespeare's poor evaluations of petitioner. In addition, even if petitioner was shunned by the English Department, was told by the principal that the Department "did not have her best interests in mind," and was advised to avoid making her problem with Sloan an administrative issue because both teachers were in tenure year, none of these items rise to any material level of concern. There are no proofs offered by petitioner that any of the aforementioned items had any effect whatsoever in her reviews and evaluations.

Although petitioner had excellent reviews during her first two years of teaching honors students, her reviews declined in her third year, when she was required to teach non-honors students. Petitioner admitted to having challenging students of different abilities in her third year. She drew a distinction between college-bound students and "trade" students. GCIT is a vocational school, with a student population of both vocational, or trade, students and college-bound students. Petitioner admitted that she had difficulty with the behaviorally-challenged "trade students." The respondent was entitled to validly consider that fact.

Respondent was entitled to not offer the petitioner tenure because the Board's decision was rational and based on objective performance data. Because the decision that was made by the Board considered objective performance data, it was not arbitrary or without consideration of the circumstances. The petitioner's unrefuted performance data, and the process employed by the District to ascertain the performance of the petitioner, negates any finding of an arbitrary and capricious decision by the Board..

No evidence of arbitrariness exists. Petitioner's evidence was her own subjective testimony that she believed she was meeting the District performance standards. Petitioner has not carried her burden of proof because there is no convincing factual evidence to support her claims. The lack of evidence produced by petitioner requires a finding for respondent.

The petitioner met the District standard on 123 of 201 indicators observed, or 61 percent. Dicken and Shakespeare expected that a teacher should have at least an 80 percent qualification level. Petitioner was not meeting the Board's expectations at a 61 percent overall performance rate, and Mateka has never recommended a teacher with a 61 percent performance rate. The Board was entitled to validly consider that fact.

The petitioner has not met her burden of proving that the underlying reasons for the Board's actions were improper. She has not set forth substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons. Her allegation of arbitrariness, without more, is insufficient to establish grounds for action.

Here the Board was faced with unsatisfactory classroom performance, and that is a valid reason why a Board may conclude that tenure should not be granted. The Board validly exercised its rights in reaching its conclusion about the petitioner, a non-tenured teacher. I **CONCLUDE** that the Board did not act arbitrarily and capriciously in failing to renew the petitioner's contract.

## CONCLUSION

The procedures used by the Board in conducting its evaluations of petitioner were not improper. In addition, the Board did not act arbitrarily and capriciously in failing to renew the petitioner's contract. It is therefore **ORDERED** that the Board's action of failing to provide petitioner with tenure status as a teacher of English is **AFFIRMED.**

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

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

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

January 27, 2016
DATE

**EDWARD J. DELANOY, JR.,** ALJ

Date Received at Agency: 1/27/16

Date Mailed to Parties: 1/27/16

mph

## APPENDIX

## WITNESSES:

**For petitioner:**

Catherine M. Buonanno
Rita Hale
Gina Mateka, Ph.D
Michael Dicken
Brian Shakespeare

**For respondent**:

Michael Dicken
Gina Mateka, Ph.D
Brian Shakespeare
Christine Deeck

## EXHIBITS:

**For petitioner**:

P-1 Substitute Teacher's Credential
P-2 Certificate of Eligibility (February 2007)
P-3 Petitioner's Resume
P-4 Interview Reports
P-5 Employment Recommendation
P-6 Not Admitted
P-7 Provisional Certificate (September 2008)
P-8 Correspondence, dated September 23, 2008

P-9 Highly Qualified Forms C&G

P-10 Correspondence, dated October 2, 2008

P-11 Employment Contract 2008-09

P-12 Provisional Teacher Program Formative Evaluation, dated November 20, 2008

P-13 Provisional Teacher Program Evaluation, dated February 12, 2009

P-14 Record of Professional Development Hours from April 1, 2008 through April 30, 2009

P-15 Correspondence May 7, 2009

P-16 Provisional Teacher Program Summative Evaluation, dated June 19, 2009

P-17 Standard Certificate (August 2009)

P-18 Record of Professional Development Hours from July 1, 2009 through June 30, 2010

P-19 Employment Contract, 2009-10

P-20 Not admitted

P-21 E-mail, dated October 20, 2010

P-22 Classroom Observation Report, dated October 26, 2010 and petitioner's Rebuttal

P-23 Dr. Mateka's Memorandum, dated November 2, 2010

P-24 Classroom Observation Report, dated November 10, 2010

P-25 Professional Development Documentation from November 3, 2010 through December 7, 2010

P-26 Memorandum

P-27 Classroom Observation Report, dated February 28, 2011

P-28 Classroom Observation Reports, dated January 21, 2011, February 9, 2011 and February 28, 2011

P-29 Record of Professional Development Hours from September 2010 through June 2011

P-30 Professional Growth Plan

P-31 Correspondence, dated April 27, 2011

P-32 Correspondence, dated April 29, 2011

P-33 Professional Annual Performance Report

P-34 Professional Annual Performance Report (with handwriting)

P-35 Correspondence, dated May 3, 2011

P-36 Memorandum, dated May 4, 2011

P-37 Correspondence, dated May 12, 2011

P-38 Correspondence, dated May 25, 2011

P-39 Correspondence, dated June 6, 2011

P-40 E-mail, June 2011

P-41 Correspondence, dated June 8, 2011

P-42 Not admitted

P-43 Petitioner's July 5, 2011, statement to the Board of Education

P-44 Not admitted

P-45 Correspondence, dated July 7, 2011

P-46 Not admitted

P-47 Not admitted

P-48 Not admitted

P-49 Not admitted

P-50 Not admitted

P-51 Not admitted

P-52 Not admitted

P-53 Not admitted

P-54 Respondent's interrogatories and petitioner's answers to interrogatories

P-55 Board of Education Policy re Evaluation of Nontenured Teaching Staff Members

P-56 Board of Education Regulation re Evaluation of Nontenured Teaching Staff Members

P-57 Petitioner's Comprehensive Analysis

P-58 Level of Performance Rubrics

P-59 Not admitted

P-60 Not admitted

P-61 Not admitted

P-62 Not admitted

P-63 Not admitted

P-64 Not admitted

P-65 Not admitted

P-66 Not admitted

P-67 Not admitted

P-68 Observations by Dr. Mateka, 2009-2010

P-69 Professional Annual Performance Report 2008-2009

P-70 Notes of Dr. Mateka

**For respondent**:

R-1 Notes of Christine Deeck

104-16

| | | |
|---|---|---|
| ROSEANNE PANICO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured art teacher in respondent's school district – challenged the District's directive to submit to an independent psychiatric evaluation following a prolonged leave of absence, pursuant to *N.J.S.A.* 18A:16-2 and Board Policy No. 4161. The District informed petitioner on December 22, 2014 that the Superintendent would be recommending that petitioner submit to this evaluation. Petitioner filed the within appeal on April 9, 2015, contending that the Board's demand for such evaluation was arbitrary, and that it should be overturned. The Board filed a motion to dismiss. Subsequently, petitioner did submit to an independent psychiatric evaluation. On October 14, 2015, the Board sent correspondence to petitioner advising that they had received the resultant report – which stated that petitioner had recovered to the point that she was able to return to teaching – and welcoming her back to work, with an anticipated return date of October 15, 2015. As of January 6, 2016, petitioner had not returned to work.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; *N.J.S.A.* 18A:16-2(a) provides that "The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health;" in this case, the Board had the right to require petitioner to submit to an independent psychiatric examination based on the *N.J.S.A.* 18A:16-2, board policy, and case law; further, since the petitioner has already submitted to the independent examination and the Board has accepted the resulting report, the petition is now moot; and, even if there was a finding that the Board's decision requiring petitioner to undergo the independent psychiatric exam was arbitrary and capricious, there would be no practical effect as petitioner has already submitted to the examination. Accordingly, the ALJ granted the Board's motion for summary decision, denied the petitioner's motion to quash subpoenas issued by the Board to two of her doctors, and dismissed the petition.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

March 11, 2016

104-16

OAL DKT. NO. EDU 6027-15
AGENCY DKT. NO. 74-4/15

| | | |
|---|---|---|
| ROSEANNE PANICO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Roseanne Panico, and the Board of Education's (Board) reply thereto.

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. This entire case involves a challenge to the Board's decision to require the petitioner to submit to an Independent Psychiatric Evaluation (IPE). After the petition of appeal was filed, the petitioner did indeed submit to an IPE. The IPE was performed by Dr. Robinson, a psychiatrist approved by the Board, and Dr. Robinson concluded that the petitioner was able to return to work. Notably, the Board accepted the IPE report and offered the petitioner the opportunity to return to work.

With respect to the petitioner's challenge to the ALJ's decision denying the petitioner's motion to quash the subpoenas issued by the Board to Dr. Renna and Dr. Tobias,

the Commissioner agrees with the Board that the subpoena issue is also now moot. [1] No documentation or information was ever obtained by the Board as a result of the subpoenas, and the Board abandoned any effort to enforce the subpoenas after the petitioner complied with the Board's request to submit to an IPE.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed as moot.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/16

Date of Mailing: 3/14/16

[1] In her exceptions, the petitioner contends that the ALJ erroneously denied her motion to quash the subpoenas without providing any substantive reasons for the denial.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**MOTION FOR SUMMARY DECISION**
**AND MOTION TO QUASH**
OAL DKT. NO. EDU 06027-15
AGENCY DKT. NO. 74-4/15

**ROSEANNE PANICO,**
Petitioner,
v.
**READINGTON TOWNSHIP**
**BOARD OF EDUCATION,**
Respondent.

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**Michael L. Resnick,** Esq., for petitioner

**Caitlin Pletcher,** Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: January 6, 2016 Decided: January 28, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Roseanne Panico filed a Petition alleging respondent Readington Township Board of Education's (District) directive pursuant to N.J.S.A. 18A:16-2(a) was arbitrary and that it be overturned.

The original Petition of Appeal was filed with the Department of Education on April 9, 2015. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 28, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties filed several briefs in support and in opposition to a motion for summary decision and a motion to quash the subpoena directed to Dr. Carmen Renna and Dr. Steven Tobias. The record closed after a telephone conference was conducted on January 6, 2016.

## FACTUAL DISCUSSION

Petitioner, an art teacher for the District since July 1, 2005, signed a request for Family and Medical Leave Act (FMLA) leave on August 26, 2014. This leave was ultimately approved after petitioner provided medical documentation from Dr. Carmen Renna (Dr. Renna), an internalist, and Steven Tobias, Psy.D. (Dr. Tobias). (See Exhibit 3 and Exhibit 5 of respondent's brief). Her initial return to work date was November 24, 2014. At the request of petitioner, supported by a second letter from Dr. Tobias, her leave of absence was extended through January 5, 2015. (See Exhibit 5 of respondent's brief). Dr. Tobias indicated that he had been treating petitioner since September 2014 for a major depressive disorder. Ibid. On December 9, 2014, petitioner and her attorney were scheduled to appear before the Board of Education in a closed session relating to a grievance she had filed. Petitioner did not appear at that meeting out of a concern of an overlap between her appearing before the Board and when others would begin to arrive for the public meeting. On December 10, 2014, petitioner requested another extension to her leave of absence to April 6, 2015. This request was supported by a letter from Dr. Tobias that indicated petitioner "will require at least several more months of treatment and is unable to work during this period." (See Exhibit 8 of respondent's brief).

The District informed petitioner on December 22, 2014 that the Superintendent would be recommending that petitioner submit to an independent psychiatric evaluation pursuant to N.J.S.A. 18A:16-2 and Board Policy No. 3161. (See Exhibit 9 of respondent's brief). The Board approved the superintendent's recommendation at a

closed session meeting on January 20, 2015. The Board set forth a written statement of reasons in support of the Board's action in a letter dated January 30, 2015. (See Exhibit 11 of respondent's brief). The following two reasons were given for the Board's decision to direct petitioner to submit to the independent psychiatric evaluation:

> 1. On December 9, 2014, you were scheduled to appear before the Board with regards to your Level III grievance demand. However, despite the Business Administrator's assurances that the meeting would be held in a private, secluded area of the school, separate and apart from the public meeting area, and with its own entrance and exit, you still refused to appear for fear that you would be seen by your colleagues and members of the community.
>
> 2. On December 10, 2014, the District received a medical not, dated December 8, 201, from Dr. Steven Tobias, which indicates that you are unable to return to work due to your depressed mood and low energy level and, without further information, that you will require several more months of treatment and, thus will be unable to return to work during this time period. Id.

Petitioner appealed the Board's decision and appeared before the Board to explain or refute the reasons presented to the Board by the superintendent. Thereafter, the Board determined it would proceed with the decision to require petitioner to undergo an independent psychiatric examination.

Respondent served subpoenas upon Dr. Renna and Dr. Tobias to produce documents relating to the treatment of petitioner. Petitioner filed a motion to quash claiming that respondents were using the subpoenas as a means to collect information notwithstanding the violation of treating physician-patient confidentiality. Petitioner submitted to an independent psychiatric evaluation by Dr. Michael D. Robinson, and on October 8, 2015, respondent was provided with Dr. Robinson's report. Dr. Robinson was the individual the Board had intended to examine petitioner. According to his report, Dr. Robinson concluded that petitioner's refusal to attend the December 9, 2014 board meeting was "rational and understandable in the context of the conditions during which the meeting would occur. Her decision reflected appropriate situational anxiety rather than a deviation from normal mental health." (See Exhibit A of petitioner's brief

dated October 15, 2015). Dr. Robinson opined that "[petitioner's] depression during the past school year was sufficiently severe as to prevent her from working as a teacher. She sought and received appropriate treatment, and has recovered to the point that she now is able to return to her profession as a teacher." Id. On October 14, 2015, the Board sent correspondence to petitioner advising that they received Dr. Robinson's report and accepted his expert medical opinion. The Board welcomed her back to work and expected her to return to work on October 19, 2015. (See Exhibit B of petitioner's brief dated October 15, 2015).

Petitioner asserts that this renders the need for medical records from Dr. Tobias and Dr. Renna moot and that the subpoenas should be withdrawn. Respondent asserts that since petitioner submitted to the independent psychiatric evaluation the petition is moot and should be dismissed as a matter of law. As of January 6, 2016, petitioner has not returned to work. As the above facts do not appear to be in dispute, I **FIND** them as **FACT**.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the

same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

Here, there is no genuine issue as to material fact in this matter in relation to the District's requirement that petitioner submit to an independent psychiatric evaluation and her refusal to do so until she met with Dr. Robinson who filed a report with the District on October 8, 2015.

Respondent asserts that the Board exercised its right under N.J.S.A. 18A:16-2 and Board Policy No. 4161 and approved the Superintendent's recommendation that petitioner undergo an independent psychiatric evaluation. Petitioner asserts that respondent does not have unfettered and absolute authority to direct petitioner to undergo the evaluation. N.J.S.A. 18A:16-2 provides, in pertinent part, that a board of education may require its employees to undergo a psychiatric examination whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health. The purpose of such examination is to "determine the individual's physical and mental fitness to perform within reasonable accommodation. Board Policy 4161 states the "superintendent shall recommend to the Board the examination of any support staff whose physical or mental condition so departs from normal health as to adversely affect the performance of the member's duties."

Petitioner argues that because Dr. Robinson concluded in his examination report that petitioner's refusal to attend the board meeting was rational and understandable . . . that the Board lacked sufficient basis to have triggered Board Policy No. 3161. Dr. Robinson's report, however, does not provide an explanation as to the second reason given by respondent for why they felt an examination was appropriate. Namely, on December 10, 2014, the District received a medical note, dated December 8, 2014,

from Dr. Steven Tobias, which indicates that petitioner was unable to return to work due to her depressed mood and low energy level and that she required several more months of treatment and, thus will be unable to return to work during this time period. Furthermore, petitioner does not attempt to argue in neither her brief in opposition to the summary decision motion nor the brief in support of the motion to quash that the second reason given by the District was insufficient to trigger board policy or the provisions permissible under N.J.S.A. 18A:16-2.

It is acknowledged in petitioner's brief, dated October 15, 2015, that school boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers. See Gish v. Bd. Of Education of Paramus, 145 N.J. Super. 96, 105 (App. Div. 1976). Their obligation to determine a teacher's fitness is based upon their duty to protect the students from a significant danger or harm, whether physical or otherwise. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency." In Re Tenure Hearing of Grossman, 127 N.J. Super. 13, 32 (App. Div. 1974).

A board of education may require a medical or psychiatric examination of an employee as a preliminary action or as an investigatory action. See Board of Education of Pleasantville v. Richard Chambers, OAL Docket No. EDU 7283-94. In Kochman v. Keansburg Board of Education, 124 N.J. Super. 203, (1973), the court recognized that a board of education "does not have the expertise to question the teacher on the matter itself but must rely on the expertise psychiatrist." Id. at 212. The Board in this matter lacked the expertise to determine whether petitioner's refusal to attend the board meeting was rational and understandable or if it demonstrated a deviation from normal mental health. Had petitioner submitted to the evaluation in the winter or spring of 2015, those questions would have been laid to rest. Based upon the above, I **CONCLUDE** that respondent had the right based on N.J.S.A. 18A:16.2, board policy and the aforementioned case law to require petitioner to submit to an independent psychiatric examination.

I further **CONCLUDE** that since petitioner has submitted to the independent psychiatric examination and respondent has accepted Dr. Robinson's report, the petition is now moot. A court will consider an issue moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. See In re Conroy, 109 N.J. Super. 453, 458 (App. Div. 1983). Even if this tribunal were to conclude that the Board's decision requiring petitioner to undergo the independent psychiatric examination was arbitrary and capricious, there would be no practical effect as petitioner has submitted to the evaluation.

Accordingly, it is **ORDERED** that:

1. Respondents' Summary Decision Motion is **GRANTED**;

2. Petitioner's Motion to Quash is **DENIED**;

3. The Petition filed in this matter is **DISMISSED**.

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

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

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

January 28, 2016
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency: January 29, 2016

Date Mailed to Parties: January 29, 2016

cmo

## Oakley, Carla

**From:** Microsoft Outlook
**To:** mlresnick@mlrlawyer.com; Caitlin Pletcher (cpletcher@comegnolaw.com) (cpletcher@comegnolaw.com)
**Sent:** Friday, January 29, 2016 12:30 PM
**Subject:** Relayed: Initial Decision - Motion for Summary Decision and Motion to Quash; OAL Dkt No. EDU 6027-15; Agency Dkt No. 74-4/15

**Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:**

mlresnick@mlrlawyer.com (mlresnick@mlrlawyer.com)

Caitlin Pletcher (cpletcher@comegnolaw.com) (cpletcher@comegnolaw.com) (cpletcher@comegnolaw.com)

Subject: Initial Decision - Motion for Summary Decision and Motion to Quash; OAL Dkt No. EDU 6027-15; Agency Dkt No. 74-4/15

105-16

AGENCY DKT. NO. 234-8/15

| | | |
|---|---|---|
| IN THE MATTER OF THE PETITION OF THE BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY, FOR SEVERANCE OF ITS SENDING-RECEIVING RELATIONSHIP WITH THE BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY. | : | COMMISSIONER OF EDUCATION<br><br>DECISION |

The Board of Education of the Borough of Deal (Deal), having applied – pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 – to the Commissioner of Education for severance of its send-receive relationship with respondent Asbury Park Board of Education (Asbury Park),[1] and to establish a send-receive relationship with respondent Shore Regional Board of Education (Shore Regional);[2] and

The Boards of Education of Asbury Park and Shore Regional not having opposed Deal's request to terminate the current send-receive relationship with Asbury Park and establish a new send-receive relationship with Shore Regional; and

The parties having complied with the public notice and comment provisions outlined in *N.J.A.C.* 6A:3-6.1(b); and

Deal having conducted a feasibility study in accordance with *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1; and

There being no dispute amongst the parties as to certain relevant facts, including that no substantial negative educational, financial or racial impact will incur to any of the school districts upon severance of the current sending-receiving relationship between Deal and Asbury Park or upon establishment of the proposed sending-receiving relationship between Deal and Shore Regional; and

[1] The parties believe a send-receive relationship currently exists between Deal and Asbury Park, but have been unable to locate a copy of the agreement.

[2] Deal operates a K through 8th grade school system, while Shore Regional operates a high school for grades 9 through 12. Asbury Park operates a Pre-K through 12th grade school system.

The feasibility study having established to the Commissioner's satisfaction that the withdrawal of the Deal students from the Asbury Park School District, and the entry of the Deal students into the Shore Regional School District, would cause no substantial negative impact on the educational programs of the school districts or on the quality of education received by the pupils in each of the school districts; and

The feasibility study having further established to the Commissioner's satisfaction that there would be no substantial negative impact on the financial conditions of the school districts; and

The feasibility study having further established to the Commissioner's satisfaction that there will be no substantial impact on the racial composition of the school districts; and

The Commissioner having received no public comments pursuant to *N.J.A.C.* 6A:3-6.1(b); now therefore

IT IS ORDERED on this ___ day of March 2016 that – pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 – the application of Deal for severance of its send-receive relationship with Asbury Park and to establish a send-receive relationship with Shore Regional – as set forth in its petition of appeal – is APPROVED, effective July 1, 2016.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/16

Date of Mailing: 3/14/16

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

106-16

| | | |
|---|---|---|
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M., | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

Petitioner, the State-Operated School District of Camden (SOSD Camden), contended that E.H. and her family, including K.M., are residents of the City of Camden – despite previously being homeless after losing their home in Voorhees Township – and now live in a Camden home that is "fixed, regular and adequate," thus precluding a determination that they are homeless. Consequently, the petitioner urged that K.M. is entitled to a free public education in Camden schools, not in Voorhees Township schools. The Executive County Superintendent rejected the petitioner's position, concluding that E.H. and K.M. were homeless and, as such, K.M. is entitled to attend school in Voorhees Township – the district of origin – at the expense of SOSD Camden, which is responsible for both K.M.'s tuition and transportation costs. E.H. has never filed an answer to the petition. Petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: documents filed by the family in this case indicate that at some point following April 2011, E.H. and her children were forced out of necessity to move in with E.H.'s mother at her residence in Camden, and no longer had a regular or permanent home of their own; the essential question here is whether their homeless state continues today; evidence supports a determination that E.H. and her family have resided at the same address on Bradley Avenue in Camden since 2011, and – as there is no material dispute on this question – summary decision as to the family being domiciled in Camden is warranted; petitioner's assertions that the Bradley Avenue residence is fully equipped and meets the criteria for a "fixed, regular and adequate" home have not been refuted by the parent or the County Superintendent; the County Superintendent, however, determined that the family is homeless and therefore Camden is responsible for tuition and transportation costs; and the record is devoid of competent evidence to explain the present intentions or resources of the E.H. – who has selected not to participate in these proceedings. The ALJ concluded that: there are no material issues in dispute, and summary decision is warranted in favor of the petitioner; E.H. and K.M. are not homeless, but domiciled in the city of Camden; and, accordingly, petitioner is responsible to provide K.M. with a free public education in its schools.

Upon full review and consideration, the Commissioner determined to remand this matter to the OAL for further proceedings, finding, *inter alia*, that: the ALJ failed to address all of the issues raised in the petition, and petitioner is entitled to findings of fact and conclusions of law on these issues; the ALJ erred in granting summary decision to petitioner on the issue of the family no longer being homeless, as petitioner failed to provide sufficient evidence to support its allegation that K.M. currently resides in a fixed, adequate and regular residence; and the record is devoid of evidence regarding K.M.'s present living conditions, as well as the resources and intentions of her parent.

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

OAL DKT. NO. EDU 6081-15
AGENCY DKT. NO. 371-12/14

| | | |
|---|---|---|
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M., | : | DECISION |
| RESPONDENTS. | : | |

The record and the Initial Decision of the Office of Administrative Law have been reviewed, along with respondent Volk's exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – and petitioner's reply thereto. Upon such review, and consideration of all submissions, the Commissioner is constrained to remand this matter to the OAL for further proceedings.

First, the Administrative Law Judge (ALJ) failed to address all of the issues raised within the Petition of Appeal; the Initial Decision is silent as to Counts Two through Five, as well as petitioner's request for reimbursement from the State. Because petitioner is entitled to findings of fact and conclusions of law on those issues, a remand is warranted.

Second, the ALJ erred in granting summary decision to petitioner on Count One because petitioner failed to provide sufficient evidence in support of its allegation that K.M. presently resides in a fixed, adequate, and regular residence and is, therefore, not homeless. *See Contini v. Bd. of Educ.*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (citing *Brill v. Guardian*

*Life Ins. Co.*, 142 *N.J.* 520, 523 (1995) (the moving party must present sufficient evidence in support of its motion for summary decision).

The Commissioner has determined that "an evaluation of 'homelessness' cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for a child's homelessness, the child's living conditions, and the resources and intentions of the parents or custodians are relevant." *M. O'K. v. Board of Education of the Borough of Cresskill, Bergen County*, OAL Dkt. No. EDU 14830-13, Commissioner Decision No. 325-14, issued August 12, 2014, at 3. Here, the record is devoid of evidence regarding the child's present living conditions, as well as the resources and intentions of her parent or guardian. Petitioner's bare assertions that the Bradley Avenue home is regular, fixed and adequate are unsupported by the record. The only certification petitioner submitted in connection with its motion (from its school business administrator) merely confirms that K.M. presently resides at the Bradley Avenue address. Additionally, results of a public records search relied upon by petitioner suggest that E.H. has utilized the Bradley Avenue address to receive mail and pay bills. This information – taken alone and out of context – does not compel the conclusion that K.M. is not considered a homeless child under relevant federal and state law. Given the lack of information contained in the record, a plenary hearing centered upon a comprehensive, fact-specific examination of the family's circumstances is required to determine whether K.M. is homeless.[1] *See, e.g., Board of Education of the Town of Hammonton, Atlantic County v. Board of Education of the City of Gloucester, Camden County*, OAL Dkt. No. EDU 18573-13, Commissioner Decision No. 311-14, issued July 31, 2014, at 4.

[1] Although E.H. has elected not to participate as a respondent in this matter, nothing prevents either remaining party from compelling her – or any other occupant of the Bradley Avenue home – to testify at a plenary hearing.

Accordingly, petitioner's motion for summary decision is denied, respondent Volk's cross-motion for partial summary decision is denied[2], and the matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/16

Date of Mailing: 3/18/16

[2] The Commissioner concurs with the ALJ that petitioner's failure to name the Eastern Camden Regional Board of Education as a respondent does not warrant dismissal of the petition of appeal. (Initial Decision at 4)

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 6081-15
AGENCY DKT. NO. 371-12/14

**STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,**
Petitioner,
v.
**C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND E.H., ON BEHALF OF MINOR CHILD, K.M.**
Respondents.

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**Bryant L. Horsley, Jr.**, Esq., for petitioner

**Geoffrey Stark**, Deputy Attorney General for respondent C. Ann Volk and New Jersey State Department of Education (John J. Hoffman, Acting Attorney General of New Jersey, attorneys)

**No appearance by E.H.**, respondent, pro se

Record Closed: November 10, 2015 Decided: February 5, 2016

BEFORE **JEFF S. MASIN,** ALJ t/a:

The Board of Education of the City of Camden (Board) seeks summary decision in its dispute with C. Ann Volk, the Executive County Superintendent for Camden County, the New Jersey Department of Education (hereinafter Executive Superintendent), and E.H., the mother of a minor student, K.M. K.M. is currently a high school student who attends Eastern Camden County Regional High School in Voorhees

Township, New Jersey.[1] She lives with her mother in the City of Camden. The Board contends that E.H. and her family, including K.M., are residents of the City of Camden, and that while in the past the family was homeless after losing their home in Voorhees Township, they are now not homeless but instead are living in a home in Camden that is "fixed, regular and adequate," thus "precluding a determination" that they are homeless. As a result, the student's right to a free education paid for by the Board entitles her to attend school in Camden, not in Voorhees Township. After the issue was raised with the Executive County Superintendent, Superintendent Volk twice rejected the Board's position and concluded that E.H. and child were homeless, and as such, the child was entitled to attend school in Voorhees Township, the district of origin, at the expense of Camden, which was responsible for both the educational tuition and the costs of transportation. See letter decision dated September 23, 2014, and second decision letter dated October 15, 2014. The Board then filed a Petition of Appeal on December 22, 2014, with the Commissioner of Education, naming as respondents Executive County Superintendent Volk, the Department of Education, Camden County Office of Education and E.H. The Executive Superintendent and the Department filed an Answer to the Complaint and later filed a second Answer. E.H. did not file an answer and the Commissioner transmitted the contested case to the Office of Administrative Law on April 30, 2015, without any answer having been filed by the parent. No answer has ever been received from E.H. The case was originally assigned to an administrative law judge other than myself. Due to the overwhelming case load and shortage of judges, the case was reassigned to this judge, serving on recall, on December 17, 2015.

As noted, no answer has ever been filed by E.H. On February 12, 2015, while the Board's petition was still pending in the Department of Education, the Board filed a Motion to Deem the Petition Uncontested by Respondents, E.H. and K.M. On February 25, 2015, the Department of Education's Director of Controversies and Disputes, M. Kathleen Duncan, wrote to E.H., providing her, by certified mail, with a "Second and Final Notice," reminding her that she had not filed an answer to the Board's petition and noting, with the emphasis of bolded type,

[1] Camden does not seek any return of tuition it has been paying for the attendance of the family's children in the Eastern Camden County Regional School District.

> You are advised that, **should an answer not be filed within ten (10) days of receipt of this notice, each allegation against you in the petition will be deemed to be admitted; whereupon, the Commissioner of Education may decide this matter on a summary decision basis pursuant to N.J.A.C. 6A:3-1.5(c).**

This Notice was signed for as delivered on March 2, 2015.

Although no answer was filed even after Director Duncan's above-quoted warning, the pending Motion to Deem was not decided and was instead noted on the transmittal form when the case was transferred to the OAL as having been filed, leaving the fate of that motion to be determined in the OAL. The prior assigned judge did not decide the motion and it remains pending. E.H. has never filed any response to that motion. As a practical matter, in the absence of any response and any designation of an attorney as her representative, E.H. must be considered as representing herself in regard to the issue of her child's education and the questions surrounding "homelessness."

The current motion for summary decision was filed by the Board on June 29, 2015. The motion was served on all respondents, including E.H. The Executive Superintendent filed a reply brief on August 12. The petitioner filed its reply on November 9, 2015. Each such document and the letters in which counsel sought extensions of time for the filing of these submissions were sent to E.H.

After reviewing the briefs filed concerning the motion for summary decision, this judge determined to hold a conference call on January 28, 2016, with counsel and. E.H. A letter dated January 14, 2016, was sent to the lawyers and E.H., scheduling the call and advising E.H. that while she had filed no answer or any other responses, if she wished to be included in the call she should contact my secretary. She did not do so and did not participate in the call. Given E.H.'s complete lack of response to any of the filings made or the conferences scheduled for this case, it must be deemed that she has decided not to be involved and therefore, I **CONCLUDE** that as to E.H., default is warranted under N.J.A.C. 6A:3-1.5(c).

As the deputy attorney general previously assigned to the matter recently left the Division of Law, the newly-assigned deputy requested some additional time to respond to the issues that were discussed in the January 28 call. A second call was held on February 4, 2016.

Is Eastern Camden Regional Board a Necessary Party?

As part of the reply to the motion for summary decision, the Executive Superintendent argues that the Board of Education of the Eastern Camden County Regional School District ("Eastern") is a necessary and indispensable party to this action which has not been joined in the case by the petitioner Board. As will be explained herein, the primary question that must be resolved here is whether K.M. is "homeless." If she is, then the issue of where she is to educated must be resolved and the "best interest of the child," consideration that must be evaluated, along with legal presumptions regarding the district of origin's role in her continuing education, would of necessity require that Eastern be involved. N.J.A.C. 6A:17-2.5(a)(1). However, if she is not homeless, then, as will be noted, Camden is without question her current domicile, and it is both responsible for her education and for determining the school she will attend (there being neither a school-choice or a special education issue in this case). It does not appear that the determination of the alleged continued homeless status of the family requires Eastern's involvement. 'The issues that need to be considered regarding that question, which will be explored below, revolve around the home in which the family currently lives in Camden, the conditions therein, their resources and intentions of the parent, and the duration of domicile in Camden at that home. There appears to be little reason to believe that Eastern can offer anything substantive on these points, which as will be explained, are in large part matters that of some necessity, must come from the parent.. As such, on the limited issue of homelessness, Eastern is not a necessary party. However, if it is found that K.M. is homeless, Eastern must then be noticed to determine if it can be of assistance in determining the educational path for the child going forward, as would be expected.

Domicile-Where has the Family Been Living

N.J.S.A. 18A:38-1

> Public schools shall be free to the following persons under 20 years of age:
>
> d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

It is first important to note that the remaining parties are not in dispute that whatever may be the status of E.H. and her family regarding "homelessness," they are domiciled in the City of Camden. On April 8, 2011, E.M. signed a "Student Residency Form" for Eastern Camden County Regional High School, indicating that her family had not had a permanent address since March 20, 2011, and was temporarily living with "more than one family." The form lists an A.M., born May 17, 1993, and E.M. A form signed by E.M. that same day, "Gloucester County Special Services School District McKinney-Vento Education Program," lists A.M. as a twelfth grader and E.M. as a ninth grader. At that time the address listed was on Echelon Road in Voorhees Township. According to an "Affidavit As to Homeless Status," filed in April 24, 2012, by E.M. with the Camden Board of Education's Office of The Homeless Liaison, she lived at an Echelon Road, Voorhees, address from which she and her family were forced to leave due to a "nonrenewal of lease." She advised that she was then living at an address on Bradley Avenue, Camden, with her mother, M.H. According to "School Year 2013-14 Homeless/DYFS Children Report and Tracking Form," dated August 30, 2013, Camden is identified as the sending district and Eastern Regional as the receiving district. The family is identified as including E.M., born March 31, 1996, and K.M., born September 4, 1999. Again, the address for the "actual temporary address" is listed as the Bradley Street address in Camden. E.H. signed an "Affidavit As to Homeless Status" on August 30, 2013, attesting to her having lost her Echelon Road residence due to the lease not being renewed and "separation from spouse. They are now div." She provides the Bradley Avenue address as the temporary residence. On August 23, 2013, M.H. signed a letter to the Board's Homeless Liaison, attesting to being the owner of the Bradley

Avenue home and residing there with E.H, E.M. and K.A.M. On August 20, 2014, E.H. e-mailed the Homeless Liaison, claiming to still be homeless. It is apparent from this communication and one of the days before, that E.H. and the children still resided in Camden.

I **FIND** that the evidence supports a determination that since 2011, the family has resided in Camden. There is no material dispute as to this question and summary decision as to the family being domiciled in Camden is warranted.

According to photographs, real estate reports and Google Maps photographs, the property at Bradley Avenue is a 1,136 square-foot building, a single family residence, located on a residential street. The Board's petition contends that it has a full kitchen, cooking facilities, refrigerator, stove, oven, microwave, at least one bathroom, bathing facilities, at least two bedrooms, plumbing, electricity, heat, a living room and eating area. Although the record does not identify the source for this information about the various rooms and accoutrements purportedly within the home, neither the parent nor the County Superintendent have provided any evidence to refute the Board's assertions as to these matters.

Homelessness

N.J.A.C. 6A:17-2.2 3. provides

> A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> > 3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;

Despite the clear evidence as to the family's domicile, whether the family is still "homeless" is not defined by the domiciliary status. In her decision that the family was homeless, Executive Superintendent Volk made the following determinations, which constituted the whole of her findings:

1. The family was displaced from their home;
2. The family is living in a "doubled up" situation with a relative; and
3. The family is experiencing financial hardship.

Superintendent Volk determined that the family was homeless and therefore, under N.J.A.C. 6A:17 and the federal McKinney-Vento legislation, the Camden Board was responsible for tuition and transportation costs. The Superintendent's second decision letter of October 15, 2014, simply iterated the determination of eligibility for Camden to bear these costs. In neither decision did the Executive Superintendent discuss the reasons for her stated conclusions or, importantly, as will be discussed below, the evidence upon which she relied to make her decision. And her decision does not address whether the home in which the family is living is a "fixed, regular and adequate" home for the family.

It appears from the documents filed by the family over the past years that this is a family that, at least at some point following April 2011, was forced out of necessity to live at the residence of E.H.'s mother and did not have a regular or permanent residence of their own. But the essential question here is whether that condition of homelessness continues even now, well over four years following their moving into the Bradley Avenue house. A "homeless child" is defined in 42 U.S.C. sec. 11434a(2)(A) and (B)(i) as one lacking "a fixed, regular and adequate nighttime residence . . . children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason." And there is no maximum duration of homelessness. L.R. v. Steelton-Highspire School District, 54 IDELR 155 (M.D. Pa. 2010), citing 42 U.S.C. sec. 11434a(3)(A)(i). Yet, as the Commissioner of Education has held, even where a family is forced by circumstance to relocate from a fixed, regular and adequate nighttime residence to living with relatives or friends and remains in that living arrangement, it is possible that the family may be deemed not to remain in a homeless state. In Board of Education of the Township of Maurice River, Cumberland County v. Board of Education of the City of Wildwood, Cape May County, 93 N.J.A.R. (EDU) 895, the administrative law judge noted that

> [m]erely living with relatives or friends, even out of necessity does not render a person homeless. [The regulation] covers a typical

> situation in which a family, already homeless, places one or more of its children with relations or friends. It is not intended to make all children who reside with relations and friends out of necessity homeless. Especially, when they are living with their mother.
>
> [Id. at 897].

The Commissioner and the State Board of Education affirmed this decision, but in L.C. on behalf of her Minor Child B.C. v. Board of Education of Branchburg, 96 N.J.A.R. (EDU)1003, the Commissioner noted that the decision in Maurice River did not hinge on the limited time that the child and her mother lived with the child's grandmother, but on the fact that the mother subsequently obtained a regular, fixed and adequate apartment. In L.C., the Commissioner adopted the administrative law judge's decision in a situation where it was determined that the petitioner's brother's home had "in the months since September 1995, effectively become petitioner's regular and fixed residence."

> Commissioner concurs with the ALJ's conclusion that petitioner is neither domiciled in Branchburg, where she no longer maintains a permanent home or principal establishment, nor "homeless," as per N.J.A.C. 6:3-8.1 et seq., in that, while her living arrangements with her brother may not be *permanent* in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular and adequate so as to preclude a finding of homelessness. Indeed, petitioner's circumstances are more analogous to temporary residency and eventual domicile (in Somerville) as envisioned by N.J.S.A. 18A:38-1(d).
>
> Id. at 1006.

The Board argues that as the petitioner in L.C. had been at her brother's home for nine months and it became the family's "regular and fixed residence," given the over four-year residence at the Camden address, the grandmother's home surely has not remained only a "temporary residence," but has instead become, over time, a "regular and fixed residence," warranting the removal of the "homeless" designation.

In the recent case of M.O'K. and S.O'K. on behalf of minor children K.O'K., A.O'K. AND C.O'K. v. Board of Education of the Borough of Cresskill, Bergen County, and Board of Education of the Borough of Little Ferry, Bergen County, http://njlaw.rutgers.edu/collections/oal/html/initial/edu14830-13 1.html, the parties sought a determination as to where the petitioners' children should attend school and

which district should be financially responsible for the children's education. Since the family had been living for over one year in Little Ferry, at the home of S.O'K.'s parents, after they had been evicted from their own home in Cresskill, they were deemed domiciliaries of Little Ferry, "triggering Little Ferry's obligation to fund the children's educations, pursuant to N.J.S.A. 18A:38-1(a)." However, on the issue of whether the family, although domiciliaries of Little Ferry, were nevertheless still "homeless," the Commissioner noted that at the Little Ferry home, where the family was residing with S.O'K.'s parents, the two parents and the three children occupied the bottom floor of the house, which floor had neither shower, sink or kitchen. There being only one small bedroom on that floor, the thirteen-year-old daughter and the ten-year-old son shared a bunk-bed in the parents' bedroom and the eighteen-year-old son slept in the common area. Petitioners had "always maintained that they wish to return to Cresskill, where M.O'K. lived for 27 years and where the three children were raised until their home was foreclosed on." The parents were not employed, the family's sole income was from Social Security Disability benefits, and the parents certified that they were actively searching for housing in Cresskill. Given these facts, determined from information provided by the petitioners in answers to Little Ferry's interrogatories, the Commissioner determined that the "family lacks a regular or permanent residence of its own and because of economic hardship." And, citing 42 U.S.C. sec. 11434a(2)(A), the Commissioner noted "the setting in which the children live constitutes a less than regular and adequate nighttime residence." [2]

In light of the previous case law, some of which is discussed above, the Commissioner's discussion in Cresskill of the means by which the issue of homelessness must be evaluated is enlightening

> Thus, an evaluation of "homelessness" cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reason for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.

[2] In a footnote, the Commissioner acknowledged that "the status of some homeless families can evolve into acceptable and permanent situations." However, in the case before him, he was not persuaded that this has occurred.

The Commissioner relied in part upon the decision in L.R. v. Steelton-Highspire School District, 54 IDELR 155 (M.D. Pa. 2010). There, the district judge concluded that, despite the fact that a grandmother and granddaughter she was raising, who had been forced by a fire in their home to move in with the grandmother's daughter, and had stayed there for an extended period of time, which in fact was about six months, the child nevertheless qualified as homeless, because she "lacked a fixed, regular and adequate nighttime residence, and was sharing the housing of other persons due to a loss of economic hardship or a similar reason." Cresskill, supra. The judge noted that the situation in the daughter's house involved, as the Commissioner put it, "less than ideal conditions." These "conditions" were apparently that the grandmother and granddaughter slept in the same bedroom and were not permitted to go to the lower level of the house after bedtime.

Thus, in the present matter, the fact that the family has been living in the grandmother's Camden home for such a long period of time does not preclude a determination of continued "homelessness." But as to the other factors cited by the Commissioner in Cresskill, what does this record provide. The reason for the original removal from the Voorhees Township home is known from the documents filed over the years. But, in regard to the question of "adequacy," that is, the living conditions within the Camden home, the record is essentially bare. And it is here that the parent's lack of involvement and default is critical. The parent has chosen to ignore all of the many documents filed in this case. Despite the clear warning contained in Director Duncan's letter that if no answer was filed within ten days, the assertions of the petition would be deemed admitted, E.H. never responded and has never denied that the house contained the various items and rooms identified in the petition and has never denied in any manner the contention in the Board's petition that the Bradley Avenue house is "fixed, regular and adequate." Never has E.H. chosen to deny that the home, even if not where she might wish to remain, is nevertheless an "adequate" place for her children to live. Although the Superintendent's brief refers to Exhibits A-C of its Appendix, that purport to state that the family was living with three families in the one-family residence and had not lived there continuously for the "past three years," the documents cited come not from the mother, but are instead at best hearsay and double-hearsay materials. Exhibit A is a Certification of C. Ann Volk, who merely states that in

making her determination, she relied upon Arenda Kelly-Fleming, an educational Planner in the County office, who assisted Volk in regard to the dispute. Volk received information from Kelly-Fleming, including the information identified as in Exhibits B and C. Ms. Kelly-Fleming certifies in Exhibit B that in assisting Volk, she received from Danielle Anderson-Thomas, a homeless liaison for the Department of Education, an e-mail and had several phone calls with E.H. prior to the issuance of the September 23, 2014, determination letter. Kelly-Fleming relates that E.H. told her that while living at the Bradley Avenue address for a "number of years," "she had also lived in at least one hotel/motel during that same period." No further detail about this is provided, Exhibit C is an e-mail chain, consisting of three e-mails. In the first from September 16, 2014, Superintendent Volk asks that Kelly-Fleming look into the matter of homelessness. In the second, from that same day, Kelly-Fleming asks Anderson-Thomas if Anderson-Thomas is "handling this dispute with Camden?" In the third e-mail, dated that same day, Anderson-Thomas references some information from the mother as to being displaced from Voorhees and living in Camden out of necessity. Anderson-Thomas then states, "I was advised that there are three families in a one family house." It is unclear from this whether that information came from the mother when this was supposedly the case and whether that situation still pertained But what is clear is that the exhibits offered by the Department contain nothing more that hearsay, indeed, double and triple hearsay. Apparently this is the total evidential base upon which the Executive County Superintendent's decision was made. And, in regard to the present petition and the motion for summary decision, the Department has simply offered no evidence of any substance or competence that asserts the inadequacy of the home. "What is required of the party opposing summary judgment is affirmative evidence—competent evidence, not hearsay—that demonstrates the existence of a genuine issue for trial." GMAC Mortgage v. Fraser, A-3719-08-9T2 (App. Div. 2012, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202, 216-17. It cannot be merely assumed that this home is inadequate without some competent evidence to support that fact. And the parties defending the challenged decision are those from whom evidence of such a character would be expected.

As for the parent's resources and intentions, again the record is limited. The Board has provided evidence, intended to show that the family indeed lived at Bradley

Avenue, of liens and bills, but by itself these do no tell us anything substantive about the actual resources of the family. As for intentions, there is nothing. In Cresskill, the Commissioner, noting the limited income of the family, observed that they were actively looking for housing in Cresskill. Here, the record discloses nothing to support any understanding of what the mother's intentions may be, and despite the fact of her long-ago, forced removal from the Voorhees Township home, it cannot simply be assumed that she has a desire or intention or has undertaken any efforts at all to obtain other regular, fixed and adequate housing outside of Camden, away from her mother's home.

Summary decision, as authorized by N.J.A.C. 1:1-12.5, is granted where a careful examination of the record discloses that as to the material issues of fact in the case, there is no genuine dispute, and the application of the relevant law to those undisputed material facts supports a decision in favor of the moving party. Here, as delineated by the relevant law discussed above, the relevant facts regarding the determination of "homelessness" include: First, the reason for it; here not disputed. Second, the duration of the purported continued homelessness: here over four years since removal from Voorhees Township. Third, the adequacy of the current housing. As noted, in the face of the petition, there is no competent opposing evidence. Fourth and fifth, the resources and intentions of the family. Certainly, it is the case that for these last three, the most obvious source for the information must be the parent. Her default means that she has provided no affirmative proofs as to these matters. And, it is the case that the Department, called upon by the petition to defend the decision of the Executive County Superintendent which effectively supports the parent's claim of continued homelessness, has not chosen to avail itself of discovery, through interrogatories or requests for admission, or even a request to depose the mother, in order to attempt to determine the information that would perhaps support that decision.

Given the above, I **FIND** that the petition's assertion that the Bradley Avenue home is "regular, fixed and adequate" is unopposed by any competent evidence that creates a genuine dispute of material fact as to that issue. As such, I **FIND** that the home is just that, "regular, fixed and adequate" and has moved from the status of a temporary home to that of "acceptable and permanent," which does not of course mean that the parent may not harbor some hope of someday leaving that home and Camden,

but that the current situation precludes a finding of "homelessness." I **FIND** that the record is devoid of competent evidence to explain the present intentions of the parent, or to advise as to the actual resources available to her and the family. Indeed, while the Commissioner is certainly not bound to defer to her decision, in regard to the decision of the Superintendent Volk, the record does not disclose that it was based upon sufficient competent evidence. It is conclusory at best and relies on factors that, while surely relevant, are not the sole determining factors that must be assessed.

I **CONCLUDE** that based on the record, there are no material issues in dispute and summary decision is warranted in favor of the Board. I **CONCLUDE** that E.H. and K.M. are not homeless. Therefore, the Camden City Board of Education is responsible to provide the student with a free education, and shall have the right to determine the location at which that education shall be provided. It is encouraged to consult with the parent and with the child's current school in making that decision.

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

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

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

February 5, 2016
DATE

Jeff S. Masin Edwin Peterson ALJ
**JEFF S. MASIN**, ALJ t/a

Date Received at Agency: 2/5/16

Date Mailed to Parties: 2/8/16

mph

**EXHIBITS**:

**For petitioner:**

Exhibits A through F (attached to the Petition of Appeal)

Memorandum of Law, dated June 26, 2015, with attached Exhibits A through N

**For respondent C. Ann Volk and New Jersey Department of Education**:

Letter Brief, dated August 10, 2015, with attached Exhibits A through D

107-16

OAL DKT. NO. EDU 5773-15
AGENCY DKT. NO. 61-3/15

| | | |
|---|---|---|
| G.C., ON BEHALF OF MINOR CHILD, J.Q., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/16

Date of Mailing: 3/18/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 05773-15
AGENCY DKT. NO. 61-3/15

**G.C., ON BEHALF OF MINOR CHILD, J.Q.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,**

Respondent.

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**G.C.**, pro se

**Jeffrey R. Merlino**, Esq., for respondent (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: February 19, 2016 Decided: February 22, 2016

BEFORE **RICHARD McGILL**, ALJ:

G.C. ("petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education or the Borough of Woodland Park ("respondent") in regard to her daughter, J.Q. Respondent's Answer included a counterclaim against petitioner for tuition reimbursement. The matter was transmitted to the Office of Administrative Law on April 23, 2015, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Feb. 22, 2016
DATE

Richard McGill
**RICHARD McGILL**, ALJ

Date Received at Agency: 2-24-16

Date Mailed to Parties: FEB 24 2016
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

G.C. o/b/o J.Q.
v. petitioner

Woodland Park BOE, Passaic Cty
respondent

Office of Administrative Law

DKT NO. EDU-5773-2015

Settlement Agreement

The parties agree as follows:

① Petitioner's Petition of Appeal is withdrawn, with prejudice.

② On Respondent's counterclaim for $13,221 for tuition for J.Q. for the 2014-15 school year, petitioner agrees to pay the following installments of $50 per month for 48 months, starting April 15, 2016.

③ Payments from petitioner shall be made via check or money order & mailed to:

Thomas Difluri, SBA/BS
Woodland Park Board of Education
853 McBride Avenue
Woodland Park, NJ 07424

④ Payments shall be due by the 15th of each month.

⑤ failure to pay any installment by the 15th of the month due shall result in the acceleration of the amounts due and owing to Respondent in the full amount of the counterclaim of #13,271 less any payments made by petitioner.

⑥ the parties agree this Settlement Agreement resolves this matter before the Office of Administrative Law.

Petitioner:

Gloria Cequais Quellman — 2/19/2016

Gloria Cequais Quellman — Date

For the Respondent:

Jeffrey R Merlino, ESQ. — 2/19/2014

Jeffrey R Merlino, ESQ. — Date

108-16

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF GRACE PENN, WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY. | : | COMMISSIONER OF EDUCATION DECISION |

## SYNOPSIS

In January 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:28-10 for resigning her position without giving the notice required for tenured employees.. The respondent failed to answer the order. Respondent was duly advised that – pursuant to *N.J.A.C.* 6A:3-1.5(e) – failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Issued 3/22/16

AGENCY DKT. NO. 27-2/16

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF GRACE PENN, WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY. | : | COMMISSIONER OF EDUCATION DECISION |

For petitioner, Mark G. Toscano, Esq. (Comegno Law Group, P.C.)

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on January 26, 2016, by way of an Order to Show Cause served by petitioner (West Windsor-Plainsboro Regional School District) upon respondent (Grace Penn), requiring respondent to show cause why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her contract with petitioner. By notice dated February 3, 2016, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on February 25, 2016, the Bureau sent respondent a final notice, via regular and certified mail, directing that she file an answer within ten days. The notice advised that – pursuant to *N.J.A.C.* 6A:3-1.5(e) – failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The notice sent by certified mail was returned by the postal

service as unclaimed; however, the notice sent by regular mail was not returned. No answer to the Order to Show Cause has been filed as of this date.

Having reviewed petitioner's affidavit in this matter – which states that respondent ceased working as a teacher without giving the 60 days written notice required by her employment contract – and noting that respondent has not denied the allegations therein, the Commissioner deems such allegations admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certificate pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's standard instructional certificate is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/22/16

Date of Mailing: 3/22/16

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division in accordance with applicable court rules.

166-16

STATE BOARD OF EXAMINERS DOCKET NO. 1314-188
OAL DOCKET NO. EDE 12836-14
COMMISSIONER APPEAL NO. 5-11/15

| | | |
|---|---|---|
| IN THE MATTER OF THE | : | |
| REVOCATION OF THE CERTIFICATES | : | COMMISSIONER OF EDUCATION |
| OF WILLIAM McMEEKAN BY THE | : | DECISION |
| STATE BOARD OF EXAMINERS. | : | |

Order of Revocation by the State Board of Examiners, September 17, 2015

For the Respondent-Appellant, Sanford R. Oxfeld, Esq.

For the Petitioner-Respondent State Board of Examiners, Laura M. Console, Deputy Attorney General (John Jay Hoffman, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that he engaged in unbecoming conduct warranting revocation of his teaching certificates. Specifically, appellant contends that revocation is too severe a penalty here and that mitigating factors were not properly considered. In response, the Board argues that its determination was not arbitrary, capricious or contrary to law and that it appropriately deferred to the credibility determinations made by the Administrative Law Judge (ALJ) following two days of hearing at the Office of Administrative Law (OAL).[1]

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the

[1] The hearing transcripts were not provided to the Commissioner.

record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the Commissioner notes that appellant's objections to the Board's decision are fundamentally rooted in his disagreement with the ALJ's credibility determinations and the resultant weighing of testimonial and documentary evidence. The legal standard with respect to objections of this type is well established,[2] and in the present instance, the Commissioner finds the ALJ's credibility and fact determinations – as adopted by the Board – to be both clearly explained in the Initial Decision and sufficiently supported by the record. The Commissioner further finds that appellant has offered nothing in his papers that would warrant disturbing the deference to which the ALJ – as finder of fact with the greatest opportunity to observe the demeanor of witnesses – is entitled to in this regard. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

Contrary to appellant's assertions on appeal, the credible evidence in the record amply supports the Board's assessment of appellant's conduct, which included inappropriate and unprofessional behavior. Further, in light of appellant's serious lapses in judgment – as evidenced by the pattern of deception and dishonesty he exhibited through his interaction with the district and police – the Commissioner finds that revocation of appellant's certificates is the appropriate penalty. Although appellant obviously disagrees with the penalty, it is clear from the record that he was afforded due process throughout the proceedings, and that all of his arguments were fully considered by both the ALJ and the Board; any mitigating factors are outweighed, in this instance, by the serious nature of appellant's unbecoming conduct.

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[2] *N.J.S.A.* 52:14B-10(c) states in pertinent part: "The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record."

Because there is nothing in the record to suggest that the Board's decision to revoke appellant's certificates – based on the nature and extent of the unbecoming conduct proven during the hearing at the Office of Administrative Law – was arbitrary, capricious or unreasonable, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/22/16

Date of Mailing: 3/22/16

[3] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

| | | |
|---|---|---|
| IN THE MATTER OF | : | NEW JERSEY DEPARTMENT OF EDUCATION |
| THE CERTIFICATES OF | : | STATE BOARD OF EXAMINERS |
| WILLIAM MCMEEKAN | : | ORDER OF REVOCATION |
| _____ | : | DOCKET NO: 1314-188 |

At its meeting of July 15, 2014, the State Board of Examiners (Board) reviewed information it had received from the Scotch Plains-Fanwood School District (SP-F) regarding William McMeekan. The Scotch Plains-Fanwood School District (SP-F) certified tenure charges to the Commissioner of Education alleging that McMeekan had removed a computer from school without permission and made personal use of it in his home. The district also alleged that McMeekan had made a false statement to the district about the missing computer.

Specifically, SP-F alleged that when Emilia Treglia, the district's Technology Support Specialist, went into McMeekan's classroom to follow up on a student request that certain software be installed on the TV production computers, she observed that there were only four desktop computers in the classroom where previously there had been five. When she traced the computer's serial number, it was determined that it had last logged in from outside the district and that someone was logging onto the computer using McMeekan's user identification. The local administrator account name had been changed to "wmcmeekan" and the computer had been renamed from "HS-TV-03" to "W McMeekan's iMac." The district noted that there were several logins from this iMac to the district's computer network from a Verizon FIOS network originating in Newark.

SP-F also alleged that McMeekan had entered a ticket into the district's Help Desk System requesting that computer software be installed on his classroom computers. At the bottom of the ticket McMeekan wrote "Also, why are the 4 grey imacs (last year we had 5)."

After notifying the police regarding the missing computer, the district also noted that there was another remote login attempt from the missing computer from a FIOS Internet address located in Newark. On January 4, 2013 the Scotch Plains Police retrieved the missing computer from McMeekan's home. The district and McMeekan settled the tenure case and McMeekan resigned from his tenured position in the district.

McMeekan currently holds a Teacher of English Certificate of Eligibility With Advanced Standing, issued in June 1999, a Teacher of English certificate, issued in July 2003 and a Teacher of Television Broadcasting certificate, issued in August 2006. After reviewing the above information, at its July 24, 2014 meeting, the Board voted to issue an Order to Show Cause to McMeekan as to why his certificates should not be revoked.

The Board sent McMeekan the Order to Show Cause by regular and certified mail on July 29, 2014. The Order provided that McMeekan must file an Answer within 30 days. McMeekan responded on August 21, 2014. In his Answer, McMeekan admitted that the school computer was removed without permission but stated that no personal use of it occurred. (Answer, ¶ 2). He also stated that he did not know what SP-F had reported to the Board, but denied that he had made the statement on the Help Desk ticket regarding only having four computers in his room. (Answer, ¶¶ 4, 5). He also admitted that the computer was retrieved from his home, but noted that he fully cooperated with the police. (Answer, ¶ 6). McMeekan also claimed that no tenure charges were filed against him and that the matter was resolved prior to the filing of the tenure case. (Answer, ¶ 7). In a Separate Defense, McMeekan stated that he had never been found to have committed any inappropriate actions and at no time knowingly removed any computer from his classroom or attempted to convert a computer that was not his.

He also noted that he did not knowingly make any false statements to the district about any missing computer. (Answer, Separate Defense, ¶ 1).

Since there were material facts in dispute, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Ellen S. Bass heard the matter on March 10, 2015 and April 7, 2015. The record closed on June 1, 2015, and the ALJ issued an Initial Decision on June 23, 2015. *In the Matter of the Certificates of William McMeekan*, Dkt. No. EDE 12836-14 (Initial Decision, June 23, 2015).

In that decision, ALJ Bass found that, McMeekan had removed a computer from his classroom and took it home for "some unexplained personal use, and for no other purpose." (Initial Decision, slip op. at 5). The ALJ further found that McMeekan's conduct violated district policies for the use of computers as it was impermissible to load software onto school computers or remove them from school without permission. *Ibid.* ALJ Bass also determined that "McMeekan made false statements to school personnel and to the police when he 'punched a ticket' alerting the help desk that a computer that he had taken to his home was 'missing'; when he declined for almost an hour to admit to a police detective that the computer was in his home; and when he failed to tell [the district's Network Coordinator] that they were one computer short because McMeekan himself had removed the missing computer from the classroom." *Id.* at 5-6. The ALJ concluded that McMeekan's dishonest conduct "calls into question his capacity to be a role model for children" since that conduct demonstrated "disrespect for his role as a teacher; disrespect for the school district; and disrespect for the taxpayers whose hard-earned money purchased that computer for the children of Scotch Plains/Fanwood." *Id.* at 7.

After determining that the Board had demonstrated the allegations of unbecoming conduct against McMeekan by a preponderance of the credible evidence, ALJ Bass ordered the

revocation of his certificates. *Id.* at 6-7. McMeekan filed Exceptions and the Deputy Attorney General (DAG) representing the Board filed Reply Exceptions in the case.

In his Exceptions, McMeekan argued that ALJ Bass did not find that he took the computer home for some illegal reason and that no one testified that he used the computer from his home for any purpose. (Exceptions, p. 2). He further argued that not every violation of district policies merited the forfeiture of a teaching certificate and that "taking home a computer without permission, while may be a terminable offense, certainly is not a certification issue (as it occurred only once)." (Exceptions, p. 3). He also noted that while he did initially lie to the police about having the computer, he told the truth after about 40 minutes. (Exceptions, p. 3). McMeekan argued that his single mistake should not result in the revocation of his certificates. (Exceptions, pp. 4-5). Finally, McMeekan took exception ALJ Bass' dismissal of his suggestion that only his Television Production certificate was implicated here and therefore that should be the only certificate to be revoked. (Exceptions, p. 6). In her Reply Exceptions, the DAG argued that McMeekan's Exceptions were without merit, especially his suggestions that the case turned on the purpose for which he took the computer or that there was a bright-line test for cases requiring revocation. (Reply Exceptions, p. 2). The DAG noted that "the decision to recommend revocation was appropriate and supported by the overwhelming evidence in the record" as the ALJ based it on McMeekan's "decision to misappropriate school district property followed by his evasive and dishonest behavior over the course of at least six weeks." (Reply Exceptions, p. 3). The DAG argued that the record demonstrated that McMeekan's conduct was more than an anomaly or a momentary lapse in judgment and that he had engaged in a prolonged period of deceptive behavior both with the district and the police. (Reply Exceptions, p. 3). The

DAG therefore claimed that the record demonstrated and the ALJ correctly determined that McMeekan's certificates should be revoked. (Reply Exceptions, p. 4).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of July 30, 2015, the Board reviewed the Initial Decision, Exceptions and Reply Exceptions. After full and fair consideration of the Decision, the Board voted to adopt the Initial Decision.

There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and the credibility of the witnesses, ALJ Bass concluded that the Board had amply demonstrated that McMeekan engaged in conduct unbecoming a teacher by taking a district computer home and then lying to district personnel and the police about its whereabouts. According to the ALJ, such conduct warranted the revocation of his certificates. (Initial Decision, slip op. at 6-7).

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this case, McMeekan's conduct of taking a district computer home, putting in a Help Desk Ticket that feigned puzzlement at having one less computer in his classroom and then obfuscating during his police interrogation about the computer's location, certainly satisfies that requirement. His actions, taken as a whole, clearly demonstrate conduct that warrants revocation. The Board therefore adopts the Initial Decision in its entirety.

Accordingly, on July 30, 2015, the Board voted to adopt the Initial Decision and ordered to revoke McMeekan's certificates. On this 17th day of September 2015, the Board formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that William McMeekan's Teacher of English Certificate of Eligibility With Advanced Standing and his Teacher of English and Teacher of Television Broadcasting certificates are hereby revoked, effective immediately. It is further ORDERED that McMeekan return his certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

RRH/MZ/th

Date of Mailing:

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

112-16

OAL DKT. NO. EDU 14435-15
AGENCY DKT. NO. 232-8/15

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| M.F., ON BEHALF OF MINOR CHILD, J.F. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and advisement of petitioner's failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on March 3, 2016, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. To date, petitioner has failed to submit an explanation for her failure to appear at the scheduled hearing.

However, the Commissioner notes that the Board's answer in this residency matter contains an unresolved counterclaim for tuition for the period of J.F.'s alleged ineligible attendance in the district during the 2013-2014 and 2014-2015 school years. Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/22/16
Date of Mailing: 3/22/16

[1] Final decisions of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

112-16

| | | |
|---|---|---|
| M.F., ON BEHALF OF MINOR CHILD, J.F. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter in August 2015, seeking a determination that J.F. resided within the regional area served by the Red Bank Regional High School. The respondent Board counterclaimed for tuition. The matter was transmitted to the Office of Administrative Law (OAL) to ascertain petitioner's residency and the amount of any tuition due. Petitioner failed to appear at a hearing scheduled for February 29, 2016, despite having received appropriate notice of the hearing date. Having received no explanation from petitioner for her failure to appear, the OAL returned the file to the Commissioner.

Upon review, the Commissioner noted that the Board's answer in this matter contained an unresolved counterclaim for tuition for the period of J.F.'s alleged ineligible attendance in the school district during the 2013-2014 and 2014-2015 school years. Accordingly, the Commissioner remanded the matter to the OAL for resolution of the Board's counterclaim.

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

Issued 3/22/16

113-16

**Pursuant to Referral By the Commissioner of Education**
**State of New Jersey**
**Before Timothy J. Brown, Esquire**

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**In the matter of:**

| | |
|---|---|
| **The Tenure Hearing of Edgard Chavez,** | |
| **State Operated School District of** | **: Agency Docket No. 269-9/12** |
| **The City of Newark, Essex County** | |

## Decision Upon Remand

**Appearances:**

**On behalf of State Operated School District of The City of Newark, Essex County:**
Brenda C. Liss, Esquire
& Fiona E. Cousland, Esquire
Riker Danzig Scherer Hyland Perretti LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962

**On behalf of Edgard Chavez:**
Jason E. Sokolowski, Esquire
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, NJ 08608

### Introduction

This matter arises from tenure charges of inefficiency against Edgard Chavez, (Respondent) by State Operated School District of the City of Newark, Essex County (the District) and an original October 9, 2012 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and

Disputes pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2112, c. 26.* Following said referral, the undersigned conducted a hearing on the matter on November 23, December 20 and December 21, 2012 and January 18, 2013, and issued an Award dated February 6, 2013 finding that the District had shown by a preponderance of the evidence that the tenure charges filed against Respondent are true. By decision dated May 19, 2015 the Appellate Court remanded the matter to the Department of Education to:

> determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings, thus determining a consistent procedure for teachers in positions similar to [Respondent ...] who have received tenure charges after the effective date of TEACHNJ, alleging poor performance that occurred prior to the implementation of the statute's new standards.

By letter dated June 1, 2015 the Department of Education remanded the matter to the undersigned stating:

> As directed by the Appellate Division decision issued May 19, 2015, the Commissioner is returning to you herewith the file in the above-captioned matter for you to review the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, subject to determination by you of each of respondent's defenses and any motions filed with you.

Following remand to the undersigned, the parties waived further hearings in the matter and agreed upon a briefing schedule whereby each party was given the opportunity to file an initial brief and each party was given the opportunity to file a responsive brief. After a period of holding the matter in abeyance pending a related matter, both the District and Respondent filed initial and responsive briefs, upon the receipt of which by the undersigned the matter was deemed fully submitted.

This Award is made following my careful consideration of the full original record in this matter and the arguments of the parties following remand including my careful review of the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, subject to my careful consideration and determination of each of respondent's defenses.

**Preponderance of the Evidence**

Pursuant to the provisions of N.J.S.A. 18A:6-10 "a tenured teacher shall not be terminated or reduced in compensation 'except for inefficiency, incapacity, unbecoming conduct, or other just caus." Prior to the enactment of TEACHNJ charges of inefficiency as are presented here, had to be proven by the employing school district by a preponderance of the credible evidence. On remand, as instructed by the Department, I have considered this matter anew and based upon my de novo consideration of the full record in the matter, including my observations of the demeanor of the witnesses. the transcripts, admitted evidence and arguments of the parties, and my consideration of applicable law, I find; (1) the District complied with controlling pre-TEACHNJ statutory and procedural requirements relating to the subject Inefficiency Charges and (2) the subject tenure charges have been proven by the District by a preponderance of the credible evidence.

Applying the preponderance of evidence standard in effect prior to the enactment of TEACHNJ, I reaffirm and incorporate herein, all factual conclusions made in my Award in this matter of February 6, 2013. As part of my findings in my original Decision and found anew herein, the District has, by a preponderance of the evidence, established

the assertions made by the District in the subject tenure charge against Respondent.

Those assertions therein made, include:

**CHARGE ONE: INEFFICIENCY**

During the period from October 2010 to the present, Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher. Respondent has failed to improve in certain areas set forth below despite the provision of a ninety (90) day improvement period, and despite the provision of support and assistance, Specifically, Respondent has failed to improve deficiencies during the ninety day improvement period in the following manner:

a. The Respondent has failed to design coherent instruction. This area has not improved. Respondent failed to demonstrate that students followed his instructions; Respondent failed to provide clear objectives for lesson plans: Respondent failed to give students the opportunity to actually grasp lessons; Respondent failed to provide clear instructional objectives for lesson plans; Respondent failed to design lesson plans that have a logical progression: Respondent did not differentiate instruction: Respondent failed to understand how the instructional program is differentiated for different groups of students; Respondent did not model activities. See Exhibits C, F, G, H, I, L, M, R, V, W, X, and BB.[1]
b. Respondent has failed to establish a culture of learning. This area has not improved. Respondent did not engage the entire class in answering questions; Respondent allowed student folders to be poorly maintained; Respondent failed to manage class time properly; Respondent failed to impose consequences for large percentage of students who failed to do homework; Respondent failed to emphasize a commitment to learning; Respondent failed to provide specific goals, rewards, and consequences to modify behavior of disruptive students; Respondent failed to give students the opportunity to actually grasp lessons; Respondent failed to demonstrate that students' work is valued by continuing the lesson before they complete work; Respondent failed to engage students in group work; Respondent has failed to to develop positive relationships with his students; Respondent failed to create an environment that reflected his expectations for student achievement; Respondent failed to control classroom and limit student conversations; Respondent failed

[1] Referenced exhibits are omitted from the quotation.

to engage students and encourage students to work collaboratively; Respondent did not update student work posted in the classroom; Respondent failed to control physical violence in the classroom; Respondent failed to implement classroom procedures and routines, asked a student to tell other students to go back to assigned seats; Respondent failed to manage classroom, students permitted to walk around, leave class; Respondent violated classroom management; Respondent violated behavioral contracts; Respondent failed to post classroom expectations for student behavior; Respondent failed to reinforce positive behavior; Respondent failed to consistently monitor classroom behavior by moving about the room; Respondent failed to create an environment conducive to learning; Respondent's failure to control his classroom disrupted other classrooms; Respondent displayed insensitivity towards students. See Exhibit E, G, H, I, J, M, P, U, V, Y and BB.

c. Respondent has failed to use question and discussion techniques with flexibility and responsiveness, This area has not improved. Respondent failed to use questioning and discussion techniques to produce high level questions and foster participation from all students; Respondent failed to use question and discussion techniques in even manner; See Exhibit H, I, and V.

d. Respondent has failed to engage students in learning. This are has not improved. Respondent failed to provide specific goals, rewards, and consequences to modify the behavior of disruptive students; Respondent failed to engage students in group work; Respondent failed to engage students and encourage students to work collaboratively. See Exhibit E, G, H, I, M, P, V, and Y.

e. The Respondent has failed to provide feedback to students. This area has not improved. Respondent failed to provide feedback to students in the form of exit slips, exemplars, open-ended questions, journal responses, or quizzes; Respondent failed to provide students with specific feedback; Respondent failed to provide written feedback; Respondent failed to give accurate, substantive, constructive, specific and timely feedback; Respondent failed to provide students with feedback, instead relied on secondary teachers or students themselves to provide feedback. See Exhibit E, I, K, P, V, and X.

f. Respondent has failed to attain student achievement that meets or exceeds performance benchmarks. This area had not improved. Respondent failed to give students the opportunity

to actually grasp lessons; Respondent failed to adequately instruct students. See Exhibit H, I, K, and V/

g. The Respondent has failed to maintain accurate records. This area has not improved. Respondent failed to adhere to plan book; Respondent failed to make plan book and schedules congruent and visible; Respondent failed to maintain student folders; Respondent failed to efficiently and effectively maintain instructional records; Respondent failed to keep accurate records of lesson plans. See Exhibit A, K, L, P, V, and BB.

*h.* The Respondent has failed to demonstrate promptness and attendance. *This area has improved.* (Emphasis in original)

i. The Respondent has failed to demonstrate knowledge of content and pedagogy. This area has not improved with respect to pedagogy. Respondent failed to demonstrate that he knew how to teach substantive content of lessons. See Exhibit H, R, and V.

j. The Respondent has failed to demonstrate knowledge of students. This area has not improved. Respondent failed to develop positive relationships with his students and has failed to differentiate the instructional program to meet the diverse needs of his students. See Exhibits H, R, and V.

k. The Respondent has failed t assess student learning. This area has not improved. Respondent failed to provide assessments of students beyond homework review, classroom participation, and teacher observation; Respondent failed to informally assess students while working; Respondent failed to assess students beyond classroom participation and teacher observation; Respondent has failed to use the results of summative assessments to inform instruction; Respondent failed to assess students work. See Exhibit F. H. P. R. V. W. and X.

l. The Respondent has failed to manage student behavior. This area has not improved. Respondent failed to demonstrate that students followed his instructions; Respondent failed to impose consequences for a large percentage of students who failed to do homework; Respondent failed to provide specific goals, rewards, and consequences to modify the behavior of disruptive students; Respondent failed to control the classroom and limit student conversations; Respondent failed to control the classroom – one student slapped another after an argument: Respondent failed to implement classroom procedure and routines, asked students to tell other students to go back to assigned seats; Respondent failed to control the classroom – the students are up and around, not in class; Respondent violated classroom management; Respondent

violated behavioral contracts; Respondent failed to post classroom expectations for student behavior; Respondent failed to reinforce positive behavior; Respondent failed to consistently monitor classroom behavior by moving about the room; Respondent's failure to control the classroom disrupted other classrooms. See Exhibit H, J, P, V, Y, and BB.

m. The Respondent has failed to manage classroom procedures. This area has not improved. Respondent failed to demonstrate his students' recorded homework in a binder; Respondent failed to demonstrate a clear and organized method for checking homework; Respondent utilized students to give instructions, resulting in physical violence; Respondent failed to establish procedures and routines that result in orderly and safe environment for students. See Exhibit H. P, V, and BB.

n. The Respondent has failed to communicate clearly and accurately. This area has not improved. Respondent failed to provide clear instructional objectives for lesson plans; Respondent failed to adequately instruct students. See Exhibit H, K, R, and V.

o. The Respondent has failed to reflect on teaching. This area has not improved. The Respondent has failed to reflect on teaching practices to adjust lesson plans to needs of students. See Exhibits H and V.

*p.* The Respondent has failed to contribute to the School and District. *This area has improved.* (Emphasis in original)

q. The Respondent has failed to grow and develop professionally. This area has not improved. Respondent has failed to develop positive relationships with his students. See Exhibit H and V.

r. The Respondent has failed to energize the physical space of the classroom. This are has not improved. Respondent failed to keep the classroom organized and clean. Respondent failed to display student work. See Exhibit H, P, U, and V.

*s.* The Respondent has failed to communicate with families. *This area has improved.* (Emphasis in original)

t. The Respondent has failed to implement District Policies (Discipline, Dress Code, Homelessness, Child Abuse Prevention, Student Attendance, Fire Drill, PRC/504, etc.). This area has not improved. Respondent failed to implement the district discipline policy, I&RS/504, and dress code; Respondent failed to follow staff guidelines. See Exhibit C, H, and I.

In reaching such conclusions, I have carefully considered each of Respondent's defenses and determined that such are not sufficient to support a finding that the tenure charges are not established by a preponderance of the evidence or that the penalty imposed should be reduced or modified.

## Respondent's Primary Defenses

### The District Failed to Provide Respondent a Full 90-day Improvement Period and the 90-day Plan was Inadequate

On March 26, 2012 Respondent was served with tenure charges and provided a ninety-day improvement plan. Respondent asserts that the District was thereafter required to, and failed to, comply with the guidelines and rubrics contained in the District's 2009-10 and 2010-11 Teacher Observation and Performance Guidebooks, including requirements of a modified professional development plan, teacher meetings with the school's principal and administrators to have the plan explained, monitoring of the plan, a minimum of ten observations including 6 informal and 4 formal with at least one observation occurring each week and a written analysis of how Respondent improved and did not improve by the principal. Because Respondent's 90-day plan did not comply with such mandates, Respondent asserts, the District is precluded from pursuing its tenure charges against Respondent.

The Respondent argues that the District did not provide Respondent the exacting individualized assistance necessary during the 90-day improvement period and that the plan was inadequate. Respondent asserts in this regard that Respondent was not given the opportunity to provide his input into the drafting and formulation of the plan as required,

and that instead the plan was unilaterally drafted by principal Merlo. Nor was the plan specifically developed to address Respondent's alleged deficiencies and, instead, consisted of resources provided to teachers generally, including PD360 videos, books related to teaching and pedagogical skills and meetings with administrators and other math teachers. There was no on-going assistance throughout the 90-days given to Respondent other than meetings with the principal and vice principal to go over Respondent's weekly lesson plans from late March to mid June 2012. Respondent also maintained that he was not provided a full 90 days under his improvement plan. In this regard he explained that the plan did not begin after March 26, 2012 – the date principal Merlo met with him to go over the plan - and school ended for the year on June 24, 2012. In the interim, there was one day off for Memorial Day, one week off due to spring break, a week of testing for NJASK, a couple of field trips and days of very hot weather in June. Additionally, Respondent argues, there is no evidence that Respondent received any assistance from the District beyond the middle of June 2012.

As for Respondent's performance during the 90-day period, the record establishes that he did improve and that as a consequence, Respondent argued, the District should have concluded that Respondent successfully completed his improvement plan. In this regard, he used support from District Administrators and co-employees to improve his classroom management such as creating behavior modification contracts for problem students; at the suggestion of principal Merlo he created a sign in/out sheet for his students; he improved the organization of his classroom; at least one co-worker teacher assigned to assist Respondent in the classroom testified that Respondent improved in his classroom instruction, grading and management; and although principal Merlo expressed

concern about the performance of Respondent's students in Learnia standardized tests and how such would translate into scores on NJASK, the record establishes that Respondent's students performed well on the math portions of NJASK.

As for District claims that it had concerns about Respondent's alleged failures to provide differentiation of instruction as part of the Connected Math Program, the fact is he was never offered formal training in such. As for claims relating to his lesson plans, Respondent asserted, the evidence establishes that during his 90-day period his plans improved measurably. The fact is, Respondent argued, that throughout his two years at the school and including during his 90-day plan, all of Respondent's lesson plans were approved by school administrators. Finally, "basic" ratings in evaluations are passing, Respondent asserted, and he received basic ratings throughout the 2010-11 and 2011-12 school years with the lone exception of an unsatisfactory observation by District Administrator Oliveira in May 2012. Thus, there was no reason for Respondent to receive his first ever unsatisfactory annual evaluation in his twenty years of teaching in the District from principal Merlo on June 1, 2012.

**Discussion**

Contrary to the argument of Respondent, the 90-day plan provided Respondent satisfied the 90 day required length of such plans. Under the law applying to pre TEACHNJ inefficiency charges the 90 days are calendar days and there is no dispute that Respondent was employed as a teacher at the Lafayette Street School a full 90 days while being subject to his 90-day plan. Additionally, the plan was detailed and was tailored and aligned to address Respondents numerous deficiencies, presented professional growth

goals and provided much more than the weekly meetings about lesson plans claimed by Respondent. In this regard, the evidence establishes that during the 90-day period master teacher Fitzgerald continued her visits to Respondent's classroom to assist and model for Respondent, Respondent was given opportunities to observe other teachers and, contrary to any claim that the school's administration meetings with him were inadequate, on the witness stand Respondent testified that during his 90-day plan the principal and two vice principals were coming to his classroom too often.

When Respondent was presented the 90-day improvement plan, he met with Principal Merlo and by his own admission was told he had to improve in the ways indicated in the plan and that if he did not show significantly improvement, one possible consequence would be certification of tenure charges. As for the development of the plan itself, the record establishes that the plan was originally drafted by Merlo, but contrary to the Respondent's assertions in his post hearing briefs, I find that Respondent was given the opportunity to have input into the plan and modify the plan and that he declined (thereby waiving) the opportunity. In this regard, on direct examination about his initial 90-day plan meeting with Merlo, Respondent was asked:

> Q: Were you informed if you wanted you could add anything to the plan at all?
> A: Probably, she did. Probably, she did.
> Q: And did you partake in that?
> A: No. I took it as constructive criticism.

On cross examination Respondent admitted that during the meeting with Merlo he was nervous and that he does not remember what Merlo told him about the plan. In contrast Merlo credibly testified that she explained the details of the plan to Respondent and gave Respondent the opportunity to modify the plan but that Respondent did not offer any

additions or changes to the plan. Based upon the record as a whole, I also find that Respondent was presented with an understandable explanation of the basis for criticism supporting the administration's allegations of inefficiency, and that at the beginning of the 90-day period and throughout the 90-day period Respondent was offered constructive advice on how he could meet the objectives established in his improvement plan.

I am also not persuaded by Respondent's argument that because in various of the areas of Inefficiency/Domains outlined in the 90-day improvement plan the District listed numerous professional books and "PD 360 Videos" that were generally available to other teachers, Respondent's plan necessarily cannot be found to have met the requirement that the improvement plan be individualized or designed specifically to remedy Respondent's deficiencies. There is no requirement in the law identified by Respondent to support a finding requiring that the District must offer materials to a teacher on such an improvement plan that have never been offered to any other teacher before and that are created specifically for the individual teacher and no other. Instead, the requirement that a plan be tailored to the needs of a teacher contemplates the District will use the resources the District has to assist the teacher to address the teacher's identified deficiencies. Here, the resources the District had available to address Respondent's various deficiencies included instructional videos, professional books, other teachers to model correct methods, other teachers to mentor and assist Respondent and administrators to mentor and assist Respondent, and the evidence establishes that the District used all such resources in its effort to assist Respondent.

Moreover, the videos and books referenced in Respondent's plan were not random selections or irrelevant to Respondent's needs. Instead, such books and videos

were pointedly related to Respondent's specifically identified deficiencies. For example, Respondent's Improvement Plan identified as an Area of Inefficiency/Domain; "Failure to use question and discussion techniques with flexibility and responsiveness (3b)" and listed, among other things, two 360 videos in the related "Support Activities and Resources" section of the plan. The two identified videos included one entitled, "Questioning to Stimulate Learning and Thinking" and the other was entitled, "Effective Questioning in the Mixed Ability Classroom."

Nor are the areas in which Respondent improved and the levels of his improvement enough to satisfy the goals of the plan, as the Respondent asserts. In such regard, it is not enough that Respondent's work was deemed adequate only after his deficiencies were remedied by another teacher or by an administrator. For example, the fact that Respondent's lesson plans may have been determined adequate after modification by other teachers or administrators does not establish that Respondent was drafting adequate lesson plans; or that because another teacher assisted Respondent in drafting behavior contracts that Respondent successfully modified student problematic behavior, or that merely because Respondent viewed the recommended 360 videos that he was successful in addressing the underlying related deficiencies. Again, by way of example in the deficiency discussed above relating to Respondent's "Failure to use question and discussion techniques with flexibility and responsiveness (3b)," notwithstanding that Respondent may have viewed the two listed videos such does not alone establish that he successfully satisfied the "Professional Growth Goals" listed therein. There, Respondent was directed that: "-Teacher will submit high level questions with weekly lesson plans" and "-Teacher will consistently provide adequate wait time for

students to process and respond to questions posed." Thus the videos identified in the plan were not ends in and of themselves, but rather were offered to Respondent as tools to assist him in his efforts to "submit high level questions with weekly lesson plans" and "consistently provide adequate wait time for students to process and respond to questions posed."

**The District's Tier Policy Defense**

The Respondent argued that effective with the 2009-2010 school year and continuing through the 2011-12 school year, the District adopted the "Tier Implementation Guidelines" and that the District failed to comply with the requirements of those guidelines relating to Respondent. First, Respondent asserts, he should not have been subject to tenure charges when he was evaluated as "basic" for the 2010-11 school year and "unsatisfactory" for the 2011-12 school year. Instead, he should have been considered under "Tier 3" of the process. Additionally, Respondent argued, a 90-day improvement period under the Tier Guidelines requires the school administrator to monitor the teacher as evidenced by 10 observations, weekly observations, including 6 informal and 4 formal observations. The District is bound by its own policy under controlling law, Respondent argued. Here, during his 90-day improvement period Respondent was given only two observations: a formal observation on April 20, 2012 by an interim vice principal in which he was rated "basic" and a formal observation on May 30, 2012 by District Administrator Oliveria in which Respondent was rated in only two of four domains, and rated "unsatisfactory." Where, as here, according to Respondent, the District is under the supervision of a State District Superintendent, the Superintendent stands in the shoes of the Board of Education and is thereby bound to comply with its

adopted policies unless and until such are repealed or superseded. Respondent did not have two consecutive years of unsatisfactory annual evaluations, and, as a result, he may not be subject to tenure charges. Principal Merlo may not, as she attempted to do here, simply ignore District policy, Respondent maintained.

**Discussion**

According to Respondent, at all times relevant the District was bound to comply with the procedural and other requirements contained in the District's "Achievement Through Excellence: A System of Teacher Observation and Performance Evaluation/A Guidebook for Teachers and Administrators/ 2009-2010" and the 2010-2011 version of the Guidebook. (Referred to as the 09-10 Guidebook and 10-11 Guidebook.) Respondent argues that at the time Respondent received his 2011-2012 annual summative evaluation rating of Unsatisfactory, the District was required to apply the terms of the "Tier system" established by the District in the 09-10 Guidebook; and that under that system as a result of Respondent's rating he should have been placed in "tier 3" described in the 09-10 Guidebook as "teachers whose teaching performance is such that charges do not need to be filed until after two years of unsatisfactory annual evaluations." According to the Respondent, under the "Guidelines For Tenure Charges Process" contained in Appendix K-4 of the 09-10 Guidebook, during a 90-day improvement period a teacher "is monitored by school administrator. Ten (10) observations must be conducted during the 90-days [6 informal, 4 formal]. At least one (1) observation per week of instruction must be completed during the 90-day period...." Consequently, according to Respondent, his tenure charges were premature under the tier system and, in any event, his 90-day

improvement period did not meet the requirements of the District's own policy; a policy Respondent argues was never terminated by the District.

In this regard, Respondent witness John Abeigon, Director of Organizing for the Newark Teachers Union, testified that he was the executive director of the Union running the Union's operation and managing the staff, and asserted that the 2009-2010 Guidebook was in place for the 2010-11 and 2011-12 school years; that the entire document was put in place District-wide in '10-'11 and '11-'12, and that he knew of no directives by the District that the guidelines were not in place in those years. Such included the tier system, Abeigon testified. When asked initially how he knew the Guidebook was in effect during such years, Abeigon testified; "The Newark Teachers Union was on the committee that authored parts of it."[2] Abeigon offered his interpretation of the tier system based upon a publication distributed by the Union; a publication (identified at the hearing as R-18) that I find does not speak for the District. Abeigon admitted that he was not present at any meetings where District administrators gave its directives to school principals in September of 2010 (regarding the 2010-11 school year) or September 2011 (regarding the 2011-12 school year) relating to evaluation of teachers or at any such meetings between principals in the District and their school staffs.

At the close of the hearing in this matter the record was left open for receipt of a rebuttal affidavit from the District relating to the tier system testified to by Respondent witness Abeigon and a responsive affidavit on behalf of Respondent. In an affidavit

[2] The witness did not testify that he had personal knowledge that the tier system was used by the District in the 2011-2012 school year, did not say he was on the committee that authored the guidebook and did not identify which "parts" of the guidebook were written by the Committee.

thereafter provided by the District, executed by District Assistant Superintendent Roger Leon, the Assistant Superintendent indicated that:

1. Consistent with the testimony of Abeigon, the Guidebook identified by Abeigon was distributed to teachers by principals at orientation sessions at the beginning of the 2008-2009 and 2009-2010 school years.
2. The Guidebook was distributed to teachers by principals at orientation sessions at the beginning of the 2010-2011 school year and principals were directed by the District to inform teachers that the evaluation forms and rubrics would continue to be used that school year but that the tier system would not be in use.
3. The Guidebook was not distributed to teachers during the 2011-2012 school year and instead a document entitled "Achievement Through Excellence: Teacher Observation and Performance Evaluation/A Guidebook for Teachers and Administrators/ 2011-2012" - a document that did not include a tier system - was distributed to teachers.
4. Per directives from the District administration, the tier system/procedures were not utilized in the District for the 2010-2011 and 2011-2012 school years, and

5. That principals recommending inefficiency tenure charges in 2011-2012 were directed by the District to do so without regard to the tier system.

In a responsive, executed affidavit, NTU Director of Organizing Abeigon indicated:

1. As he testified, it is his "understanding" that the District's policy with respect to the "tier" implementation program was in effect District-wide during the 2010-11 and 2011-12 school years.
2. It is his understanding that the 2010-2011 Guidebook, including a tier implementation guideline "should have been" distributed to teachers by principals at the beginning of that school year and that he knew of no written or oral directive from District administration which directed or informed principals that the tier system would not be used for the 2010-2011 school year.
3. That he was told by District administrators that as late as 2011-2012 the administrators were using the 2009-2010 guidebook.
4. That the 2011-2012 guidebook could not have been distributed to teachers at the beginning of that school year as it was not disseminated until January 2012 and that the Union filed a grievance relating to the unilaterally issued

guidebook on or about January 23, 2012 and that the matter was eventually heard in arbitration on June 28, 2012.

5. Past practice and regulation require that the District consult with the Union regarding policies and procedures requiring evaluation of tenured teachers and past practice of the parties requires that unless a new evaluation model is created by October 1 of any year the prior year's model will remain in effect.
6. He knows of no directive from District administration to any principal directing that they go forward during the 2011-2012 school year with efficiency tenure charges without regard to the tier system, and that to the best of his knowledge he "believes" teachers have been led to believe in numerous District schools that the tier system was utilized in the 2010-2011 and 2011-2012 school years.

Based upon the record, I find both the testimony and written statement of Respondent's witness Abeigon on the tier system to be equivocal. He, I believe honestly as well as intentionally, repeatedly qualified his testimony about the implementation of the tier system in the 2010-2012 school years with ambivalent words rather than using affirmative, unequivocal statements and did not identify how he gained direct personal knowledge of the alleged required use of the tier system in the two school years at issue. The fact is, Abeigon admitted on cross examination that he was not present when any

principal oriented teachers at the beginning of the 2010-11 or 2011-12 school years, and that he is not aware of any directives from District administration relating to the tier systems during those years. Abeigon's statements about what "should have" occurred as a result of the District's obligations to the Union relating to changes in evaluation systems, are legal conclusions and I find the record herein is insufficient for the undersigned to determine the correctness of such legal conclusions.[3] In contrast, the statement of Assistant Superintendent Leon is unequivocal; the District ended its use of the tier system prior to the 2010-2011 school year and the tier system was not in effect during the 2010-2011 school year or 2011-2012 school year. Importantly, such statements by Leon are consistent with the testimony of principal Merlo, a witness who was responsible for implementation of the District's policies at the Lafayette Street School and whose testimony that the tier system was not in use during the two school years involved herein I credit.

Based upon the record as a whole, I find; (1) that the fact that the District did not apply the tier system contained in the 09-10 or later Guidebook to Respondent does not constitute a defense to the instant tenure charges, and (2) that the 90-day improvement plan applied to Respondent was adequate.

**Respondent's Highly Qualified Defense**

According to Respondent, at all times relevant he was not "highly qualified" in math and consequently, his assignment to teach departmentalized middle-school math at

[3] I also note that on remand the Union did not offer the results of its 2012 arbitration referenced in Abeigon's post-hearing rebuttal affidavit.

the Lafayette Street School was contrary to the No Child Left Behind Act of 2001, and as a result, he may not be found inefficient. According to Respondent, there is no evidence whatsoever, that he was Highly Qualified to teach 6th grate departmentalized math for the 2010-11 and 2011-12 school years at Lafayette Street school. The opinion of principal Merlo does not make Respondent so qualified and the District cannot deem Respondent inefficient in a position to which he was not qualified in the first place.

**Discussion**

I am not persuaded by Respondent's argument in this regard. Respondent identified no persuasive legal precedent to support such a finding. The penalties in the No Child Left Behind related law/regulations for having non highly qualified teachers teaching in certain schools related to issues of federal funding. The Respondent did not identify any portion of the law or regulation arguably establishing the protection for teachers as Respondent advocates herein.

**Respondent Defense Relating to Progressive Discipline**

The doctrine of progressive discipline applies to tenure charges and here, Respondent asserts, if any penalty is warranted at all, it should be one less severe than termination. In this regard, Respondent argues, in his twenty years with the District prior to the 2010-11 school year Respondent had never been subjected to any discipline whatsoever; his classroom observations and annual evaluations were extremely positive and during that period he never received an unsatisfactory annual evaluation. Under such circumstances, any deficiency in Respondent's teaching performance during the 2011-12 school year should be limited to some lesser form of sanction such as a Teacher

Assistance Program, increment withholding, suspension without pay or transfer. In any event, Respondent argued, under principles of progressive discipline, removal is excessive considering the gravity of Respondent's conduct.

**Discussion**

Respondent's progressive discipline argument has to be considered within context. It may be true that Respondent taught adults for many years in the District and received annual evaluations that did not result in tenure charges. However, contrary to the implication of Respondent's argument, he was not "set up to fail" by the District's assigning him to Lafayette Street School. There is no dispute that the adult education program in which Respondent taught for many years ceased to exist. If Respondent was thereafter going to work as a teacher for the District, considering his teaching certification is K through 8, it was not unreasonable for the District to assign him a position at an elementary school. The challenges facing Respondent under such circumstances cannot be understated. However, the fact that Respondent was faced with such a challenge does not offer him a level of protection beyond that normally associated with tenure.

In the instant matter, the evidence establishes that the District, and particularly principal Merlo, recognized that the transition form adult to elementary students would be challenging for Respondent, and the record establishes that Merlo took extraordinary steps to assist Respondent, not just during the 90-day improvement period, but rather for the entire 2010-2011 school year and the entire 2011-2012 school year. Giving Respondent the benefit of the doubt, the District waited until the last minute, so to speak,

to place Respondent on a 90-day improvement plan. Notwithstanding the extraordinary efforts of the District, the preponderance of the evidence establishes that Respondent was inefficient as asserted in his tenure charges.

Respondent's underlying theory in support of lesser discipline here is based upon principals of progressive discipline; that less severe discipline will result in desired improvements in the employee's behavior/performance. Under the circumstances here, I am not persuaded that a suspension of Respondent, a withholding of his increment or further efforts by the District to assist Respondent would result in such a substantial improvement in Respondent's performance as to warrant his retention. The District did so very much for Respondent for almost two years and did not obtained significant positive results. The opportunities offered Respondent and resources expended on his transition form adult teaching to elementary teaching that preceded his 90-day improvement period recommend against mitigation or a finding that a lesser penalty will result in the desired change in Respondent's performance.[4] I find that lesser discipline is not appropriate here

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[4] Again, as I found in my original Decision in the matter and affirmed herein:

> After two years of such focused effort and assistance by the District as well as written reprimands, observations and evaluations that he never challenged, Respondent continued to struggle. Respondent continued to have difficulty with, among other things, the preparation and design of lesson plans and differentiating his plans to meet the differing needs of different groups of students; he continued to have difficulty with managing class time; he continued to have difficulty establishing and enforcing procedures and routines of his students; his classroom continued to be disrupted by student behavior; he had a difficult time creating an atmosphere in his classroom conducive to learning; and his students struggled to learn. Upon overall review of the record, and acknowledging that I have no reason to question the professional judgments and evaluations of the educators involved herein, when comparing Respondent's performance early in the 2010-2011 school year to his performance late in the 2011-2012 school year, I find that such a comparison establishes that Respondent failed to show improvement of any significance through the course of his two school years of teaching at Lafayette Street School.

## Conclusion

Upon careful, de novo consideration of the full original record in this matter and the arguments of the parties following remand including my review of the facts anew pursuant to the preponderance of the evidence standard in effect for inefficiency cases prior to the enactment of TEACHNJ, and subject to my having careful consideration each of Respondent's defenses, I find that the District has met its burden of proving the subject tenure charges by a preponderance of the credible evidence.

Respondent's discharge is hereby sustained.

Dated: March 17, 2016

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision Upon Remand in Agency Docket Case No. 269-9/12 sustaining tenure charges on Thursday, March 17, 2016.

Timothy J Brown

119-16


# Prof. Robert T. Simmelkjaer, Esq.

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119-16

March 24, 2016

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Re: I/M/O Tenure Charges Against Michael Lefkowitz , State Operated School District of the City of Camden
[Respondent's Emergent Motion for Reinstatement]
Agency Docket No. 329-10/15

Dear Counsel:

Pursuant to N.J.S.A. 18A:6-14, I hereby order the reinstatement of the Respondent, Michael Lefkowitz ("Lefkowitz"), to the payroll of the Camden City School District retroactive to February 25, 2016. N.J.S.A. 18A:6-10 clearly states that "[u]pon certification of nay charge to the commissioner, the board may suspend the person against whom such charge is made with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges ... then the fully salary ... of such person shall be paid beginning on the one hundred twenty-first [121st] day until such determination is made.

The above statute is clear and ambiguous. Since the tenure charge in the instant matter was certified to the Commissioner on October 27, 2015, Lefkowitz is entitled to receive his full pay retroactive to February 25, 2016. With respect to the District's claim that Lefkowitz is not entitled to reinstatement because he filed a Motion for Summary Decision, the Arbitrator finds that he had a right to file this motion, which he did contemporaneously with his Statement of Position and Statement of Evidence on

September 2, 2015, and should not be penalized for exercising his rights to respond to the Tenure Charge. With respect to the District's second claim that it is entitled to a "setoff" of the unemployment benefits that Lefkowitz received since the start of his suspension without pay from the District because these benefits constitute "salary or pay" from "substituted employment," the Arbitrator concurs with the Respondent in finding that "there is no case law, administrative decision, statute or regulation that supports the concept that unemployment benefits, that is benefits an individual received because they are unemployed would constitute "pay" or salary" from "substituted employment."

## INTERIM AWARD

The Respondent, Michael Lefkowitz, shall be reinstated to the District's payroll retroactive to February 25, 2016. It is so ordered.

March 24, 2016

Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 24th day of March, 2016 before me came Robert T. Simmelkjaer, who represented to me that he is the individual who executed the foregoing instrument, which is his Interim Award.

March 24, 2016

Notary Public

RENEE DISTELHURST
NOTARY PUBLIC OF NEW JERSEY
ID #21606
MY COMMISSION EXPIRES 8/12/2019

cc: Kathleen Duncan, Esq.
Director, Bureau of Controversies and Disputes

OAL DKT. NO. EDU 2445-16
AGENCY DKT. NO. 35-2/16

| | | |
|---|---|---|
| D.H., on behalf of minor child, D.H., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

This matter involves a dispute as to whether the petitioner is domiciled in the respondent Piscataway School District or in the Plainfield School District. Despite the fact that the petitioner did not establish the right to emergent relief permitting D.H. to immediately attend school in the Piscataway School District while this case is pending, D.H. must be enrolled in some school district.[1] The petitioner indicated during the argument on emergent relief that the Plainfield School District would not allow the petitioner to register D.H. in Plainfield. If the petitioner is not able to register D.H. in the Plainfield School District, the petitioner may file a

[1] If the petitioner had filed an appeal of the respondent's residency determination within 21 days of the notice of ineligibility, D.H. would have automatically been permitted to attend school in the Piscataway School District while the appeal was pending.

separate petition of appeal and motion for emergent relief, and request that the new petition be consolidated with this matter. In the meantime, the respondent may voluntary enroll D.H. in the Piscataway School District to enable D.H. to attend school during the pendency of this case on the merits. In the alternative, if it is ultimately determined that D.H. is entitled to attend school in the Piscataway School District, the respondent could then be responsible for tuition costs sought by the Plainfield School District.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/16
Date of Mailing: 3/24/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 02445-16
AGENCY DKT. NO. 35-2/16

**D.H. ON BEHALF OF MINOR CHILD D.H.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY**,

Respondent.

---

**D.H.**, pro se

**David B. Rubin,** Esq., for respondent

BEFORE **RICHARD McGILL**, ALJ:

D.H. ("petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Township of Piscataway ("respondent") in regard to her son, D.H. In conjunction with the petition, petitioner filed an application for emergent relief.

The matter was transmitted to the Office of Administrative Law on February 18, 2016, for determination as a contested case. An oral argument in regard to petitioner's motion for emergent relief was conducted on March 1, 2016, at the Office of Administrative Law in Newark, New Jersey.

Petitioner filed her motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In her Pro Se Residency Appeal, petitioner states that she has rented an apartment in Piscataway since 2014. Her parents own a home in Plainfield approximately four or five blocks away from petitioner's apartment. Petitioner's parents left their home in Plainfield and asked petitioner to "house sit" for them until the property is foreclosed on. Petitioner further states that when her parents come to New Jersey and stay in their home, she stays in her apartment every night. Further, in the event of a foreclosure she will be in her Piscataway address full time.

Respondent presented a certification of Martin Hibinski, who is employed by respondent as an Assistant Truant Officer. According to the certification, student D.H. left and returned to the address in Plainfield on numerous occasions from September 2015 to January 2016. Officer Hibinski concluded that petitioner and her son, D.H.,

were living in Plainfield and that petitioner was renting the apartment in Piscataway for her daughter.

After a hearing, respondent sent a letter dated December 21, 2015, to petitioner advising her of its determination that D.H. is not eligible to enroll in respondent's schools. Further, the letter advised petitioner of her right to appeal to the Commissioner of Education within twenty-one days. Despite this advice, petitioner did not file an appeal with the Commissioner of Education within twenty-one days.

The first factor is whether petitioner will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

The harm from loss of education would be considered irreparable, but petitioner may well be able to avoid this result by registering D.H. in Plainfield's schools. The pertinent regulations are set forth at N.J.A.C. 6A:22-4.1 to -4.2.

The next requirement is that the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)2. In this proceeding, petitioner claims that D.H. is domiciled within the school district and that therefore he has the right to attend respondent's schools.

In accordance with N.J.S.A. 18A:38-1(a), public schools shall be free to a person over five and under twenty years of age who is domiciled within the school district. It follows that the legal right underlying petitioner's claim is settled.

The next consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. Respondent presented numerous details based upon an investigation that continued from September 2015 to January 2016. Petitioner attempted to raise some factual issues, but it cannot be said that petitioner has demonstrated a likelihood of prevailing on the merits.

The final requirement is that when the equities and interests of the parties are balanced, petitioner will suffer greater harm than petitioner will suffer if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)4. Since it appears that petitioner would be able to enroll D.H. in the Plainfield schools, petitioner has not established that she will suffer greater harm than petitioner, if the requested relief is not granted.

In order to prevail on a motion for emergent relief, the movant must satisfy all four requirements under N.J.A.C. 6A:3-1.6(b). Here, petitioner meets one of the requirements but fails to satisfy the other three. Under the circumstances, I **CONCLUDE** that petitioner's request does not satisfy the applicable standard for emergent relief. Accordingly, it is **ORDERED** that petitioner's request for emergent relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 3, 2016

DATE

**RICHARD McGILL**, ALJ

ljb

118-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

| | |
|---|---|
| IN THE MATTER OF THE TENURE CHARGE OF INEFFICIENCY<br><br>- against -<br><br>DANIELLE CARROLL,<br>Respondent-Teacher<br>- filed by -<br><br>STATE- OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,<br>District-Petitioner<br><br>AGENCY DOCKET NO. 261-9/15 | OPINION AND DECISION WITH RESPECT TO RESPONDENT'S MOTION TO DISMISS |

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Teresa L. Moore, Esq., Counsel,
Riker Danzig Scherer Hyland Perretti, LLP

FOR THE RESPONDENT

Colin M. Lynch, Esq.,
Zazzali Fagella Nowak Kleinbaum & Friedman, P.C.

BACKGROUND

On August 7, 2015, Armando Cepero, Principal of Miller Street School, State-Operated School District of the City of Newark ("District") filed a charge of inefficiency against Danielle Carroll ("Respondent"), a tenured teacher pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3.[1]

The bases for the tenure charge was that "Respondent has been rated Partially Effective and Ineffective in two consecutive annual summative evaluations as follows:

1) Respondent was rated Partially Effective in her 2013-14 annual summative evaluation;

2) Respondent was rated Ineffective in her 2014-15 annual summative evaluation."

Section 25 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act requires that in order to bring charges of inefficiency against a tenured teacher, he or she must have had two consecutive annual summative evaluation ratings of either "ineffective," "partially effective," or a combination thereof.

On November 15, 2015, the Respondent filed a Motion to Dismiss the Inefficiency Charge because "Carroll's summative evaluation is fatally flawed and, as a matter of law, may not form the basis of the instant charges."

Specifically, Respondent maintains that "her SGOs were simply ignored by her Principal in evaluating her 2014-15 teaching performance." According to the Respondent, "Carroll's Corrective Action Plan ('CAP') established two (2)

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[1] By letter dated October 14, 2015, the District indicated that it "is willing to proceed at hearing as if the charge had been brought solely on the basis of N.J.S.A. 18A:6-17.3."

specific Student Growth Objectives ('SGOs') as required by applicable law for the purpose of objectively analyzing student performance, and more importantly, for present purposes, for the purpose of analyzing Carroll's teaching performance."

## STATEMENT OF FACTS

Respondent Carroll is a ten-year tenured teacher, most recently assigned by the District to teach Second Grade Elementary Education at the Miller Street School for the 2014-15 school year.

The District placed Carroll on a Corrective Action Plan for the 2014-15 school year. Since Carroll taught Second Grade, instructing in both Math and English, her SGOs contained objective data-driven measures of student growth in both of those subject areas.

For Math, on page 2 of Carroll's five-page CAP, the students were given a "baseline" assessment. "The baseline assessment was the MIP Pre-Test Numbers to 1,000 which is the district's recommended baseline assessment. Based on this assessment 9 students (60%) performed at or above grade level; 6 students performed below grade level." (See Ex. #A). Predicated on that baseline assessment, Carroll's Math SGO was specifically established as follows:

> The student growth objective for the above students is for 9 students to maintain mastery and an additional three students to perform at or above grade level. By the mid year (sic) assessment 80% of students will be performing at or above grade level. By the May (sic) 14 students (93%) will be performing at or above grade level in mathematics.

Respondent identified several metrics in her CAP, by which she would measure whether her students met their learning goals in Math, as follows:

o Interim Assessment
o Unit Assessment
o PARCC

In her mid-year review, the metric that would be used to measure student progress in Math was changed and listed as follows: "Math in Focus Assessments."

Respondent identified several metrics in her CAP by which she would measure whether her students met their learning goals in ELA as follows:

o DRA2 ["Diagnostic Reading Assessment"]
o KLA Unit Assessments ["Core Knowledge Language Assessment"]
o Weekly Writing Assessment

"In addition to the Math SGO, the CAP also established an SGO for 'ELA' or English Language Arts. Here too, the CAP identifies the students' baseline assessment for measuring growth: 'At the time that the DRA 2 assessment was administered 10 students (59%) performed at the suggested DRA2 performance level of a 16 or above for students entering grade 2. 7 students (41%) fell below the suggested benchmark and therefore are performing below grade level." (See Exhibit 'A')." Predicated on that baseline assessment, Carroll's ELA SGO was specifically established as follows:

> By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skill in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. This will increase the fall projection of 10 students (59%) to 15 students (88%) of students performing on grade level by the mid year (sic) assessment. The remaining two students who are significantly below grade level will move from a 6 DRA level to a level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an

improvement rate of 67% from January doubling their growth objective for the year.

According to the Respondent, the foregoing SGOs met the legal requirement under NJTEACH to objectively measure student growth. Section (d) of N.J.S.A. 18A:6-17.3 states that tenure charges filed against an employee alleging inefficiency may only be based on "those evaluations conducted in accordance with the rubric adopted by the board and approved by the commissioner pursuant to N.J.S.A. 18A:6-16 et al. The evaluation rubric is governed by another section of the TEACHNJ Act, N.J.S.A. 18A:6-123, which specifies the minimum requirements for its approval. Among other things, the evaluation rubric 'shall' include:

1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher." [emphasis added].

"Evaluation rubrics for all teachers shall include the requirements described in N.J.S.A. 18A:6-123, including, but not limited to... (1) Measures of student achievement pursuant to N.J.A.C. 6A:10-4.2"; (2) Measures of teacher practice

pursuant to N.J.A.C. 6A:10-4.3 and 4.4. N.J.A.C. 6A:10-4.2 outlines detail the student achievement components, which includes the SGOs, that must be considered as part of a teacher's annual summative evaluations, as was set forth in N.J.A.C. 6A:10-4.1 as follows:

> The student achievement measure shall include the following components...Student growth objective(s), which shall be specific and measurable, based on available student learning data, aligned to Core Curriculum Content Standards, and based on growth and/or achievement... (i) For teachers who teach subjects or grades not covered by the Core Curriculum Content Standards, student growth objectives shall align to standards adopted or endorsed, as applicable, by the State Board. (emphasis added).

Evaluations underlying inefficiency charges brought pursuant to the Act must be at least partially based on objective measures of student performance, commonly referred to as SGOs.

The District's Framework for Effective Teaching policy manual, specifically the "Overview of Evaluation Components" section, instructs teachers and administrators to "start the yearly evaluation process with a goal setting conference which will focus on setting both specific learning goals (sometimes called Student Growth Objectives or SGOs) and professional development goals for the teachers...[which] are captured in the teacher's Individualized Professional Development Plan ('IDPD') or Corrective Action Plan ('CAP'). The policy goes on to define a student learning goal as a 'long-term objective on which the teacher will focus for his/her classes or groups of students. Each objective or focus area should be a skill or behavior critical to the students' success in the course and be aligned to the standards and/or curricular

objectives. The goals should be measurable and based on available student learning data.'" (Id. at p. A11) (emphasis added).

Each teacher without a student growth percentile ("SGP") (such as Carroll) shall have at least two (2) SGOs developed by the teacher in conjunction with his or her supervisor or a principal's designee. SGOs "and the criteria for assessing teacher performance based on the objectives shall be determined, recorded and retained by the teacher and his/her supervisor by October 31 of each academic year." N.J.A.C. 6A:10-4.2(e)(4). In calculating Carroll's summative evaluation for the 2014-15 school year, the Respondent asserts that the District was required to include scores from Respondent's SGOs based on specific, measurable and available student learning data.

At the required "mid-year review" of Carroll's CAP, the evaluator found that she had made "significant progress" toward her goals and was "effective" in making progress toward her SGOs. (Resp. brief, Ex. #B).

On page 5 of 10 of Carroll's summative evaluation, the Principal listed only her ELA SGO.

Respondent's summative evaluation for 2014-15 included a rating as to whether her student learning goals/student growth objectives were met. In a section called "Competency 4: Reflecting on the Student Learning Plan," the summative noted that "the finding from this section should relate to the ratings that you assigned to the teacher for Indicator(s) 4d, 4e and 4f." (Petitioner's Statement of Evidence, Ex. #15 @ 4-5). The Evaluator rated Ms. Carroll on

Indicators 4d, 4e and 4f, which are subsections of Competency 4, "Student Progress Toward Mastery" as follows:

4d. Partially Effective
4e. Partially Effective
4f. Ineffective

"In addition, the 2014-15 summative includes three questions about student learning goals, and the evaluator gave the following answers to those questions:"

Q. What were the student learning goals set during the creation of the IPDP/CAP, including any revisions made at the mid-year review or after observations?

A. By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skills in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. By the fall 15 students (88%) of students performing on grade level by the mid-year assessment. The remaining two students who are significantly below grade level will move from a 6 DRA to a level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an improvement rate of 67% from January doubling their growth objective for the year. [This goal was not revised during the course of the school year.]

Q. What progress did students demonstrate specifically around the earning [stet] these student learning goals? Please describe what metrics were used to assess progress of these goals.

A. As demonstrated by formal and informal observations, Ms. Carroll has not met students' learning goals. Below is list:

AIP, PLC's, implementation of professional development, lesson plans, unit plans and yearlong plans, quality of student work samples, gradebook, MIF [Math in Focus] training, CLI training and students responses and feedback.

Q. Overall, did the teacher meet the goals?

A. Did Not Meet Goals.

The mid-year review provides the following clarification regarding the "Math in Focus Assessment" metric:

> Yes. Ms. Carroll is on track to meet the goals that were set. Yes. For the DRA, students demonstrated 38% growth from September to January. Math in Focus Mid-Year Assessment: 72% or 16 students received 70% or above on the math mid-year assessment. Additional work with word problems through modeling and guided practice is necessary, as well as continual review of calendar routines to practice value, rounding, etc.

## CONTENTIONS OF THE PARTIES

### Respondent Position

The Respondent contends that her Motion for Summary Decision should be granted because her 2014-15 summative annual evaluation is "fatally flawed" due to the failure of her principal to provide either a SGO score or any objective data as to whether she met her SGOs. The District's conclusory assertion that she did not meet her SGOs supported only by "subjective, non-data driven criteria, such as 'Carroll's training' and generalized 'observations' is deemed insufficient to fulfill the statutory mandate." According to the Respondent, "[t]his deficiency is not a mere 'procedural' shortcoming, but rather, a substantive defect rendering Carroll's 2014-15 summative evaluation effectively void."

Given the purported defect in Carroll's 2014-15 summative evaluation, the Respondent argues that she "isn't required – as claimed by the District – to demonstrate that the error 'materially affected the outcome of the evaluation.'" To the extent that Respondent would be required to make such a demonstration, "she has done so, since SGO scores are a core requirement of any evaluation.

They represent 'a,' if not 'the,' centerpiece of the Act." The Respondent further argues:

> Their exclusion from her evaluation is statutorily material, such that her evaluation, in the absence of such scores, is inherently arbitrary and capricious and cannot serve as a basis for inefficiency tenure charges. Because Carroll's 2014-15 annual evaluation cannot serve as a basis for the charges, the District lacks the two summative annual evaluations necessary to pursue charges against Carroll for "inefficiency," and the charges must, respectfully, be dismissed.

With respect to the mid-year change made in Carroll's Math SGO, the Respondent notes that "she still met her Math SGO at mid-year. She also met her ELA SGO, and the determination she did so was based upon data-driven objective metrics. In Component 4(f) of her mid-year evaluation, it is undisputed that she was rated 'effective' based upon those objective data-driven metrics." (See, Dist. Ex. #12 @ p. 12).

In response to the District's assertion based on the Q&A portion of Carroll's evaluation that "[t]hese answers demonstrate that the evaluator used not only the metrics listed in Respondent's CAP, as revised in the mid-year evaluation, to determine whether she met her 2014-15 student learning goals, but also used other sources of information that were listed plainly in the summative," the Respondent notes that "the District then acknowledges that the summative evaluation 'does not recite a math goal in the answer to the question for the student learning goals recited." In addition, the Respondent notes that the District omitted noting that "the 'summative' also fails to state Carroll's Math SGO, or that the 'summative' fails to recite Carroll's ELA SGO score, which was also part of her CAP." The Respondent further takes issue with the District's

claim that the "overwhelming amount of evidence demonstrates that Respondent's student learning goals were considered and rated in her 2014-15 summative evaluation."

Notwithstanding the District's claim of an "overwhelming amount of evidence," the Respondent contends that "no actual evidence is cited or proferred." With respect to the Principal's response to the query: "What progress did students demonstrate specifically around those student learning goals? Please describe what metrics were used to assess progress of these goals?", the Respondent concludes that the undisputed answer cites "no specifics" or "metrics" were used to assess progress. "Nor does the Principal bother to cite any of the "assessment/metrics" from either Carroll's Math or ELA SGOs cited in her CAP, the alleged revised "Math in Focus" assessment cited in her Mid-Year review, or even her ELA SGO assessment quoted in the summative evaluation."

"What we get instead of a 'specific' and 'metric' based assessment of Carroll's SGOs is as follows:

> As demonstrated by formal and informal observations, Ms. Carroll has not met student learning goals. Below is a list:
>
> AIP [Attendance Improvement Plan], PLC's [Professional Learning Communities], implementation of professional development, lesson plans, quality of student work samples, gradebook, MIF [Math in Focus] training, CLI training and students responses and feedback."

In the absence of a SGO score, specifics or metrics, either those in Carroll's CAP or mid-year review, the District relies on Carroll's "ineffective" rating on Component 4(f) in her summative, "progress toward goals" – with "no

explanation provided as to why or how the determination was made based upon either Carroll's SGOs or the stated 'metrics' that were supposed to be used to determine if she met them – i.e., an SGO score."

Rather than cite to any specific metric – i.e., an SGO score, the Respondent characterizes as "gobbledy gook" the above-stated Principal's list of non-quantitative items. None of the above is deemed a metric that measures student growth. The Attendance Improvement Plan (AIP), Professional Development, lesson plans and student work samples, "do not objectively measure student growth as contemplated by the applicable law and regulations and certainly are not the measures of student growth identified in Carroll's CAP or mid-year evaluation."

Referring to the DOE guidance for "Developing and Using Practical Measures of Student Learning," SGOs are: "(1) long term goals; (2) that are specific and measurable; (3) aligned to state academic standards; (4) based on student growth and/or achievement; (5) set using available student learning data; (6) developed by a teacher in consultation with his or her supervisor; and approved and scored by a teacher's supervisor." (emphasis added).

The Respondent further maintains that "an evaluation rating may not be provided at all to a teacher in the absence of an SGO score." See N.J.A.C. 6A:10-2.4(4)(d). "[i]f any scores for teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to pending assessment results, the annual summative rating shall be calculated once all component ratings are available."

The Respondent further cites the Legislature's findings and declarations regarding the TEACHNJ Act as follows:

> b. The New Jersey Supreme Court has found that a multitude of factors play a vital role in the quality of a child's education, including effectiveness in teaching methods and evaluations. Changing the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the federal "No Child Left Behind Act of 2001." (emphasis added).

Moreover, the DOE's implementing regulations, specifically 6A:10-4.1, Components of teacher evaluation rubric, mandate that teacher evaluations include student achievement components.

> (c) To earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4.

The Respondent reiterates that, given the absence of a 2014-15 SGO score, "the District simply does not have the required two consecutive years of 'ineffective' or 'partially ineffective' performance evaluations necessary to pursue charges under Section 25 of the Act. Inasmuch as N.J.S.A. 18A:6-17.2(d) places the "ultimate burden" on the District "of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met," the Respondent argues that the District cannot meet its burden because "[t]he only evaluations which may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, C.26 (C. 18A:6-117 et al.)." N.J.S.A. 18A:6-17.3.

With respect to the statutory defenses, the Respondent maintains that "defenses (1) and (4) would easily apply." According to the Respondent, defense one (1) is applicable because her evaluation "failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan." Also, defense four (4) is applicable because "the substitution of non-metric considerations in allegedly analyzing whether or not Carroll met her SGO's is the very height of arbitrary and capricious conduct..."

Finally, the Respondent rejects the Certification of Larisa Shambaugh, dated December 28, 2015, wherein "she explains how student growth objectives are incorporated into the annual summative scores of teachers in the Newark Public Schools (NPS)." The Respondent also takes issue with the District's "belatedly provided 'Equivalency Application'" as a rationale for not providing Carroll with a SGO score.

Although the Respondent acknowledges that "the District sought and received approval to wrap the SGO score into its Teacher Practice components, and more specifically 'Competency 4,' which contains a sub-section '4(f),' entitled 'Progress Toward Goals'... and increased the value of Competency 4 to 32% to ensure 'equivalency,"[2] the Respondent argues that "neither the waiver application, nor the Commissioner's approval of the application exempts the District from issuing a SGO score for the Respondent nor, even more importantly, utilizing objective measures of student growth in evaluating her and

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[2] "The District increased the value of Competency 4 to 32% of the evaluation score, rather than 21% which would have been the case if the SGO score were an independent standalone component of the evaluation.'

her peers." Thus, the District neither sought, nor was granted, waiver from N.J.A.C. 6A:10-4.1(c) ("to earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4.").

The District's own "equivalency application" confirms this, by noting, "[t]o be clear, NPS is not requesting any waiver from the weighting or inclusion of SGOs or SGP...[i]ndeed, the district follows this regulation explicitly." (See ¶3 of Waiver Application).

In seeking the "waiver," the District informed the Commissioner that it would include within Competency 4 (presumably through sub-competency 4(f)) what is "seen through quantitative data, (e.g., progress on student learning goals set at the beginning of the year, interim assessments, standardized tests, etc.)." (See ¶2 of Waiver Application).

Since neither the District nor the Commissioner can waive a statutory mandate, the District's equivalency waiver does not exclude the requirement "that the evaluation rubrics include 'multiple objective measures of student learning that use student growth;' including the utilization of 'standardized assessments...' Certainly, there is no evidence in the 2014-15 summative evaluation of any quantitative data – only reference to patently subjective criteria that do not jibe with the SGOs established in Respondent's CAP or her mid-year evaluation."

District Position

The District, in opposition to the Respondent's Motion to Dismiss, maintains that it "complied fully with its obligation to provide a summative evaluation of the Respondent's performance in the 2014-15 school year that included a rating based on whether Respondent's students met objectives for their academic growth. As such, the Motion should be denied."

After reviewing and amending the Respondent's mid-year metric for Math to substitute "Math in Focus assessments," noting her ratings in Indicators 4d, 4e and 4f (subsections of Competency 4, "Student Progress Toward Mastery"), and reviewing the evaluator's Q&A answers about learning goals supra, the District states:

> "These answers demonstrate that the evaluator used not only the metrics listed in Respondent's CAP, as revised in the mid-year evaluation, to determine whether she met her 2014-15 student learning goals, but also used other sources of information that were listed plainly in the summative. The fact that the summative does not recite a math goal in the answer to the question asking for the student learning goals to be recited is hardly a 'fatal flaw,' as Respondent argues. Rather, the overwhelming amount of evidence demonstrates that Respondent's student learning goals were considered, and rated, in her 2014-15 summative evaluation."

The District acknowledges that TEACHNJ, inter alia, requires, in terms of measurable student objectives, the following:

P.L. 2012, c.26 ("TEACHNJ") requires that the school districts adopt a rubric approved by the Commissioner of Education, and that

> The State Board of Education shall promulgate regulations...to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals and vice-principals. The standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric he partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measure and implementation processes. Standardized assessment shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher. N.J.S.A. 8A:6-123(a) and (b)...

"The School District adopted such a rubric, and its adoption and approval by the Commissioner are not at issue on this motion. The School District also abided by its obligation to use 'measures of student achievement' in teachers' summative performance evaluations, as the applicable regulation provides:

> Measures of student achievement shall be used to determine impact on student learning. The student achievement measure shall include the following components:
>
> Student growth objectives, which shall be specific and measurable, based on available student learning data, aligned to Core Curriculum Content Standards, and based on growth and/or achievement;
>
> (e) Student growth objectives for teachers shall be developed and measured according to the following procedures:
>
> (1) The chief school administrator shall determine the number of required student growth objectives of teachers, including teachers with a student growth percentile. A teacher with a

> student growth percentile shall have at least one and not more than four student growth objectives. A teacher without a student growth percentile shall have at least two and a maximum of four student growth objectives. By August 31, prior to the academic year in which the evaluation rubric applies, the Department shall provide on its website the minimum and maximum number of required student growth objectives within this range.
>
> (3) Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each student growth objective. If the teacher does not agree with the student growth objectives, the principal shall make the final determination.
>
> (4) Student growth objectives and the criteria for assessing teacher performance based on the objectives shall be determined recorded, and retained by the teacher and his or her supervisor by October 31 of each year, or within 20 work days of the teacher's start date if the teacher begins work after October 1..."

In its sur-reply, the District reiterates that the Respondent's "2014-15 summative evaluation included measures of student learning goals ('student growth objectives')...both in the narrative portion of the summative evaluation as well as in the accompanying rating sheet." See Petitioner's Statement of Evidence, Ex. 15 (pp. 4-5) [narrative] and pp. 8-10 [rating sheet].

The student learning goals incorporated into the Respondent's summative evaluation are in conformance with the District's state-approved teacher performance evaluation system (i.e., the Framework for Effective Teaching).

With respect to Competency 4, called "Student Progress Toward Mastery," the District notes that "Competency 4 outlines mechanisms for identifying whether or not students are learning in one lesson and over the

course of the year." *Id.* Six indicators, each of which is rated, comprise Competency 4:

> In an individual lesson:
> 4a. Checks for Understanding
> 4b. Feedback
> 4c. Demonstration of Learning
>
> Over the course of a year:
> 4d. Using Data
> 4e. Understanding of Growth
> 4f. Progress Toward Goals

According to the District, the ratings the Respondent received at her mid-year and summative evaluations for Competency 4 "but not in classroom observations during the school year," entailed, as described in the Framework, "utiliz[ing] the evidence specifically around the teachers' progress in meeting student learning goals in the teacher's...CAP."

The District disputes the Respondent's contention that "her summative evaluation should include a standalone 'SGO score,' or something to that effect, and she moves to dismiss the charge contending, in essence, that the lack of a category so denominated renders her summative evaluation deficient. To the contrary, the applicable regulation provides:

> Student growth objectives for teachers shall be developed and measured according to the following procedures: ...The teacher's designated supervisor shall calculate each teacher's student growth objective score. The teacher's student growth objective score, if available, shall be discussed at the teacher's annual summary conference and recorded in the teacher's personnel file." N.J.A.C. 6A:10-4-2(e)(6).

In short, the District argues that "the record shows plainly that student learning goals were included and rated in competencies 4d, 4e and 4f of the Respondent's summative evaluation."

The District has further submitted the Certification of Ms. Larisa Shambaugh ("Shambaugh"), Executive Director of Strategic Initiatives in the Talent Office of the NPS. Whereas Ms. Shambaugh "recognizes that the District's method of calculating student academic growth and evaluating teachers on that progress 'looks different' from the SGO-setting methods that the State Department of Education has suggested in nonbinding guidance," the District avers that it "requested a determination from the Department of Education pursuant to N.J.A.C. 6A:5 that its method of rating student growth is equivalent to the requirements of N.J.A.C. 6A:10-4.2 (student achievement components of teacher evaluation) (Shambaugh Cert. ¶1¶1 9-11 and Ex. A)."

The District urges the Arbitrator to "be guided by the Department's initial approval of the Framework and its January 2015 equivalency approval." Unlike the Respondent's reliance on NJSDOE guidance set forth in the "Student Growth Objectives Guidebook (undated), whose use is "suggested" rather than mandated, the District alludes to the Achieve NJ: Teacher Evaluation Scoring Guide which states:

> *"Local school districts have discretion on how to combine observation data and evidence about a teacher's practice collected throughout the year into a final teacher practice rating on a 1 – 4 scale,"* and on page 6, "SGO scoring can be approached in several ways. The specific approach must be determined at the local level (district or school)..." (emphasis added).

In her Certification, Shambaugh notes that the District's evaluation rubric was approved by the NJSDOE in October 2012 and entitled Newark Public Schools Framework for Effective Teaching Guidebook for Teachers and Administrators. The Framework focuses on five competencies, with each competency containing several '"indicators' that are rated individually. When the overall summative evaluation is calculated at the end of the year, the evaluator determines the teacher's performance rating on each of the five competencies."

"The ratings on each competency is assigned a point value and the points are added together (or subtracted, which is possible with respect to the Competency 5 rating) to obtain an overall summative rating."

"The maximum possible number of points was seventeen (17) in 2013-14, and nineteen (19) in 2014-15 as a result of a two-point increase in weight given to Competency 4 in 2014-15. In 2014-15, teachers were rated 'highly effective' if their overall score was 17-19 points; 'effective' if their overall score was 13-16 points; 'partially effective' if their overall score was 8-12 points; and 'ineffective' if their overall score was 0 to 7 points."

"The School District's evaluation system factors annual measures of student academic achievement, called 'student learning goals' or student growth objectives, into each teacher's summative evaluation through ratings given in three of six indicators in Competency 4. Indicators 4(d), 4(e) and 4(f) measure various aspects of student learning progress in 'using data,' 4(d); 'understanding of growth,' 4(e); and 'progress toward goals,' 4(f). These three indicators address information that is gathered during the course of the school year, and

are rated at the mid-year evaluation and the summative evaluation, not in each classroom observation."

"At no time did the Department mandate that NPS measure student achievement in the precise manner that is set forth in its guidance documents...The methods published by the Department are suggested, but not mandatory." At some point, "the District submitted a formal equivalency application to the Department of Education requesting recognition that its method of implementing annual student growth objectives into annual teacher performance evaluations is equivalent to what N.J.A.C. 6A:4-2 requires." It reads:

> Progress on a teacher's SGOs is included in a teacher's annual evaluation through Competency 4. Specifically, there are several indicators in Competency 4 that focus on the teacher's practice on setting goals (indicator 4d), reviewing data (4e), and ultimately accomplishing progress as set out in the SGOs (4f). As Competency 4 counts for up to 6 out of 19 points (or 32% of the overall rating), NPS is in compliance with the SGO requirements of TEACHNJ. (see third page)

The District explained that it was not seeking a waiver from the inclusion of SGOs that N.J.A.C. 6A:10-4.2 requires because "it follows that regulation," but rather a declaration that "the manner in which the District incorporates these measures into a teacher's annual summative rating," as distinguished from the "typical approach of calculating the teacher's practice rating and then adding on scores from SGOs and SGP separately," was acceptable.

According to Shambaugh, "[a]ny argument that the NPS teacher evaluation system does not include a score for measuring student learning or SGO should be rejected because Competency 4 includes that very information.

Additionally, while the method that NPS uses 'looks slightly different in implementation than the typical approach,' the Department has determined that this method is in compliance with TEACHNJ."

The evidence collected using Framework includes "tangible outcomes or actions that can be seen and/or measured – that is, what can be *observed* (through classroom observations, team meetings, interactions with students, etc.); what can *be seen in artifacts* (e.g., examples of the teachers' and students' work, such as unit or lesson plans, student work portfolios, planning tools, etc.); and *seen through quantitative data,* (e.g., students' progress on learning goals set at the beginning of the year, interim assessments, standardized tests, etc.). Evaluators use what they have seen through all of these lenses to assign each teacher a score in each Competency, which leads to a single overall evaluation rating of Highly Effective, Effective, Partially Effective, or Ineffective."

DISCUSSION

The Arbitrator is persuaded that Respondent has made a prima facie case that when the State-Operated School District of the City of Newark filed tenure charges against her alleging inefficiency pursuant to the Section 25 of the NJTEACH Act not only was the District required include a student growth objective ("SGO") or student learning goal in her annual summative evaluation for each of the two years (2013-14/ 2014-15) where she had been consecutively rated "partially effective" and "ineffective, but also the SGO score had to be based on objective, measurable and data driven evidence of student growth or progress in the subject areas she taught. N.J.A.C. 6A:10-4.1.

It is undisputed that Ms. Carroll, who was placed on a Corrective Action Plan ("CAP") for 2014-15, developed a Math SGO and an English Language Arts or ELA SGO in consultation with her principal. It is also undisputed that the Respondent set her Math SGO in the CAP as follows:

> The student growth objective for the above students is for 9 students to maintain mastery and an additional three students to perform at or above grade level. By the mid-year assessment 80% of students will be performing at or above grade level. By the May 14 students (93%) will be performing at or above grade level in mathematics.

Respondent further identified several metrics in her CAP that she would utilize to ascertain whether the students had met their learning goals in Math as follows:

> Interim Assessment
> Unit Assessment
> PARCC

Subsequently, in her mid-year review, the metric that would be used to measure student progress in Math was changed to: "Math in Focus" assessments. Accordingly, Carroll's SGO was measured by this "metric" in her summative evaluation.

As distinguished from a typical standalone SGO, which is numerically weighted and added to the teacher practice score to obtain the total summative rating for the academic year, the State-Operated School District of the City of Newark received an "equivalency" approval from the NJSDOE to integrate the SGO score into its Teacher Practice domains, specifically "Competency 4," which, in sub-domain 4(f), contains "Progress Toward Goals."

The annual summative evaluation Carroll received on sub-domains 4(d), 4(e) and 4(f), including, "Progress Toward Goals" reads as follows:

> Evidence-based Growth Areas for Competency 4
>
> Ineffective rating 4a-Checks for Understanding; 4b Feedback; 4f Progress Toward Goal. Ms. Carroll reads to prepare and anticipate students' inquiries. As demonstrated, she will try to respond to students' questions, but she will not have sufficient information. Provide students the opportunity to put a wondering up and then allow students to research. She needs to utilize the computer lab and provide students the opportunity for research of specific topics. Example what system was in place to police these ancient countries or states? Is it any different than today?

The District has maintained that "the record shows plainly that student learning goals were included and rated in competencies 4d, 4e and 4f of Respondent's summative evaluation." With respect to sub-domains 4d, 4e, and 4f, upon which the District has predicated the Respondent's SGO, specifically 4(f) Progress Toward Goals, the evaluator wrote the following responses to the queries:

> What progress did students demonstrate specifically around learning these student learning goals? Please describe what metrics were used to assess progress (toward) these goals.
>
> As demonstrated by formal and informal observations Ms. Carroll has not met student's learning goals. Below is a list:
>
> AIP, PLC's, Implementation of professional development, Lesson plans, Unit plans and year long plans, quality of student work sample's, gradebook, MIF training, CLI training and student responses and feedback.
>
> Overall, did the teacher meet the goals?
> Did Not Meet Goals

The crux of the Respondent's Motion for Summary Decision is the District's purported failure to comport its summative annual evaluation of

Respondent with N.J.A.C. 6A:10-4.4(c) which states: "To earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores and a teacher practice score."

Whereas the District acknowledges that its method of "calculating student academic growth and evaluating teachers on that progress 'looks different' from the SGO-setting methods that the State Department of Education has suggested in nonbinding guidance," with respect to the Respondent's Motion for Summary Decision, the pivotal issue is whether the SGO "scores" the Respondent received based upon Indicators 4d, 4e and 4f, particularly assessing students' progress toward goals, are tantamount to the statutory requirement that evaluation rubrics include "multiple objective measures that use student growth," including the utilization of "standardized assessments."

Inasmuch as the evidence indicates that, notwithstanding the change made in Respondent's Math SGO during her mid-year CAP review, she still met her SGO based on objective numerical data and was rated "effective" at that juncture, in the Arbitrator's opinion, the District's discontinuance of these data-based SGO measures [i.e., DRA (38% growth); MIF (72% received 70% or above)] for her annual summative evaluation requires explanation. The District's acknowledgement that the summative evaluation "does not recite a math goal in the answer to the question asking for the student learning goals to be recited" combined with the fact that the Principal does not cite any of the "assessment/metrics" from either Carroll's Math SGO (i.e., the revised "Math in

Focus") assessment cited in her mid-year review or even her ELA SGO quoted in the summative evaluation is problematic.

As previously noted supra, the AIP and Math in Focus training references to metrics used to formulate a SGO are devoid of data or measurable objective information such as standardized tests. Clearly, neither the MIF and CLI training nor the lesson plans and student work samples measure student growth.

In the absence of specific metrics or scores comprising Carroll's SGOs, given the Respondent's prima facie case, the ultimate burden shifts to the District to prove that it met the statutory mandate to generate a SGO score for a tenured teacher charged with inefficiency. "The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met." N.J.S.A. 18A:6-17.3(2)(d).

In the Arbitrator's opinion, a determination of whether the District's method of developing a SGO, given the Achieve NJ: Teacher Evaluation Scoring Guide which states, inter alia, "SGO scoring can be approached in several ways," and the District's reliance on its evaluation system approved by the NJSDOE, particularly its Framework for Effective Teaching, met the statutory criteria insofar as providing the Respondent with a data-based SGO is concerned, requires an evidentiary hearing. In this regard, it is noteworthy that the District's Framework for 2014-15 mandates that student learning goals "be measurable and based on available student learning data."

Although the District acknowledges that by seeking an equivalency waiver, which allowed it to incorporate its SGO score into its Teacher Practice

components rather than using a standalone SGO score, "NPS was not requesting any waiver from the weighing or inclusion of SGOs or SGPs...," it is unclear how the District calculated whether the Respondent met the data-based SGOs set forth in her CAP. The evaluator conducting Respondent's mid-year review addressed the MIF assessment as follows:

> Yes. Ms. Carroll is on track to meet the goals that were set. Yes. For the DRA, students demonstrated 38% growth from September to January. Math in Focus Mid-Year Assessment: 72% or 16 students received 70% or above on the math mid-year assessment. Additional work with word problems through modeling and guided practice is necessary, as well as continual review of calendar routines to practice value, rounding, etc.

Also problematic are the means by which the District converted the subjective "metrics" it used to rate Carroll partially effective in sub-domains 4d and 4e, ineffective for 4f of Competency 4 into objective data, and then calculated the number of points out of a maximum of six (6) points she was entitled to receive. The Arbitrator further deems subject to additional explanation and reconciliation the Framework evidentiary standard of "What can be seen in quantitative data?" (i.e., standardized assessment data, interim assessments, standardized tests, etc.) with the paucity of metrics/data in the summative evaluation.

In order to render a summary decision, the Arbitrator should be persuaded by a preponderance of evidence that there are no genuine issues of material fact in dispute, and the nonmoving party is entitled to judgment as a matter of law. The areas discussed above for which greater clarity is sought preclude granting the Respondent's Motion to Dismiss. "Motion for summary decisions must be

denied when there are genuine issues of material fact that can only be resolved through an evidentiary hearing."

In the final analysis, the Arbitrator will have to determine on the merits whether, on the one hand, the District failed to provide the Respondent with a legally sufficient SGO based on specific measurements of student learning goals or "metrics" and thereby its issuance of Carroll's 2014-15 annual summative evaluation, as well as the tenure charge of inefficiency based on two consecutive years of partially effective or ineffective summative evaluations, was statutorily deficient; or, on the other hand, as the District contends, there exists an "overwhelming amount of evidence that Respondent's learning goals were considered and rated in her 2014-15 summative evaluation."

Clearly, the DOE's implementing regulations mandate that in order "to earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4." Moreover, these regulations further provide that " [i]f any scores for the teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to pending assessments results, the annual summative evaluation shall be calculated once all component ratings are available." N.J.A.C. 10-2.4.4(d).

Since both the District's ultimate burden of proving that the tenure charges against Carroll for inefficiency brought, pursuant to Section 25 of the Act based on two consecutive years (2013-14 and 2014-15), of either partially effective or

ineffective annual summative ratings were made in accordance with law and the implementing regulations, and the four statutory defenses to the tenure charges as set forth in N.J.S.A. 18A:6-17.2 can only be determined "on the merits after a hearing and not procedurally without a hearing," the District's Motion to dismiss must be denied. *See I/M/O Tenure Charge of Leonard Yarborough*, (Dkt. No. 259-9/15)(Jan. 6, 2016)(Arbitrator Arthur A. Riegel). In the event the District either fails to meet its burden or the Respondent establishes that either statutory defense (1) or (4) or both are applicable in the instant case, evidence that the Respondent's "evaluation failed to adhere substantially to the evaluation process" as a result of the District's omission of a quantitative SGO score, or that such omission constitutes "arbitrary and capricious" conduct on the District's part, the Arbitrator would be required to determine "if that fact materially affected the outcome of the evaluation." N.J.S.A. 18A:16-17.2. A related issue is whether a finding that a deficient SGO score "materially affected the outcome" of the Respondent's "evaluation process" is tantamount to a finding that but for her deficient SGO score she would have been rated effective?

Considering the remedy proposed by the Respondent of dismissing the tenure charge of inefficiency filed against her by the District based on a "partially effective" rating for 2013-14 and an "ineffective" rating for 2014-15 and "restoring the Respondent to employment with full back pay, benefits, seniority, and all other emoluments of her position," the Arbitrator finds that a factual inquiry is necessary to ascertain whether the District substantially complied with the evaluation process.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

**AWARD**

(1) The Respondent's Motion for Summary Decision is denied.

(2) The evidentiary hearing will proceed when the Respondent , Ms. Danielle Carroll, is medically cleared by her physician to attend the hearing.

March 28, 2016 — Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

I, Robert T. Simmelkjaer, hereby affirm that I have executed this instrument as my Interim Award in Agency Docket Case No. 261-9/15 denying Respondent's Motion for Summary Decision as set forth above.

March 28, 2016 — Notary Public

RENEE DISTELHURST
NOTARY PUBLIC OF NEW JERSEY
ID #21606
MY COMMISSION EXPIRES 8/12/2019

114-16

OAL DKT. NO. EDU 08547-15
AGENCY DKT. NO. 112-5/15

| | | |
|---|---|---|
| ELIZABETH CORBACHO-MUSNGI, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/16

Date of Mailing: 3/24/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 08547-15
AGY REF NO. 112-5/15

**ELIZABETH CORBACHO-MUSNGI**,
Petitioner

v.

**STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,**
Respondent.

---

**Nicholas Poberezhsky**, Esq., for Petitioner (Caruso, Smith, Picini, PC, attorneys)

**Robert M. Tosti**, Esq., for Respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC, attorneys)

Record Closed: February 23, 2016 Decided: February 29, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ:

Petitioner seeks reimbursement of salary withheld from February 14, 2015 through February 21, 2015, from respondent.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on June 11, 2015.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of al issues in controversy between the parties.

## ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

2/29/16
DATE

Thomas R. Betancourt, ALJ

Date Received at Agency: 3-3-16

Date Mailed to Parties: MAR 3 2016

Laura Dudeis
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

**ROBERT M. TOSTI, ESQ.**
**ATTORNEY ID#: 016711975**
**PURCELL, MULCAHY, HAWKINS, FLANAGAN & LAWLESS, LLC**
**One Pluckemin Way**
**P.O. Box 754**
**Bedminster, New Jersey 07921**
**(908) 658-3800**
**Attorneys for Respondent, State-Operated School District of the City of Newark, in the County of Essex**
**Our File No. (650) 10160-ECF/RFB**

| | |
|---|---|
| In the matter of<br>ELIZABETH CORBACHO-MUSNGI,<br><br>and the<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX | **BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**<br>**OAL DOCKET NO. EDU 08547-2015N**<br><br>**STIPULATION OF SETTLEMENT** |

Petitioner, Elizabeth Corbacho-Musngi, residing at 10 Honiss Place in Newark, New Jersey 07104 and Respondent, the State-Operated School District of the City of Newark, whose address is 2 Cedar Street, Suite #1, Newark, New Jersey 07102, having resolved the outstanding issues between them, agree as follows:

WHEREAS Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS a prior tenure charge case was resolved by a decision of an arbitrator, and Petitioner was subject to certain loss of salary, and

WHEREAS due to a bookkeeping error, at the time the statutory period of unpaid suspension expired, petitioner was not placed back on the payroll in a timely manner and

WHEREAS, the District is an *Abbott* District, with stringent budget limitations and due to the uncertainly of the outcome of a trial as well as the expenditure of resources due to multiple days of hearings with numerous witnesses and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS, this Stipulation of Settlement is in the best interest of the Parties and the public by establishing certainty of result and avoiding an uncertain conclusion after protracted and costly proceedings at the expense of the public;

In exchange for the remuneration of pay equivalent to thirteen (13) days' salary at Petitioner's 2014-15 pay rate, to be effectuated by Respondent within thirty (30) days from the date that this Stipulation of Settlement is signed by the Parties, the sufficiency of which is hereby acknowledged, Petitioner hereby waives, releases and discharges any and all claims or rights that she has or may have against the Respondent District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Petitioner's employment with the District up to the date of the execution of this Stipulation of Settlement.

1/27/16
DATE

E Corbacho-Musngi
ELIZABETH CORBACHO-MUSNGI

2-19-16
DATE

STATE-OPERATED SCHOOL DISTRICT

115-16

115-16E

OAL DKT. NO. EDU 02756-16
AGENCY DKT. NO. 48-2/16

| | | |
|---|---|---|
| R.R., ON BEHALF OF MINOR CHILDREN, J.R. AND L.R., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| | : | DECISION ON |
| V. | : | APPLICATION FOR EMERGENT RELIEF |
| BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY, | : | |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/23/16

Date of Mailing: 3/24/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**DECISION ON**
**EMERGENCY RELIEF**
OAL DKT. NO. EDU 02756-16
AGENCY DKT. NO. 48-2/16

**R.R. ON BEHALF OF MINOR CHILDREN,**
**J.R. AND L.R.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,**
Respondent.

---

**Rosa Elfant Rickett**, Esq., pro se, petitioner (The Elfant Rickett Law Firm, attorneys)

**Rodney T. Hara**, Esq. for respondent, Board of Education of the Borough of Glen Rock, Bergen County (Fogarty & Hara, attorneys)

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

On February 22, 2016, petitioner, R.R., on behalf of her children, J.R. and L.R., filed with the Commissioner of the New Jersey Department of Education (Department) a Petition for Emergent Relief against respondent, Board of Education of the Borough of Glen Rock, Bergen County (Board or District).

The Petition for Emergent Relief reflects that R.R. resides at 123 Maple Street[1], Glen Rock, New Jersey; that petitioner purchased her home in Glen Rock on or about January 5, 2016; that on or about January 20, 2016, petitioner completed the paperwork to enroll J.R. and L.R. in the District's schools; that petitioner provided a letter to the Superintendent outlining the reasons why it is necessary and in the best interests of her children to be placed at Coleman School; and that petitioner was thereafter advised by the Superintendent that her children were being placed at Central School.

The Petition for Emergent Relief alleges that the District's action in not allowing J.R. and L.R. to attend Coleman School was inappropriate, unreasonable, arbitrary and capricious, and in violation of her minor children's rights. The Petition for Emergent Relief seeks entry of an order directing that petitioner's children be immediately placed at Coleman School.

By letter dated February 22, 2016, the Director of the Department's Bureau of Controversies and Disputes (Bureau) notified petitioner that when relief is sought on an emergency basis, a motion accompanied by a memorandum addressing the standards for such relief must also be filed. On February 22, 2016, petitioner filed with the Commissioner a letter brief. On February 23, 2016, petitioner filed with the Commissioner correspondence to supplement the Petition for Emergent Relief. The Commissioner transmitted the Petition for Emergent Relief to the Office of Administrative Law (OAL), where it was filed on February 24, 2016.

On March 1, 2016, the Board filed a letter brief in opposition to the Petition for Emergent Relief, accompanied by a Certification of Dr. Paul Valenti, District Superintendent, with exhibits. On March 1, 2016, petitioner filed a reply to the Board's opposition. On March 2, 2016, the Board filed a surreply. Oral argument was held on March 2, 2016.

Pursuant to N.J.A.C. 6A:3-1.6(a), where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the

[1] A fictitious address is used herein.

jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case. A motion for a stay or emergent relief must be accompanied by a letter memorandum or brief which addresses the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In order to prevail on an application for emergent relief, the petitioner must meet all four prongs as set forth above.

Irreparable harm is harm that cannot adequately be redressed by monetary damages. Crowe, supra, 90 N.J. at 132-33. Emergent relief should not be ordered except when necessary to prevent substantial, immediate and irreparable harm. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Here, while it may for various reasons be beneficial or preferred that petitioner's children attend the same school as other children on their street, petitioner argued that by not attending the same school as other children on the street, her children "may be emotionally and academically harmed." It is insufficient to argue that harm "may" result, and there was no evidence presented to support that petitioner's children will suffer emotional and academic harm. To the contrary, although petitioner's children presently attend school out-of-district, they have nevertheless forged friendships with their neighbors.

Petitioner also argued that the Board has discriminated against her children, and that her children will be harmed "by not being similarly treated as the other children living on [Maple Street] all of whom attend the Coleman School." However, the Superintendent

certified that there is another child on Maple Street who attends Central School. Further, although the petitioner may take issue with the District's policies and regulations, there was no evidence to suggest that the District's policies and regulations are being applied solely or differently to her children. To the contrary, the Superintendent certified that there are multiple other children, geographically closer to Coleman School than petitioner's children, who do not attend Coleman School and are on a waiting list to do so. Further, the Superintendent certified that there are multiple other streets in Glen Rock with students who attend Coleman School and Central School.

Finally, petitioner argues that she will suffer harm "in the immediate future" when she is forced to transport J.R. to the middle school, L.R. to the Central School and her twins to preschool at the Coleman School. Even if such circumstance was to be viewed as "harm," is certainly is not immediate harm that would warrant the extraordinary remedy of emergent relief.

In view of the foregoing, I **CONCLUDE** that petitioner has not established irreparable harm.

Petitioner failed to specify any particular statute, regulation or other legal basis for the rights asserted by petitioner, to wit: her "legal right to promote the best interests of her children", her "right not to have to transport three different set of children to three different schools," and "J.R. and L.R.'s right to attend their District home school and be treated in a similar manner as the rest of the children living in their immediate neighborhood." Additionally, petitioner's brief and argument likewise failed to cite any legal support relative to the underlying issue of the legality of the District's policies and regulations, its "virtual border" system, or its ability to assign students to particular schools. Further, while in part relying upon the District's policies and regulations in support of her position, petitioner also argues that the policies are in conflict and not clear.

In view of the foregoing, I **CONCLUDE** that petitioner has not established at this time that the legal right to her claim is settled or a likelihood of success on the merits.

In balancing the equities and interests of the parties, the petitioner has cited a number of reasons she seeks to have her children enrolled at Coleman School, including personal, convenience and financial reasons. However, summarily placing petitioner's children in Coleman School, absent a determination on the merits, would open the door for other parents to similarly request specific school placements, potentially adversely affecting the number of students and class sizes at the District's schools, and potentially resulting in adverse financial ramifications in accommodating such changes.

In view of the foregoing, I **CONCLUDE** that petitioner has not established that she will suffer greater harm than the District if emergent relief is not granted.

In sum, I **CONCLUDE** that petitioner has not met her burden to establish an entitlement to emergent relief.

It is hereby **ORDERED** that petitioner's application for emergent relief be **DENIED.** It is further **ORDERED** that a telephone prehearing be held on **March 14, 2016** at **3:00 p.m.** to address procedural and scheduling matters.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

3/3/16
DATE

Kelly J. Kirk
**KELLY J. KIRK**, ALJ

dlc

120-16

IN THE MATTER OF THE TENURE CHARGES REGARDING

RESPONDA SIMS

DOCKET NO. 360-12/15

AND THE

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

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

AWARD

APPEARANCES:

FOR THE DISTRICT:

FRANK J. VITOLO, ESQ.
RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
HEADQUARTERS PLAZA
ONE SPEEDWELL AVENUE
MORRISTOWN, NEW JERSEY 07962-1981

FOR MS. SIMS:

JOHN BRANIGAN, ESQ.
OXFELD COHEN, PC
60 PARK PLACE, SIXTH FLOOR
NEWARK, NEW JERSEY 07102

DATES OF HEARING:

FEBRUARY 11, 2016 (TELEPHONICALLY)
MARCH 1, 2016
MARCH 7, 2016

## I. PROCEDURAL BACKGROUND

The State-Operated School District of the City of Paterson, Passaic County ("District" or "Employer") initiated and the State District Superintendent certified to the Commissioner of Education a tenure charge seeking the termination of employment of Responda Sims ("Respondent" or "Ms. Sims"), who is employed as a Secretary within the District. By letter dated December 28, 2015, the charges were referred to this Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. By agreement of the parties, the hearing of this matter was commenced telephonically on February 11, 2016, and was

continued in person on March 1 and 7, 2016, at the offices of the District, 90 Delaware Avenue, Paterson, New Jersey. Throughout this proceeding, both parties were ably represented by legal counsel. Each party was provided a full and fair opportunity to present evidence through documents and testimony. All witnesses testified under oath and were subject to direct, cross, and redirect examination. The parties agreed to the presence of a court reporter and to the subsequent preparation and use of a transcript of the evidential hearings. When the taking of evidence was concluded on March 7, 2016, counsel agreed to present written closing arguments. Same were timely conveyed to the Arbitrator, whereupon the record was closed. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full, fair, and careful consideration to all evidence of record, all arguments, and all authorities and citations offered by the parties.

## II. THE CHARGES AND APPILCABLE STANDARDS

Based upon the Notice of Tenure Charge of Inefficiency issued by the District, the State District Superintendent's finding of probable cause to credit the evidence in support of the charges, and Respondent's Answer, the Office of the Commissioner of Education concluded that the charges, if true, were sufficient to warrant dismissal or reduction in salary, "subject to determination by the arbitrator of respondent's defenses. . . ." The charges thus were referred to this Arbitrator by the Bureau of Controversies and Disputes pursuant to N.J.S.A.18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, for her review "under the preponderance of the evidence standard."

In the charges against Respondent, the District asserts that she "has demonstrated an inability to effectively execute her duties as a secretary" and that, specifically, she failed to effectively perform the following duties (set forth in Paragraphs 3 through 21 of the Notice of Tenure Charge): to demonstrate competency in word processing, computer data bases, and organizational skills; to demonstrate communication skills and proper etiquette; to organize and maintain files; to maintain information for yellow cards, registers, and monthly reports; to exhibit a mature attitude; to exercise good professional judgment; to cooperate with School

District staff; to perform her duties skillfully; to exhibit good work habits; to accept constructive criticism; to establish and maintain rapport with parents and with administrators; to maintain confidentiality; and to maintain regular attendance and punctuality at work.

## III. FINDINGS OF FACT

### A. Background

Respondent has worked as a secretary since approximately 1995 and has been employed by the District as a Secretary for more than 16 years. Beginning in the year 2000, she worked at two schools in the District and then was assigned to Napier Academy, formerly known as School 4. She continued there until January 2013, when she was transferred to School 2, her current assignment. During Respondent's tenure at Napier Academy, the Principal to whom she reported completed evaluations in 2008, 2009, 2010, 2011, and 2012. In each, the Principal gave Respondent the highest of ratings for outstanding performance, with numerous accolades. In the performance evaluation at Napier Academy, issued in April 2012, the Principal wrote as follows:

> She is my confidant and friend. There isn't anything she wouldn't do for me, my staff or the students of Napier Academy. She was friendly to parent[s] and visitors and, at the same time confidential and discreet in private matters. She has been a blessing to me and an asset to the school.

By the end of 2012, however, the working relationship between Respondent and the Napier Academy Principal had deteriorated as the result, according to Respondent, of an argument that involved inappropriate remarks by Respondent.

In January 2013, Respondent thus transferred to School 2 ("the School") and began working directly for Principal Felisa Van Liew and two Vice Principals, Dorothy Eason, who joined the school in July 2013, and Edward Cisneros who joined School 2 at the beginning of the 2013-2014 school year. Also working in this office was another Secretary, who had been assigned to that office for a number of years.

Secretarial tasks within the office were allocated in a general manner by which Respondent would handle most matters pertaining to students while the other Secretary addressed primarily matters involving teachers. In the absence of one of the Secretaries, it was expected that the other would assume responsibilities for the student or teacher tasks, as the case may be. Also, while Respondent was responsible for student-related issues, she also performed duties relating to substitute teachers, which was a category of functions separate from those pertaining to faculty.

Principal Van Liew testified that there was a very significant workload for these two Secretaries. They were, she said, busy all of the time, with the telephone presenting frequent interruption from teachers, parents, staff, and students. Principal Van Liew testified that the office was understaffed and actually needed three secretaries in light of the volume of activity.

### B. May 2013 Positive Evaluation

In May 2013, following five months on the job at School 2, Principal Van Liew completed a formal evaluation of Respondent's performance. In it, she listed "commendable" or "satisfactory" in all applicable categories. In no category was Respondent rated as needing improvement or as performing unsatisfactorily, and in no category was she rated as having been "outstanding." It was noted in the comments that Respondent was still new to the School and was learning the responsibilities. Principal Van Liew wrote that Respondent "is to be commended for her interpersonal skills. She demonstrates a pleasing telephone etiquette and is pleasant to the parents, students and staff." Principal Van Liew testified that, at this five-month point, until she had had a better opportunity to evaluate Respondent's skills, she wanted to stay "middle of the road," confirming that Respondent had excellent communication and interpersonal skills with parents and staff members.

### C. Performance during 2013-14 School Year; Mixed Evaluation

The record conveys little information regarding specifics of Respondent's performance in the course of the 2013-14 school year, but, by the end of the year, Ms. Van Liew was, she said, "beginning to see things that needed improvement" as well as some areas in which Respondent was performing unsatisfactorily. Ms. Van Liew noted specific concern regarding Respondent's organizational skills, and, in particular, filing, which were areas in which Ms. Van Liew relied heavily on Respondent. She found, however, that Respondent sometimes could not quickly locate items.

The evaluation for Respondent's first full school year at the School was completed on June 19, 2014, by Principal Van Liew. While she gave Respondent mostly satisfactory ratings and included commendable ratings as to rapport with staff, personal appearance, dependability, and attendance/punctuality, she rated Respondent as needing improvement in organizational skills, work habits, organizing and maintaining files, office management categories of mature attitude, professional judgment, cooperation, and skillful performance of duties. Respondent was rated as "unsatisfactory" with regard to computer competency in the area of "data base." These areas of needed improvement were noted in the comments, to wit: "organizational skills for performing a variety of secretarial and clerical tasks in a timely manner needs [sic] improvement." Also it was noted that Respondent maintained a positive working relationship with the office staff, demonstrated basic knowledge of office skills and maintained commendable attendance and punctuality.

The Summary stated as follows:

> Overall the secretary exhibits a personality that relates well within the school community. However, her ability to perform confidential secretarial tasks for an effective and efficient school office are in need of improvement. Some of the tasks require a knowledge of the rules and regulations of the school and school system and the frequent exercise of independent judgment within the scope of the authority granted by the administration.

Respondent acknowledged receipt of the evaluation at the end of the school year but noted that she did not agree with the rating.

### D. 2014-15 School Year and Imposition of CAP

When the following school year commenced, Respondent returned to work on or about August 23, 2014. A few weeks later, Ms. Eason found that Respondent was behind in preparing spreadsheets for lesson plans, faculty meetings, and "submitted documents."
As of September 1, Principal Van Liew had prepared a Corrective Action Plan (CAP) to guide the steps for performance improvement for Respondent. The District and its witnesses have acknowledged that the CAP approach is used for teachers, rather than staff, but Ms. Van Liew and Ms. Eason testified that they regarded it as a useful tool for assisting Respondent to improve in the needed areas. Ms. Van Liew, Ms. Eason, and Respondent met on or about September 1, 2014, and Respondent asked to have some time to review the written CAP before signing or otherwise indicating agreement.

Respondent then was away on medical leave from mid-September until on or about October 21, 2014. On the day of her return, they met again, and Respondent asked to have Union representative involved. They reconvened on October 23, with a Union representative participating. A summary of that meeting indicates that the Union representative asked if Respondent needed any additional training and Respondent replied that she could always use additional training and asked specifically to attend a training program on the Infinite Campus software, which had been introduced while she had been on medical leave. Respondent was told that she could not go for training, as a report was past due[1], and she was instructed instead to seek assistance from the other Secretary in the office.

[1] Respondent testified that, upon her return from medical leave, she discovered that a number of tasks had not been completed in her absence and that numerous medical documents for students and some staff had yet to be entered into the computer system.

The CAP, which Respondent signed only to indicate receipt, addressed a list of essential tasks, responsibilities, and skills which comported with the School Secretary Job Description, followed by a statement of the type of performance expected for Respondent to achieve proper fulfillment of each responsibility. For each function, the CAP also references the steps that the District planned to take to help the Respondent achieve each type of improvement needed. The CAP was to apply, generally, throughout the remainder of the 2014-15 school year. It addressed the need to prioritize tasks; create a route sheet/spreadsheet label for lesson plans, etc.; generate student attendance notifications; check substitute staff in the assigned teacher; distribute notices to staff, students and parents; complete required monthly reports; maintain student files and records; develop proficiency in MS Office; undergo Infinite Campus training; protect confidentiality of records of students and staff; keep area clear of clutter; and act as receptionist. In some categories, specific subsets of the tasks were noted. With regard to the support that was to be provided, the CAP states, as to Infinite Campus, that "training will be provided by a district designee from the office of Ms. Anita West." It also was recommended that Grievant have a refresher course on Microsoft. Other categories provided for support by "monitoring through observation" and review of policies.

Vice Principal Eason testified that, in the months that followed, she met with Respondent "various times" to walk through the CAP to "get her feedback as far as what was written in the tool and any concerns that she may have had." Ms. Eason also recounted her efforts to fulfill the supportive steps that were listed in the CAP. She testified to having provided a template for a spreadsheet that Respondent could use for documents being collected, even though Respondent has said that she knew how to create such a spreadsheet. Ms. Eason said that she "assisted" Respondent by monitoring substitute teacher assignments, noting that substitute reports had to be faxed or scanned for weekly submission but, as she was receiving word that this was not happening, she would go back to make sure that the reports were being submitted. Ms. Eason stressed the importance of reviewing attendance notice documentation, which must be done daily, and the consequences of the failure, but there was no specific information provided regarding efforts to monitor or observe this work or specific ways in which Respondent could improve. She noted that she monitored the route sheets which reflect faculty attendance. Ms.

Eason also said that she monitored Respondent's progress through observations, although no formal account or record of same was produced, and it does not appear that such observation was conducted in any formalized or organized manner.

### E. Training

Vice Principal Eason said that training was provided, although details were sparse, and that "there were times when Ms. Sims did receive support in the MIS support here at Central Office when reports were due," referring to Infinite Campus. Respondent had requested, at the October 23 CAP meeting, to attend training in Infinite Campus that she had missed due to medical leave. That request was not approved, as noted above, because, Ms. Eason said, a monthly report was overdue (although Respondent had just returned from multi-week medical leave and the delay in this instance would not have been attributable to her). Respondent was instructed to seek assistance from the other Secretary in the office. Mr. Cisneros asked one of the specialists in the IT department to assist Respondent. That IT Specialist worked with Respondent once, but he described it as "unofficial" and noted that he had spent approximately an hour. Mr. Cisneros testified that this was more time spent in training than the teachers received, but he also noted that the Secretaries have access to more extensive information than teachers and thus their functions are more complicated. To develop proficiency, Ms. Cisneros said, it was necessary to use the system frequently and to "play with it" to become readily adept.

### F. Performance Issues in 2015

Early in 2015, issues arose regarding the assemblage of student emergency contact information. Respondent was asked several times over the course of a week in January 2015 to prepare a list to verify if such information had been supplied for each student. Ms. Van Liew testified that she wanted to know who the teachers were who were not obtaining and supplying the information. For this and other matters to which teachers were not attending promptly, such as late lesson plans, Ms. Van Liew had told Respondent, "The first time you send it out. Second time you go through this. Third time you tell me who they are." The student contact information, once

secured for all students, then had to be updated within Infinite Campus. To complete this work, Respondent asked if she could leave the office and work in an empty room. Ms. Van Liew at hearing acknowledged that this was a good point, as the office was very busy and Secretaries are often interrupted, but she noted that Respondent could not be permitted to leave the office, as it would result in only one Secretary being present.

Reporting of attendance is a key function to be performed by Respondent, yet there were instances in which she did not perform this task adequately. When teachers do not provide the necessary attendance information, the Vice Principal must be informed, for the consequences are significant. If a student is not recorded as being in attendance, a call automatically is placed to parents, and it of course creates undue alarm when the child is there but the attendance records are wrong. Ms. Eason testified, however, that, instead of reporting the teachers, Respondent would call them directly to get the attendance information in an effort, Ms. Eason believed, to protect the teacher from adverse action.

On January 28, 2015, Vice Principal Cisneros asked Respondent to obtain a list of staff members on the email list and to make corrections. Respondent on January 28 made an email inquiry to obtain this, and the IT person responded with a request for more specific information. Respondent apparently failed to reply, and Mr. Cisneros inquired two days later to spark Respondent to answer, which she did on February 5, resulting in receipt of the list on February 5. Mr. Cisneros then inquired as to whether the corrections had been completed. Having received no reply as of February 11, he emailed Respondent again on asking if the corrections had been made and advising her that he expected to receive an email confirming that the task was completed. Five days later he wrote again, noting that the changes had not been made, that he had expected an email from Respondent and that he regarded the directive he had given her as being incomplete. He advised Respondent that, at this point, he would handle the matter himself. Respondent replied that she had taken steps to have the changes made via a work order, as she had been advised that one "cannot just take anyone off the email list." Mr. Cisneros responded requesting the work order number and, when Respondent had not replied a few hours later, he wrote, "you can fwd me the email you got from the system. . ." The following day, Mr.

Cisneros emailed Respondent noting that he had not received information from her but that he had confirmed through IT that it had been done by another staff member at Respondent's request. He wrote that it had not been appropriate for her to pass this task along to another employee when she had been instructed to perform the task.

Issues also had arisen regarding the management of substitute teacher assignments and information. Information was not being forwarded in a timely manner, and Respondent in some instances attributed the failure to the scanner being inoperable, leading her to send facsimiles that reportedly were not received. This was, according to Ms. Eason, an ongoing problem and led to confusion as to which substitute teachers were assigned where and for what work they should be compensated.

### G. CAP Review and June 2015 Evaluation

In April/May 2015, Ms. Eason reviewed the CAP with Respondent and noted in the CAP as follows:

> It is recommended that Ms. Sims work on prioritizing task[s] by creating a daily to do list, which will create good work habits for the operation of the office. Organizing her task[s] as they pertain to documenting monthly reports, student attendance, substitutes, and lesson plans is critical. These areas are in continuous need of improvement and often require verbal reminders (email correspondence) from administration. Her inability to organize and maintain documents efficiently effects [sic] task[s] being completing [sic] in a timely fashion. (Example: preparation of assigning substitutes first thing in the morning. All substitutes need to be provided with a schedule, class attendance sheet and substitute folder).
>
> Over all, Ms. Sims [sic] ability to perform secretarial and clerical task[s] are essential for the administration, faculty, students and parents of the school. It is imperative that she gain knowledge of the rules and regulations of the school, as it pertains to the maintaining an efficient and effective office.

Ms. Eason testified that it was her conclusion that Respondent had made no progress on the areas addressed in the CAP.

What followed, at the end of the 2014-15 school year, was an evaluation completed by Ms. Eason in which Respondent was rated as satisfactory in only seven categories and as needing improvement or as being unsatisfactory in most of the categories that corresponded with the CAP. In total, the evaluation reflected nine categories of unsatisfactory performance. For some reason, the "data base" was listed as not applicable, but computer competency in the area of communication was an area of unsatisfactory performance, as was organizing and maintaining files, organization skills in the area of maintenance of necessary information for yellow cards and monthly reports, and "cooperates and performance duties skillfully. She also was rated unsatisfactory in the "personal trait" categories of dependability, confidentiality, and good work habits.

In the comments, it was noted that, while Respondent presented a positive public relations image with the school community, "her level of confidentiality is questionable concerning business matters under her purview as the school secretary." It also was noted as to personal traits that, although she was pleasant and personable, engagement in personal calls was overwhelming and resulted in a lack of job performance. It also cited Respondent's use of 27.5 sick days, one personal day, and two instances of tardiness. The sick days appear to coincide with Respondent's period of medical leave, and there is no additional information regarding issues of tardiness. With regard to the personal day, Respondent noting in the evaluation, and Ms. Van Liew confirmed at hearing, that Respondent had taken personal time so that she could go to Central Office to seek assistance from the MIS department in completing reports, a practice of which Ms. Van Liew reasonably disapproved.

In the Summary Statement, Ms. Eason wrote:

> Despite numerous conversations about organization, the secretary's method or lack there of [sic] is haphazard at best. While she does collect various documents, she does not present information or explain procedures in any consistent or uniform manner. Part of her difficulty is having a working knowledge of the process and prioritizing projects. Attention needs to be given to pressing matters such as school building reports. These reports fall under her responsibility and are often not completed when due. Showing initiative in her willingness to learn

would imply a willingness to accept constructive criticism which would improve her work habits.

On October 14, 2015, Principal Van Liew issued the Notice of Tenure Charge of Inefficiency. It set forth the charges noted above.

## IV. ANALYSIS

### A. Charges Not Supported by a Preponderance of the Evidence

The District bears the burden of proving the charges by a preponderance of the evidence. At the outset, the Arbitrator finds that insufficient evidence has been produced to support the charges alleging that Respondent failed to maintain regular attendance and punctuality. The June 2014 evaluation commended Respondent's performance in this area, and the only evidence in the record regarding subsequent absenteeism was the reference in the June 2015 evaluation, which cites two unidentified instances of tardiness, one personal day (used to seek training at the Central Office), and the single block of several weeks when Respondent was off duty due to medical procedure. While her attendance thus was not perfect, and the use of the personal day, while perhaps commendable for initiative was understandably not an action condoned by the District, the record does not establish a failure in attendance that could support a charge of ineffectiveness.

In addition, the charge relating to the critical responsibility of maintaining the confidential status of information is not supported by the record. Testimony by the District's witnesses indicated that certain information available only to the "front office" staff had become known beyond the administrative office and that the suspicion was that it had been conveyed by Respondent. Suspicion standing alone cannot prove a charge, and the record does not indicate the nature of the disclosed information, nor does it indicate why, other than the observation that Respondent has excellent communication skills and rapport with parents, students, and staff, it was believed to have been Respondent who released the information. Principal Van Liew testified only that

"we weren't quite sure whether or not – things that would get things – that would come back to us from staff members, those were things that were discussed in the office." Accordingly, the proofs fail as to this charge as well.

The District also contends that, with regard to the handling of Vice Principal Cisneros' request for updates to the email list in January 2015, Respondent engaged in insubordination. Acknowledging that this allegation was not among the charges stated, the District argues that it is supported by the record and that the charges therefore should be viewed as having been amended to conform to the evidence. The Arbitrator finds, however, that the evidence upon which the District relies to establish insubordination shows a series of communications that resulted in compliance and completion of the task, albeit less than promptly and through means that did not meet with the Vice Principal's approval. Respondent's reaction was impertinent but it did not rise to the level of insubordination.

### B. Remaining Charges/Procedural Shortcomings

What remain are charges that relate to Respondent's technical skills and competency is use of the necessary computer programs and processes, her organizations skills, work habits and tasks, including filing and completion and submission of required reports; and her communication and interaction with others. The Arbitrator finds that the record establishes deficiencies in the areas cited. Respondent was falling short of timely and complete fulfillment of her responsibilities as they related to maintenance and submission of important reports and completion of significant tasks. The Arbitrator also finds, however, that the process by which these deficiencies were addressed was flawed and does not comport with any applicable standard to support a finding that termination is warranted.

Respondent argues that the District inappropriately held her to the standards used for evaluating teachers and applied the faculty-based CAP system to her, which was an overly rigorous, intended to address the high standards of performance required by teachers, making it inapplicable to personnel such as Respondent who handle matters not in the direct course of

educating children. In this regard, Respondent argues that, as secretaries were not included in the statutory system that involves the CAP, the prior system should apply. It provided for an employee to be given notice that his or her performance was inefficient and then the employee was to be given a 90-day improvement plan addressing those areas of inefficiency. The employee was to be informed with specificity of the areas in which performance was deficient and that unless the inefficiencies are corrected within a minimum of 90 days, the certification of inefficiency would result. As the District stresses, however, Respondent in this regard relies upon a statutory provision that is no longer in effect. Thus, application would not be appropriate.

The School in this instance chose to proceed with a process that roughly paralleled the approach required for tenured teachers. The School determined that using a CAP approach would be an effective means of helping Respondent improve and, if that failed, would provide the foundation which charges would be brought. The CAP process, however, cannot be borrowed to use as a sword while disregarding the elements that function as a shield. When the CAP process is applied to teachers, however, specific requirements exist, and comparable elements were lacking here. The absence is a flaw not because of imperfect application of a process that does not apply in the first place but because the omission eliminated important elements of corrective opportunity and notice that are fundamental elements associated with discharge from any form of tenured employment.

At the outset, the School moved to a CAP without a comparable history of poor evaluations. For teachers, the triggering element is the evaluation of partially effective or ineffective. Here, Respondent had received one very positive evaluation in April 2013, and then, in June 2014, she received an evaluation with commendable in four categories, satisfactory in 14, needs improvement in four, and unsatisfactory in one area of computer competency ("data base," which the following year was rated as being not applicable). There was no overall rating. By contrast, the system for teachers under NJAC 6A:10 provides for a specific approach to and components of evaluations and categories that are highly effective, effective, partially effective, and ineffective. The evaluation instrument used for Respondent did not follow or exist within a system that followed this rubric. Thus, it cannot be said that Respondent's June 2014 evaluation,

with a single finding, out of 23 categories, of one unsatisfactory element could be regarded as the equivalent of partially effective or ineffective such that it would trigger the serious action of imposing a Corrective Action Plan. Indeed, the Principal's testimony was that, at this point, she only had "begun" to see areas in need of improvement.

Thus, regardless of whether there is an effort to hew as closely as possible to tenured teacher process or whether it is used merely as a guide for a fair and productive foundation to begin the process of corrective action, the June 2014 evaluation was insufficient to trigger the establishment of a CAP for which a lack of success would lead to termination. Further, as the Respondent argues, the review process for teachers is defined and logical and involves several formal steps in the course of a year, such as the required number of observations. No such elements existed for Respondent, which further supports the idea that a CAP and the concept of moving toward imposition of charges were not reasonable under these circumstances, as the first element that would lead to imposition of a CAP is lacking.

Further, the processes to be implemented with a CAP and to be pursued in helping the employee fulfill the improvements stated therein also were lacking in this case. The CAP incorporated no structured review or process. There was a review meeting after several months, but the record contains evidence only of a few amorphous conversations between Grievant and the Vice Principal. Unlike the increased observations and post-observation conducted for teachers who are working under CAPs, nothing indicates that consistent, meaningful review and evaluation were provided within a structure for improvement. Further, while the District highlights efforts it says were made to help Respondent achieve the performance improvements needed in computer proficiency, the support in the record for same is thin. Instead of significant training regarding the new Infinite Campus software, the training provided to Respondent was, by the IT specialist's own description, "unofficial," consisting only of an hour. Respondent's requests to seek assistance were declined, as they would have taken her away from the office. In the final evaluation, the Vice Principal suggested that Respondent lacked a willingness to learn, and yet the evidence shows that Respondent continued her efforts, although often fruitless, to seek training.

Most significantly, the system applicable to teachers ensures that effective notice is given so that the teacher is well aware when continued employment is in jeopardy. Through training, ready references, and the very clarity of the system itself, a teacher is aware of the process and that a CAP portends a possible step toward to termination of employment. In the instant case, Respondent was not put on notice that her job was in jeopardy, and nothing in the record suggests that she was ever advised that if she did not achieve the improvements sought in the CAP charges would be issued. The District argues that Respondent never became proficient in various tasks yet it appears that this was less a lack of proficiency or capability than a lack of focus or appreciation that precise and timely compliance with processes, without modification, was required and that failure in this regard could result in loss of employment. Teachers are made well aware that termination may result following a CAP, for it is part of a specific and formal process. That process does not apply to staff and thus there is no indication that Respondent would have known that a failure to fulfill the elements stated in the CAP or that a single poor evaluation would lead directly to discharge from a position she had held successfully (albeit at other schools) for 16 years.

For these reason, the Arbitrator must find that the procedures and processes employed by the School did not provide adequate notice, opportunity to improve, and support to do so. These steps are woven well into the process for teachers, but the School adopted only limited parts of that process, omitting the elements of notice and correction to which Respondent, as a tenured employee, is entitled. That is not to say that the District was wrong for attempting to parallel the process used for teachers, but the School failed to incorporate those essential elements that would have given Respondent proper notice of the potential for loss of employment, an understanding of the imperative for correction, and meaningful opportunities to improve.

## AWARD

For the reasons stated, the charges against Respondent are dismissed. Respondent is to be restored to her position with full back pay and benefits.

Dated: March 27, 2016

Jacquelin F. Drucker, Esq.
Arbitrator

State of New York )
) SS:
County of New York )

On this 27th day of March, 2016, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6018984
Qualified in New York County
Commission Expires February 1, 2019

121-16

DOCKET # 345-10/15
X----------X
In the Matter of the Tenure Charges Preferred by

**SCHOOL DISTRICT OF THE CITY OF NEWARK** **ARBITRATOR'S**
"District

**RULING**

-against-

**KENYADA MITCHELL**
"Respondent"
X----------X
**BEFORE:**
**ARTHUR A. RIEGEL, ESQ., ARBITRATOR**

**APPEARANCES:**
**FOR THE DISTRICT:**
**ADAMS GUTIERREZ & LATTIBOUDERE, LLC by DERLYS M. GUTIERREZ, ESQ.**

**FOR THE RESPONDENT:**
**LAW OFFICE OF JOSEPH J. FUSELLA by JOSEPH J. FUSELLA, ESQ.**
**JEFFREY BOWDEN, PRESIDENT, EDISON TOWNSHIP EDUCATION ASSOCIATION**
**TYLER, VAN PELT, RESPONDENT**

## *PROCEDURAL HISTORY*

On October 28, 2015, Counsel for the District served a Statement of Charges, a Statement of Evidence (including exhibits) and a Certificate of Determination and Personnel Action on Counsel for Respondent. On November 23, 2015, I was designated to serve as the Arbitrator for this proceeding.

Pre-hearing conferences were held on December 4 and 30, 2015. The hearing was convened on January 5, 2016. The parties subsequently determined that this matter should be resolved through a Stipulation of Settlement dated February 19, 2016. Counsel for the District forwarded a copy of

the Stipulation of Settlement to me for my review and approval.

## DISCUSSION

The adjudication of tenure charges are governed by the provisions of N.J.A.C. 6A:3. The specific section of this statute that relates to the withdrawal, settlement or mooting of tenure charges is N.J.A.C. 6A3-5.6.

Thus, the instant Stipulation of Settlement (Stipulation) must be reviewed pursuant to those terms. I have reviewed the Stipulation of settlement in the context of 6A3:5.6. I note that both the Respondent and Counsel for the District indicated their agreement to the Stipulation by signing the appropriate signature pages.

6A3:5.6 sets forth the standards to be used by the Arbitrator when determining if a settlement of tenure charges should be approved. Paragraph (a) sets forth the six specific standards set forth in *In re Chardonick* , State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.( 842, 846). Paragraphs (b)- (e) set forth additional requirements. I have carefully reviewed 6A3:5.6 in its entirety and make the following findings.

Paragraph (a)(1)- The bottom item on page 1 of the Stipulation satisfies this provision.

Paragraph (a)(2)- The third item on page 2 of the Stipulation satisfies this provision.

Paragraph (a)(3)- The signature pages of the Stipulation shows that both the charged and the charging parties consented to the Stipulation,

Paragraph (a)(4)- Item 16 of Stipulation indicates that Respondent agreed to the Stipulation with a full understanding of his rights.

Paragraph (a)(5)- Items 2, 5, 9, 11, 12,13, 14, 20 and 21 indicate that this Stipulation is in the public interest.

Paragraph (a)(6)- Respondent is a member of the teaching staff. Item 8 of the Stipulation indicates that Respondent is aware of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. Item 8 includes a statement indicating that the District has a duty to advise the Board of Examiners of Respondent's resignation.

Paragraph (b)- This paragraph reflects two requirements. The first one (concerning access to information and records deemed public by law) is satisfied by Item 12. The second one (concerning the signature of the board counsel authorizing the settlement ) is satisfied by the relevant signature page.

Paragraph ( c )- This paragraph requires the submission of Stipulation to the Commissioner in advance of its being forwarded to me. State District Superintendent Cerf indicated his approval of the Stipulation by signing it on February 29, 2016. The copy Stipulation that I received bore the signature of State District Superintendent Cerf.

Paragraph (d)- This provision is applicable if the tenure proceedings are concluded prior to the adjudication of the charges due to the resignation or retirement of the respondent. In this case, Respondent retired prior to the adjudication.

Under this provision, the District notified the State Board of Examiners of Respondent's resignation. Paragraph (d) is specifically addressed in Item 8 of the Stipulation.

Paragraph (e)- This provision is applicable when the Stipulation requires the respondent to relinquish his/her State Board of Examiners certificate.

In this case, the Stipulation does not require Respondent to relinquish his State Board of Examiners certificate. Thus, Paragraph (e) is inapplicable in this case.

Having reviewed the Stipulation in the context of N.J.A.C. 6A:3-5.6, I conclude that is satisfies the statutory requirements. Thus, based on the above, I make the following

**RULING**

The Stipulation of Settlement dated February 19, 2016 is approved.

Dated: March 22, 2016

ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

**AFFIRMATION**

STATE OF NEW YORK)
COUNTY OF NASSAU )

I, Arthur A. Riegel, am the individual described herein and who executed the foregoing instrument, which is my Ruling.

ARTHUR. A. RIEGEL

**ADAMS GUTIERREZ & LATTIBOUDERE**
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorney for the State-operated School
District of the City of Newark

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF KENYADA MITCHELL<br><br>and<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | **AGENCY REF. NO. 345-10/15**<br><br><br><br>**STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Kenyada Mitchell, residing at 21 Willoughby Street, Apartment 2A, Newark, New Jersey, 07112, ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of Unbecoming Conduct, Corporal Punishment and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure*

*Charges Against Kenyada Mitchell, State-operated School District of the City of Newark, Essex County* ("Tenure Charges"), and such charges were assigned Docket No. 345-10/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Arthur A. Riegel ("Arbitrator") for a hearing; and

**WHEREAS,** Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, the District is a State-operated school district with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, including several young students, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without litigation, avoids requiring several young students to testify in this procedure and miss educational time, and further avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the District, which shall provide for his resignation

from the District effective April 1, 2016 ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Respondent also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. Upon final approval of the signed Stipulation by the Arbitrator, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the District, and Respondent reserves the right to defend same.

4. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be placed on administrative leave with pay for the time commencing on October 27, 2015 through March 27, 2016 and will receive salary for said time period. All salary paid for said period shall be subject to all applicable salary withholdings and deductions. Between March 28, 2016 and March 31, 2016, Respondent will be placed

revocation of Respondent's teaching certification or license or seek to prevent him from applying for or receiving pension benefits on any grounds related to the Tenure Charges or his resignation, pursuant to this Stipulation of Settlement, based upon Respondent's prior years of satisfactory service to the District.

9. As of the Effective Date, all of Respondent's rights of employment with the District, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

10. Respondent will not apply for reemployment with the District at any time. Specifically, Respondent will be considered to have permanently resigned from his tenured position as a result of this Stipulation of Settlement. If Respondent does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

11. In exchange for the consideration set forth in paragraph 4 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the

District or separation from employment with the District. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract,

collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent also agrees to withdraw any and all pending complaints or actions that have been filed against the District or any of its employees or representatives.

12. Notwithstanding Paragraphs 2, 11 and 14 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 11, Respondent agrees not to seek or accept any resulting relief whatsoever.

13. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within

which to consider this Stipulation of Settlement, and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

14. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the District receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the

District is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

15. This agreement shall not constitute a precedent in any matters involving other District employees.

16. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

17. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

18. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

19. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

20. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

21. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

22. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 2/9/16

KENYADA MITCHELL

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated 2-29-16

By: CHRISTOPHER CERF
State District Superintendent

**CERTIFICATION**

I, Kenyada Mitchell, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 2/29/16

KENYADA MITCHELL

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 2/19/16

Derlys Maria Gutierrez, Esq

ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the State-operated School
District of the City of Newark

**APPROVED:**

Dated: 2/20/16

Arthur A. Riegel, Arbitrator

# EXHIBIT "A"

KENYADA MITCHELL
21 Willoughby Street
Apt. 2A
Newark, New Jersey 07112

February 19, 2016

Christopher Cerf, State District Superintendent
The Newark Public Schools
Office of the State District Superintendent
2 Cedar Street
Newark, New Jersey 07102

**Re: Irrevocable Letter of Resignation**

Dear Superintendent Cerf:

Kindly accept this letter as my irrevocable resignation from my employment with the Newark Public Schools, effective at the close of business on March 31, 2016.

Thank you for your kind attention to this matter.

Sincerely,

Kenyada Mitchell

cc: Bernard Mercado, Esq., Newark Public Schools
Derlys M. Gutierrez, Esq.
Joseph J. Fusella, Esq.

122-16

**NEW JERSEY DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

In the Matter of the Tenure Hearing of Brian Medley:

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**STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY**

"Petitioner,"

- and -

**BRIAN MEDLEY**

"Respondent."

Agency Dkt. No. 291-9/14

**OPINION AND AWARD**

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**STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY**

"Petitioner,"

- and -

**BRIAN MEDLEY**

"Respondent."

Agency Dkt. No. 367A-12/14

**OPINION AND AWARD**

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**Before**
**James W. Mastriani**
**Arbitrator**

**Appearances:**

**For the Petitioner:**
Louis R. Lessig, Esq.
Brown & Connery

**For the Respondent:**
Wayne J. Oppito, Esq.
New Jersey Principals and Supervisors Association

This proceeding arises from two separate sets of tenure charges filed by the State Operated School District of the City of Camden [the "Petitioner" or "District"] against Brian Medley [the "Respondent" or "Medley"], a tenured principal employed by the District. Specifically, the District determined to certify tenure charges with the Commissioner of Education on September 26, 2014 charging Medley with inefficiency pursuant to N.J.S.A. 18A:7A-45. Later, on December 19, 2014, the District filed additional tenure charges against Medley with the Commissioner of Education charging him with conduct unbecoming a school employee. Shortly thereafter, the District filed a Motion to Consolidate the initial and additional tenure charges. The additional tenure charges were filed after hearings had been scheduled on the initial tenure charges. Although the charges represent two separate cases, the Motion to Consolidate was granted. Thus, both the initial and additional tenure charges are properly before me for determination.

A pre-hearing conference was held on November 14, 2014. Formal arbitration hearings were scheduled and held on January 5, 7, 12 and 15, 2015 in Westmont, New Jersey. At the hearings, each party argued orally, presented and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from Timothy Matheney, Chief Intervention Officer, New Jersey Department of Education (October 2014, prior position Director of the Office of Evaluation) – Donna Agnew, Principal Evaluator,

Camden City School District – Catherine McClellan, Managing Partner and Principal Scientist, Clowder Consulting – Leroy Seitz, Interim Superintendent of Schools for the Franklin Township School District, Somerset, New Jersey – Robert Fisicaro, Superintendent of Schools, Mantua Township, Gloucester County – Margaret Jeker Nicolosi, County Superintendent for Camden and Burlington counties, and Interim Regional County Superintendent for Gloucester, Salem, Cumberland, Cape May, Atlantic Counties – Thomas Flemming, Administrator and Evaluator, Camden City School District – Paul Nedeau, Assistant Director in the Office of Evaluation, Department of Education – Susan Ficke, Senior Director of Teacher/School Leader Evaluations – Carmen I. Ortiz, Bilingual Department Chair, Camden School District – Barbara Hutchinson, Department Chair for Health and Physical Education, East Camden Middle School – Respondent Brian Medley, Principal, Pyne Poynt Middle School, Camden County School District. Each party filed post-hearing briefs on or about March 13, 2015.

The public employer is the State Operated School District of the City of Camden. Pursuant to the terms of the State Intervention Statute, the operations of the Camden City School District were assumed by the State of New Jersey on June 25, 2013. Thereafter, evaluations of building principals and vice principals were conducted during the 2013-2014 school year. The evaluations resulted in tenure charges being filed against four administrators. One Respondent, Leon Mashore, filed a Motion to Dismiss. The motion contended that the tenure

charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." Because of the likelihood that similar motions would have been filed in the cases involving the three other administrators, the parties executed a Consent Order in the Mashore case that extended to all of the cases. This resulted in an agreement to have the decision on the Motion to Dismiss application in the Mashore case be applicable to the other tenure cases, including the instant one involving Medley. The Motion to Dismiss in the consolidated case was denied in an Opinion and Award issued on December 23, 2014 by Arbitrator Walter DeTreux. Because I have incorporated that Award into this decision, it will not be summarized in detail at this juncture. It is sufficient to note that Arbitrator DeTreux denied the Motion and found that TEACHNJ, N.J.S.A. 18A:6-117, et. seq. and its accompanying regulations N.J.A.C. 6A:10-2.1, must be read in concert with the evaluation provisions set forth in the State Intervention Statute N.J.S.A. 18A:7A-45. Although he found that the District had the authority to file tenure charges under the State Intervention Statute, he found that genuine issues of material fact existed that required resolution through the respective arbitrations.

## BACKGROUND

Respondent is a tenured principal and was Principal of Pyne Point Middle School during the 2013-2014 school years. He began his career as an

elementary school teacher at Sacred Heart School in 1982, spent two years in the juvenile justice system, taught seventh and eighth grade English at the Martin Luther Christian Day School in Pennsauken, taught fifth grade at Bonsall Family School in the Camden School District in 1990, became a Vice Principal at the Bridgeton School District between 2002 and 2004, returned to the Camden School District in 2004 as a Vice Principal at the Molina Elementary School and became Principal of Forest Hill Elementary School in 2008 until August 2011, at which time he transferred to Pyne Point Middle School.

On June 25, 2013, the operation of the District was assumed by the State of New Jersey pursuant to the State Intervention Statute N.J.S.A. 18A:7A-45. Margaret Jeker Nicolosi was appointed at that time to serve as Interim State District Superintendent. Around this time, Dr. Robert Fisicaro[1] was assigned to create a District Office of Evaluation [the "Office"] as authorized by N.J.S.A. 18A:7A-45. The Office was responsible to assess the performance of the District's principals and vice principals. According to Ms. Nicolosi, the date of the takeover, June 25, 2013, was the date that the assessment cycle for the evaluation of principals in the school district commenced. She testified that she met with the principals on June 25, 2013 and briefed them on the time period for the assessment cycle and the manner and method that would be used to conduct their evaluations. Respondent, for reasons cited below, disagrees that this date

[1] Dr. Fisicaro was the lead Implementation Manager for the Office of Evaluation, Department of Education.

can serve as the commencement of the assessment cycle for Respondent's evaluations.

Under the authority of Dr. Fisicaro, two evaluators were assigned to assess the performance of Medley. Dr. Fisicaro explained that the use of two evaluators was for the purpose of ensuring fairness and reliability in the evaluations. The primary evaluator was Dr. Donna Agnew. The other evaluator was Dr. Thomas Flemming. Both are retired school district superintendents. Dr. Agnew was hired in October of 2013. She first visited Pyne Point Middle School on October 21, 2013 and conducted the first formal evaluation of Medley on December 4, 2013. A post-evaluation conference was held between Dr. Agnew and Medley on December 12, 2013 for the purpose of reviewing Dr. Agnew's evaluation and recommendations. Dr. Agnew conducted a second evaluation on March 19, 2014. A post-evaluation conference was held between Medley and Dr. Agnew on March 25, 2014. Dr. Flemming was also hired in October 2013. He conducted a third evaluation of Medley on June 12, 2014.[2] A post-evaluation was held between Dr. Flemming and Respondent on June 14, 2014. Dr. Agnew completed a summative evaluation, the Annual Performance Report, on June 19, 2014 and held a summative evaluation conference with Respondent on June 23, 2014.

[2] Dr. Flemming also held a pre-evaluation conference with Medley.

## The Evaluation Instrument

The instrument to evaluate the District's principals was the result of the involvement of several educators, including:

- Timothy Matheney, then Director of the New Jersey Department of Education ("DOE") Office of Evaluation;
- Dr. Robert Fisicaro, then Lead Implementation Manager for the DOE Office of Evaluation;
- Margaret "Peggy" Nicolosi (then Camden County Superintendent);
- David Hardy, then Executive Director of the Camden Regional Achievement Center ("RAC"); and
- Anjali Kulkarni, then Project Manager with the Camden RAC

Mr. Matheney provided detailed testimony as to how the criteria for the instrument was set and submitted to the Department of Education through its Request for Qualification process. The recommended instrument was approved by the Department of Education on June 14, 2013 and was authorized to be used thereafter by the District. According to Mr. Matheney, the instrument complied with standards set by the Interstate School Leaders Licensure Consortium ("ISLLC"). The instrument consisted of three domains with each domain having a set of sub-domains. Domain 1 is entitled Instructional Leadership, Domain 2 is entitled Cultural Leadership and Domain 3 is entitled Organizational Leadership. According to Mr. Matheney, a fourth domain was added to the instrument entitled Effectiveness of Teacher Practice Viewing and Evaluation Practice. This domain

was added for the purpose of assessing how principals performed teacher evaluations.

## The Evaluations

The testimony and documentation as to the evaluations of Medley is extensive. The record on the conduct of the evaluations has been thoroughly reviewed along with the respective positions of the parties as to whether they can properly serve as a basis for the tenure charges. The evaluations yielded numerical ratings that were determined by the evaluators based upon their judgment of the evidence that related to the domains and subdomains. The evaluations also contained "actionable feedback" that were connected to the ratings received by the Respondent for the purpose of future guidance, especially in areas where the evaluations yielded ineffective ratings.

As previously stated, the first evaluation was conducted on December 4, 2013 by Dr. Agnew. In the first domain (Instructional Leadership), Medley received an ineffective score of 1.5 due to his receipt of 1 or 2 ratings in every sub-domain. In the second domain (Cultural Leadership) Medley received a partially effective rating of 2 due to having either received a 1 or 2 rating in four of the five sub-domains. In the third domain (Organizational Leadership) Medley received a partially effective rating of 2. In the fourth domain (Evaluation Leadership), Medley received an ineffective rating of 1.2. The level of the ineffective rating was largely caused by Medley receiving the lowest possible

rating in four of the five sub-domains. Based upon each rating for each domain, Medley received an overall evaluation of 1.75. This rating is defined as ineffective.

Dr. Agnew also conducted the second evaluation on March 19, 2014. In the first domain (Instructional Leadership), Medley received an ineffective score of 1.5 due to his receipt of a rating of either a 1 or 2 in every sub-domain. In the second domain (Cultural Leadership) Medley received a partially effective rating of 2.2. In the third domain (Organizational Leadership) Medley received an ineffective rating of 1.4. In the fourth domain (Evaluation Leadership), Medley received an ineffective rating of 1.4. Based upon the ratings for each domain, Medley received an overall evaluation of 1.63. This rating is defined as ineffective.

The third evaluation was conducted by Dr. Flemming on June 12, 2014. In the first domain (Instructional Leadership), Medley received an ineffective rating of 1.5. In the second domain (Cultural Leadership) Medley received a partially effective rating of 2.2. In the third domain (Organizational Leadership) Medley received an ineffective rating of 1.8. In the fourth domain (Evaluation Leadership), Medley received a partially effective rating of 2. Based upon the ratings for each domain, Medley received an overall evaluation of 1.88. This rating is defined as ineffective.

An Annual Performance Report was completed by Dr. Agnew on June 19, 2014. Based upon her review of the evaluations that she and Dr. Flemming conducted, the Annual Performance Report, also known as a "summative evaluation," yielded an average score for Medley in Domain 1 of 1.58, a rating deemed as ineffective. In Domain 2, Medley received a partially effective rating of 2.13. In Domain 3, Medley received an ineffective rating of 1.73. In Domain 4, Medley received an ineffective rating of 1.55. Based on these results, Medley received an ineffective overall score of 1.75. After the evaluations were completed, Dr. Agnew held a summative evaluation conference with Medley on June 23, 2014.

In addition to asserting that it had cause to dismiss the Respondent for inefficiency based upon the ratings in the aforementioned unsatisfactory evaluations, the District filed separate charges alleging that Respondent engaged in unbecoming conduct by directing teachers to change their "self-assessments" for Domain 4 for the purpose of achieving higher evaluation ratings. In this regard, it alleges that Respondent failed to adhere to a requirement that he not have any direct input into a teacher's completion of a self-assessment form and further, to not view the teacher's self-assessment until it had been uploaded into Teachscape, a certification requirement. The District alleges that, despite receiving training to the contrary, he directed teachers Jose Matos and Shabrees Chrisdon, as well as Librarian Tania Morgan, to change certain aspects of their self-assessments to reflect improvements in the assessments. Petitioner further

contends that while either tenure charge must be sustained individually, when the two tenure charges are considered as a whole, they form a basis to prove "other just cause" as an additional basis for dismissal.

## Position of the District[3]

The District contends that the September 26, 2014 charges of inefficiency were timely filed pursuant to N.J.S.A. 18A:7A-45(c). Under this provision, a State District Superintendent must wait until after the twelve (12) month assessment cycle has been completed to dismiss a principal for inefficiency. According to the District, that cycle commenced on June 25, 2013 when the former Interim State District Superintendent Peggy Nicolosi met with the principals, provided them with the evaluation instrument and informed them that they would be evaluated under new criteria. She informed them that they could be dismissed the following year if, pursuant to the State Intervention Law, they were deemed to have performed inefficiently after three evaluations. The District asserts that it complied with the minimum time requirements because Medley was evaluated three times during the 2013-2014 school year, he received a summative evaluation, was then served with inefficiency charges on July 15, 2014 and the District then certified the charges to the Commissioner of Education on September 27, 2014.

[3] The arguments of the District are comprehensive and broad in scope. They will not all be summarized but all have been considered.

The District further contends that the evaluation Instrument was fair, unbiased and reliable. It was approved by the Department of Education and complied with ISLCC standards. The District cites the testimony of Dr. Catherine McClellan, an expert in the field of educator evaluation instruments. She concluded that the instrument and system used by the District would produce evaluation results that are fair, unbiased and reliable. The District cites her testimony:

> The instrument is comprehensive in that it encompasses the key aspects of a school leader's job. It is clear and well-written. The evidence required is available to school leaders and should be relatively easy to procure and present. The evaluations ... contain actionable feedback, they are specific and detailed. The rubric has usable number of levels. It has four levels. So my experience and as a researcher in the space of using these types of scales, four levels is a usable number of levels. The subdomains are clearly related to and cover the space of each domain. And they are concrete and comprehensible.

The District also cited Dr. McClellan's testimony that the Instrument produced actionable feedback that in her view, and contrary to the view of Respondent, would make a formal corrective action plan ["CAP"] unnecessary. She concluded that there is not a "large distinction between having a formal corrective action plan and being given formal actionable feedback with a request that it be acted on by the next formal evaluation cycle." Dr. McClellan further opined that the training that the administrators' evaluators had received was effective and continued throughout the 2013-2014 school year. Her testimony also reflected her opinion that the time period of one year or even less was sufficient for the evaluatee, the Respondent, to act on the actionable feedback and the

recommendations that were made during the three full evaluation cycles. She concluded that the performance of a principal such as Medley, who was rated at partially effective or ineffective over a series of observations, is reflective of one with significant deficiencies who could not continue to serve in the critical position of a principal after one year of state intervention.

The District further contends that the additional tenure charges it filed against Respondent on December 19, 2014 for conduct unbecoming a school employee must be sustained. This view is based upon evidence that Respondent directed teachers to manipulate their teacher self-assessments for the purpose of inflating their ratings. The District points out that no teacher at Pyne Point School was rated below an effective summative rating and that this was contrary to the rating results in 25 out of the District's 27 schools.

## Position of the Respondent[4]

Mr. Medley, the Respondent, urges dismissal of the tenure charges involving both inefficiency and conduct unbecoming for several reasons. Initially, he asserts that the District failed to comply with the State takeover legislation. Respondent disputes that the District met the statutory requirement that a principal may be dismissed "after completion of an assessment cycle of not less

[4] The arguments of the Respondent are comprehensive and broad in scope. They will not all be summarized but all have been considered

than twelve months." Medley submits that his primary evaluator, Dr. Agnew, was not hired by the District to perform the evaluations until October 2013 and that timesheets show that October 24, 2013 was the first day that she actually visited Pyne Point Middle School. Thus, Respondent asserts that the assessment cycle could not have commenced until October 24, 2013. Because Respondent was served with tenure charges on July 15, 2014 after a June 23, 2014 summative evaluation, Respondent submits that the assessment cycle period was at best only 10 months in length and therefore violative of the statute. Respondent further notes that the tenure charges were filed only seven months after Dr. Agnew performed the first evaluation and only eleven months from the time that the principals received training in the evaluation procedures for principals on August 21, 2013. Given the above, Respondent argues that:

> N.J.S.A. 18A:7A-45 clearly reads that the assessment cycle shall not be less than 12 months. The State-Operated School District in Camden did not afford Mr. Medley with the minimum amount of time for an assessment provided in the statute. The assessment unit was not hired until October, 2013. The charges must be dismissed because of the school district's failure to comply with N.J.S.A. 18A:7A-45. N.J.S.A. 18A:1-1 provides for the definition of an "academic year" as being the period between the time school opens in September until the next succeeding summer vacation, generally a period of 10 months. The state takeover statute does not read that the assessment cycle is to be for an academic year. The Legislature could have done so, but it did not. The statute requires that the assessment cycle shall not be less than 12 months. The assessment cycle for Mr. Medley was considerably less than 12 months in violation of the statute. The tenure charges against Mr. Medley must be dismissed.

Respondent further contends that the District failed to comply with its own procedures. He cites a document in evidence that reflects the framework for the

conduct of principal evaluations. Respondent contends that he was not offered additional support as required by the District's procedures for those who have less than effective ratings. Specifically, under the Principal Practice Section, Respondent asserts that the District was required to provide him with a Corrective Action Plan (CAP) and that he never received one. Respondent points to the Summative Rating section which states that "at the conclusion of the 12 month evaluation period ... all principals will receive individual development plans or Corrective Action Plans based on their ratings." Respondent submits that the comments, or actionable feedback, that Dr. Agnew made in her evaluations do not amount to a CAP and even assuming that it did, Respondent was entitled to have, but did not receive, at least one additional observation per year pursuant to the reference to a CAP contained in the Professional Development and Support section of the District's procedures. Respondent cites to case law holding that a board of education is required to render positive assistance in an effort to overcome any deficiencies and that the District did not do so.

Respondent also contends that the District's actions were arbitrary, unreasonable and/or capricious. According to Respondent, the District's primary evaluator had no experience with inner city school districts. In this regard, the evaluator is said to have not taken into consideration that Camden is an inner city school district with a large non-English speaking parent population and that such districts typically have greater difficulty in obtaining parent involvement. Despite

this, Dr. Agnew was unduly critical of Respondent's efforts to obtain parental involvement. Respondent also contends that Dr. Agnew never testified as to what the basis was of her expectations for Respondent's involvement in school activities. Respondent further submits that the District did not consider State test scores which indicated that student performance at Pyne Point Middle School was actually improving.

Respondent offered expert testimony from Dr. Leroy Seitz who, in his long-term capacity as a school superintendent, testified to his familiarity with TEACHNJ and Achieve NJ. Dr. Seitz opined, among other things, that the evaluation process adopted by the District did not offer Respondent the opportunity to be aware of expectations and afford him with proper training on the evaluation instrument.

Respondent further contends that the tenure charge alleging conduct unbecoming is without merit and must be dismissed. It points out that in Domain 4, Professional Responsibilities, there was a new requirement for teachers to complete a Teacher Self-Reflection Form and that Respondent merely provided support for teachers in their effort to fulfill this new requirement. Respondent argues that:

> In these situations, Mr. Medley offered support in a variety of ways, email being just one. What is being alleged by the school district as an egregious and deliberate act to circumvent the evaluation system process, in effect, was Mr. Medley suggesting how the document would give a fair and accurate assessment, or reflection

of the teacher's performance. These reports, as a part of all teacher evaluations, were forwarded to the Office of Evaluation, which reviewed them. To reiterate, this form was just one of the many, new requirements for teachers to fulfill in 2013-2014. More importantly, as the building principal, one of Mr. Medley's duties and responsibilities roles was to support his teachers. It would be unfair to the teachers to allow them to submit a document that did not give a true and accurate reflection of themselves as it relates to Domain 4. Mr. Medley's communications with teachers was very matter-of-factly with regards to the recommendations and/or directives for their document. He never mentioned or remotely alluded to anything about improving a "score." Mr. Medley's intent was to support teachers to include valuable information and data that would give a true and accurate reflection of their responsibilities during the 2013-2014 school year.

The charge indicates that the Self-Reflection form is "intended" to be done alone. However, no one from central administration (i.e., the Office of Evaluation) specifically stated to Mr. Medley that principals could not assist teachers in any way when completing Domain 4. As the building principal, Mr. Medley was responsible for support to his teachers. The school district's own witness, Sue Fricke, acknowledged that if teachers had questions, they would go to their principal. The suggestions Mr. Medley gave to the 3 teachers does not constitute unbecoming conduct and does not warrant his dismissal. Even, if Mr. Medley had a mistake in his recommendations to his teachers, the mistake would not warrant removal from his tenured position.

## DISCUSSION

This proceeding includes separate tenure charges certified to the Commissioner of Education on September 27, 2014 and December 19, 2014 for inefficiency, conduct unbecoming or other just cause. Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The District, as one

subjected to state intervention, cites the State Intervention Statute for its authority to file tenure charges without having to base such charges on a two year evaluation cycle. The burden is on the District to establish, by a preponderance of the evidence, that there is merit to the tenure charges and, if so, whether they warrant Respondent's dismissal from employment.

The December 19, 2014 tenure charges allege conduct unbecoming centering on Respondent's communications with three teachers over their self-assessments. They do not directly implicate the separate charges of inefficiency that center on Respondent's evaluations and the relationship between the State Intervention Statute and TEACHNJ. I first address this separate filing.

The District's allegations are serious in nature. In the event that Respondent manipulated teacher self-assessments for the purpose of inflating their ratings, such conduct would clearly constitute conduct unbecoming and warrant close examination of whether the penalty of dismissal was justified. The charges go to the character and integrity of portions of Domain 4 and the self-assessment evaluation process. Teacher evaluations not only affect an individual teacher's ratings. They also allow the District to draw comparisons among the District schools in order to assess relative school performance.

The District makes specific allegations that Respondent interfered with the self-assessments of teachers Jose Matos and Shabrees Chrisdon, as well as

Librarian Tania Morgan. The self-assessments fall under Domain 4 of the teacher evaluation in the area of professional responsibility. Domain 4 constitutes 20% of a teacher's summative evaluation rating.

The District has shown that Respondent was trained in Domain 4, received specific instruction on the self-assessment component of the domain and that the District conveyed caution to its administrators that the individual Domain 4 submissions were not to be subject to supervisory review until they were uploaded into Teachscape. The District, through documentary submissions, has established that Respondent did engage in email communication with the three individuals offering suggestions on how to revise their self-assessments through certain deletions and revisions. However, after thorough review of the record with respect to these communications, I cannot conclude that Respondent directly or indirectly attempted, or intended, to manipulate the teachers' self-assessments for the purpose of inflating their ratings or otherwise improperly alter the ratings by persuading the teachers to revise the substance of the self-assessments for that purpose.

The record does not include any evidence whatsoever that establishes that Respondent engaged in any oral or written communication with the teachers that concerned the actual ratings or scores in connection with the self-assessment form. It is important to note that the District had been no prior experience with this form prior to the 2013-2014 school year. It was not

unreasonable for teachers and their principal to engage in communications directed towards submitting accurate observations and responding to inquiries concerning the completion of information on this new aspect of Domain 4. District testimony acknowledges that such communication itself was indeed not improper. A more reasonable response by the District under all of the circumstances would have been to engage its administrators in broader discussion over what communication and direction was appropriate and what was not and to provide clearer distinctions between the two.

Based upon the insufficiency of evidence in support of the December 19, 2014 tenure charges, I conclude that they must be dismissed in their entirety.

As previously indicated, the September 26, 2014 charges, as well as three other District cases, were consolidated before a single arbitrator, Walt DeTreux, to decide a Motion to Dismiss applicable to all Respondents. In all four tenure cases filed by the District, the Respondents' contended that the tenure charges "were defective and premature in that such charges were not based on a two-year evaluative cycle pursuant to N.J.S.A. 18A:6-17.3 and were not preceded by the issuance of a corrective action plan as required by N.J.A.C. 6A:10-2.5." After entertaining full legal argument by the parties, Arbitrator DeTreux decided that the State Intervention Statute, N.J.S.A. 18A:7A-45, permitted the District to file the tenure charges by its terms and that such charges alleging inefficiency were consistent with the statute's goals of allowing the removal of ineffective

administrators early in the process of rebuilding and revitalizing a failing district. However, he also found that the State Intervention Statute must be read "in concert" with TEACHNJ, N.J.S.A. 18A:6-117, et. seq., statute that revised the evaluation process. He also determined that the subject matter of the Motions with respect to other issues raised genuine issues of material fact that can only be resolved through arbitration hearings on the merits of each individual tenure charge. Thus, the interrelationship, if any, of the two statutes and the parties' interpretation of same must be analyzed and resolved on the facts of this case when considering the merits of the tenure charges and especially Respondent's objections to those charges based upon the District's alleged failure to apply TEACHNJ or to properly apply the terms of the State Intervention Statute.

The District has established that it acted promptly to implement its statutory authority under State Intervention. On or about the June 25, 2013 date of intervention, Ms. Nicolosi was appointed Interim State District Superintendent.[5] A School District Office of Evaluation had already been created under the authority of Dr. Fisicaro to evaluate the performance of vice principals and principals. Prior to State Intervention, on June 14, 2013, the Department of Education approved the evaluation instrument to be used by the District during the 2013-2014 school year. It was in place prior to Ms. Nicolosi meeting with the District's principals on June 25, 2013. During that meeting she explained how

[5] Ms. Nicolosi was Interim State Superintendent until August 21, 2014 when Paymon Rouhnifard became State Superintendent. She continued to assist the transition in the capacity of a Senior or Special Advisor.

the evaluation process was going to proceed for principals. She testified that on June 25, 2013:

> I met with the principals, giving them the information about how they were going to be evaluated and the timelines, that it wouldn't be any less than 12 months and no more than 18 months.

The meeting was not limited to the procedures for the evaluation of principals. Discussions were also held concerning teacher evaluations. The principals were informed that in order to perform teacher evaluations, they were required to be certified in Teachscape.[6] Respondent attended the June 25, 2013 meeting. I find that the District has established that Respondent was properly noticed on the evaluation instrument and the timelines to be used for the conduct of the evaluations.

Formal evaluations of Respondent were conducted on December 4, 2013, March 15, 2014 and June 12, 2014. All overall ratings were "ineffective." At the end of the 2013-2014 school year, Respondent received an Annual Performance Report or "summative evaluation" on June 19, 2014. The overall rating on the summative evaluation was 1.75. Under the evaluation scheme, this score is deemed to be a rating of "ineffective." The overall score was based upon an average score of the evaluations that had been conducted by Evaluators Agnew and Flemming. There was general consistency in the results of virtually all of their evaluations. Although Respondent's testimony reflects that he had

[6] The District provided evidence that Respondent was noticed regarding the implementation of Teachscape at least two years prior to state intervention.

differences of opinion as to the ratings he received, there is no basis to conclude that the evaluations were not fair, regular or inconsistent with the terms and framework of the State approved evaluation instrument. Respondent's main objections to the utilization of the ratings as a basis for the tenure charge of inefficiency are the District's calculation of the time period for the evaluation assessment cycle and its completion pursuant to N.J.S.A. 18A:7-45(c) and the District's failure to provide Respondent with a Corrective Action Plan.[7] I next address the merits of the tenure charges and the central objections asserting that they must be dismissed.

I have considered Respondent's objections to when the evaluation assessment cycle began. This issue is directly connected with calculating the length of the assessment cycle. I am persuaded, on this record, that the District has established that June 25, 2013 was the date that the assessment cycle for principals in the school district commenced. Respondent disagrees. He asserts that the assessment cycle could not have started prior to the evaluators being in place and that this date could not have been prior to October 24, 2013. Respondent regards this date as significant because Respondent's primary evaluator, Donna Agnew, was not hired until October 2013 and had not set foot in the Pyne Point Middle School until October 24, 2013. Thus, when this date is measured with the July 15, 2014 date when Respondent was served with tenure

[7] N.J.S.A. 18A:7-45(c) states: Notwithstanding any other provision of law or contract, the State District Superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal or vice-principal performance in districts under full State intervention established by the commissioner pursuant to subsection a. of this section.

charges, Respondent asserts that the time period was only ten (10) months. Respondent argues that this violates the State Intervention Statute even if this dispute is found to be governed solely by that statute.[8]

After due consideration, I find Respondent's perspective as to the proper calculation of the time period for the evaluation assessment cycle under the statute to be overly restrictive. If the commencement of the evaluation cycle were to be tied to the date of hire of the evaluator, or the date the evaluator first set foot into the school, this would relieve Respondent of his responsibility to be held accountable for the educational processes under his authority after State intervention commenced on June 25, 2013 and, in this case, for four months thereafter. Respondent would limit such accountability by excluding performance during all of the time period prior to his primary evaluator being on site. This view is not consistent with the evaluation criteria in the evaluation instrument that made him accountable for his performance after June 25, 2013, nor the broad and specific authority set forth in the State Intervention Statute that grants the State District Superintendent immediate authority over the education process in the District once the State officially intervened. In this case, that date was June 25, 2013.

The June 25, 2013 date is not significant solely because it marked the date of State intervention. I do not find that this date, standing alone,

[8] As noted, Respondent's objections to the tenure charges extend beyond a strict application of the State Intervention Statute.

automatically constitutes the commencement of the assessment cycle. Instead, it was the actions of the District upon state intervention that dictates the effective date. As indicated, the Interim State District Superintendent promptly held a meeting with principals on that date. Respondent was in attendance. The meeting included information on the process under which the principals would be evaluated and also the time periods for the evaluation. An Office of Evaluation had already been created prior to the date of intervention. According to the testimony of Dr. Fisicaro, the Office created the evaluation instrument that provided the evaluation rubric and the feedback portion of the evaluation to the evaluatee. The instrument was approved by the Department of Education prior to intervention. Testimony reflects that significant efforts were made by the District to guide evaluators to develop explicit standards for the development of evidence relating to the evaluation instrument that could not be misunderstood. According to Ms. Nicolosi, at the June 25, 2013 meeting, she gave an overview of the evaluation rubric, its domains and provided each principal with a copy of a portion of the State Intervention Statute that was relevant to principals and vice principals. She informed them that they would be subject to multiple evaluations during an evaluation period that was no less than twelve (12) months but no more than eighteen (18) months. The principals were then provided a document on July 24, 2014 that, among other things, again noticed them that a principal could be dismissed for failing to meet performance criteria after a twelve (12) month evaluation cycle. Principals were provided with training and information regarding the evaluation process for principals during the summer and prior to

the opening of schools in September. Specific training on the Instrument was provided by Mr. Matheney on August 21, 2013. Respondent was aware of the standards that were going to be applied. Training sessions were conducted during and after the commencement of the 2013-2014 school year. There is scant evidence reflecting that Respondent misunderstood or challenged the basis upon which he was going to be evaluated. The testimony from his evaluators consistently reflected that Respondent, whether intentional or not, did very little to engage them between evaluations, especially in regard to the actionable feedback that served as guidance for correction of the observations that led to the ineffective ratings. Evaluators Agnew and Flemming offered credible testimony as to their availability to meet with Respondent over any issues he had with the instrument, the ratings or the actionable feedback.

Respondent correctly points out that Dr. Agnew was not hired until October 2013 and Respondent's first evaluation was not conducted by Dr. Agnew until December 4, 2013. However, it is significant that the evidence that formed the basis for that evaluation consisted of information and standards set forth in the instrument that well preceded the date of the first formal evaluation and were known by the Respondent that they would serve as the basis for his evaluations. The overall rating on the December 4, 2013 evaluation was "ineffective." These findings included the Respondent's failure to attend subject matter meetings and to maintain sign-in sheets. These requirements were known to the Respondent and unrelated to the date that his main evaluator was

in place. Dr. Agnew noted that Respondent's failure to participate in instructional learning team meetings prevented him from following up on subject matters when he met with teachers in their classrooms. Dr. Agnew observed that Respondent had not taken any surveys from parents and had not identified low performing staff members for the purpose of developing remediation plans for them. He had not completed evaluations of his teaching staff despite his awareness of this important requirement at the June 25, 2013 briefing by the Interim State Superintendent. Dr. Agnew also observed that Respondent did not meet the standard required for communicating with his staff and the community. He did not adhere to teacher observation timelines to ensure that the required number of teacher observations were undertaken. Respondent was noticed of the requirement to prepare for the Teachscape Danielson Certification Assessment. However, he did not achieve certification until October 2014. His failure to do so caused him to fall behind in his evaluation of teachers. Significantly, this time lag continued throughout the rest of the school year. Dr. Agnew found that Respondent did not perform walkthroughs nor complete evaluations in Teachscape in their proper format. It was an unreasonable and inaccurate argument by Respondent to assert that Dr. Agnew was barred from evaluating him for not meeting the requirements for which he had received proper and ample notice dating back to June 25, 2013. Actionable feedback was provided on this evaluation for Respondent's review to enable and assist him to correct the deficiencies that were found. Similar deficiencies and actionable feedback are reflected in the additional evaluations. The summative evaluation was also

based in part upon an evaluation of Respondent's performance commencing on the date of the intervention and the Interim Superintendent's briefing.

Although Respondent's arguments were clearly articulated and vigorously presented, I do not find merit in his contention that the assessment cycle should have been calculated from the time that his initial evaluator was appointed and set foot in the school. The District has established, through testimony and relevant exhibits, that it complied with N.J.S.A. 18A:7A-45 by noticing Respondent of the District's authority under the law and its expectations for principals. The record is clear that Respondent was informed of his requirement to successfully pass the test to be proficient in conducting teacher evaluations. This fact was known to him prior to the appointment of his evaluators and independent of their presence. Upon takeover, Interim State Superintendent reminded Respondent and others that teacher evaluation is a crucial part of transforming education throughout the District. Respondent did not meet this requirement and his explanations for his failure to do so are without merit. Respondent's evaluator, despite her lack of presence at that time, was clearly authorized to evaluate Respondent on whether he fulfilled this obligation after state intervention.

I next turn to Respondent's contention that he was deprived of a Corrective Action Plan or an additional evaluation period in which to assess his performance prior to the filing of the tenure charges. This issue must be

reviewed and considered within the overall dispute as to the District's statutory authority under the State Intervention Statute and/or TEACHNJ. This issue is also connected with Respondent's contention that he was entitled to a two year evaluation cycle prior to the filing of tenure charges based upon "inefficiency."

The initial issue for determination is the weight to be given to the substance of the statute that governs a state takeover district. Respondent's central objections are that notwithstanding the State Intervention Statute, TEACHNJ and its implementing regulations, as well as the District's own document explaining its evaluation process required either a Corrective Action Plan, "additional support" or "at least one additional evaluation" prior to deciding that tenure charges can be filed for "inefficiency." This is a matter of statutory construction and interpretation.

The District was subjected to state intervention pursuant to N.J.S.A. 18A:7A-45. The statute at subsection 45(c) states:

> Notwithstanding any other provision of law or contract, the State District Superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal or vice-principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal or vice-principal performance in districts under full State intervention established by the commissioner pursuant to subsection a. of this section.

The State Intervention Statute stands in contrast to certain provisions in TEACHNJ that provide for a two-year evaluative cycle (N.J.S.A. 18A:6-17.3) and

a corrective action plan (N.J.A.C. 6A:10-2.5). The contention that the District's actions were deficient by failing to adhere to these alleged requirements presumes that TEACHNJ either supersedes the State Intervention Statute or must be given greater weight when the State Intervention Statute is read "in concert" with TEACHNJ. Such conclusion would require that an addition or modification be read into TEACHNJ that would reflect a legislative intent to do so. Based upon the fact that State Intervention districts have been provided with clear and specific authority in N.J.S.A. 18A:7A-34, et. seq. with respect to dismissal of a tenured principal for inefficiency and the absence of any legislative action removing or modifying such authority, I simply cannot find evidence of such legislative intent. The authority of a takeover district has not been overridden, repealed or modified by subsequent legislation. As noted by Arbitrator DeTreaux, the legislature did not remove this authority when it approved TEACHNJ. I agree with his finding. The State Intervention Statute was, by its terms, legislation limited to the narrow legal action of the State taking over a local district that had been found not to have met its lawful obligations. Under the intervention statute, the District's utilization of an assessment cycle of twelve (12) months was consistent with its authority. If TEACHNJ had been intended to serve as a balance to the broad authorities granted to a State Intervention district, such intent was not manifested in the language of that statute. TEACHNJ does extend to public school principals but it did not remove the authority of a takeover district to act based upon a more narrow assessment

cycle than that provided to principals employed in a non-takeover district. This is consistent with Arbitrator DeTreaux's observation that:

> One of the goals of the State Intervention Statute was to allow the State District Superintendent to remove ineffective administrators and supervisors early in the process of rebuilding and revitalizing the failing district. Extending the assessment cycle for principals and vice-principals from "no less than 12 months" to 2 years would be a significant departure from the goal of the intervention statute. It is unlikely the legislature would enact such significant change without clearly stating so in the TEACHNJ statute.

The application of the State Intervention Statute to the Respondent, based upon all of the above, clearly made him subject to a stricter standard for evaluation that he would have been had he not been employed, as here, by a district that was subject to state intervention. The record does show that the Respondent displayed important assets such as providing student supervision. Nevertheless, his employment in this District was subject to the exercise of unique statutory authority and the record supports the conclusion that this authority was properly exercised by the District in accordance with that authority.

I have closely examined Respondent's arguments that the District's evaluation policy required a corrective action plan that allowed additional periods of time to tenure charges being filed. I do not find reference to a corrective action plan thwarted the authority of the District to file tenure charges in this instance. Reference does exist to principals who are "on a corrective action plan." This is an apparent reference to those principals who may have been on such a plan at time of state intervention. Beyond this observation, there is nothing that would

have prevented the District from providing such a plan at any time during the assessment cycle, in contrast with actionable feedback, if it deemed such course of action to have been appropriate. The fact that it did not exercise such discretion did not constitute a waiver of its statutory authority to file tenure charges. In the instant matter, the District did provide the Respondent with substantially similar direction for correction and improvement of his performance. Under the statutory scheme for state intervention, I find that the District has established that additional notice of ineffective performance and additional opportunity for improved performance was not required.

## AWARD

In accordance with the terms of the Opinion, the tenure charges filed in Agency Docket No. 367A-12/14 shall be dismissed in their entirety. The tenure charges filed in Agency Docket No. 291-9/14 shall be sustained. Pursuant to N.J.S.A. 18A:7-45(c), Respondent Brian Medley shall be dismissed effective on the date of this Award.

Dated: March 25, 2016
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 25th day of March, 2016, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

JOHN J. BLANCHARD
Attorney At Law
of New Jersey

123-16

JENNIFER FARGO,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

*Pro se* petitioner filed an appeal in October 2015 challenging the Board of Examiners' determination to deny her application for an experience-based Certificate of Eligibility (CE) as a Teacher of Career and Technical Education (CTE): Baking. Petitioner contended that she had 4,000 hours of relevant employment experience as well as significant training in baking at the French Culinary Institute, which should be deemed to meet the applicable statutory and regulatory provisions for obtaining a CTE: Baking endorsement. The respondent filed a motion for summary decision in lieu of an answer. Petitioner never responded to the motion for summary decision.

The ALJ found that: there are no issues of material fact, and the matter is ripe for summary decision; the issue in this case is whether respondent's denial of petitioner's application for the CTE: Baking CE was consistent with the applicable statutory and regulatory provisions; petitioner has not provided any evidence or documents to show that her education and experience at the French Culinary Institute, or her work as a teacher's aide at Hudson County School of Technology have a one to one correspondence with the certification requirements. Accordingly, the ALJ concluded that petitioner has not shown that respondent's denial of her application for a CTE: Baking CE was inconsistent with applicable rules and regulations. The ALJ granted respondent's motion for summary decision, and recommended dismissal of the petition.

Upon review, the Commissioner concurred with the ALJ's determination that the respondent is entitled to summary decision. Accordingly, the petition was dismissed.

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

March 31, 2016

123-16

OAL DKT. NO. EDU 19735-15
AGENCY DKT. NO. 330-10/15

| | | |
|---|---|---|
| JENNIFER FARGO,<br><br>PETITIONER,<br><br>V.<br><br>NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,<br><br>RESPONDENT. | : | COMMISSIONER OF EDUCATION<br><br>DECISION |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Board of Examiners is entitled to summary decision. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/31/16
Date of Mailing: 3/31/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT.NO. EDU 19735-15
AGENCY DKT. NO. 330-10/15

**JENNIFER FARGO,**
Petitioner,
v.
**NEW JERSEY STATE BOARD OF EXAMINERS,**
Respondent.

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**Jennifer Fargo,** pro se

**Lauren A. Jensen,** Esq., for respondent New Jersey State Board of Examiners (John J. Hoffman, Attorney General)

Record Closed: January 29, 2016 Decided: March 2, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, Jennifer Fargo, (Fargo) appeals the New Jersey State Board of Examiners (Board) denial of her application for teacher of baking licensure. The matter was transmitted to the Office of Administrative Law (OAL) and filed on December 9, 2015. December 7, 2015, respondent filed a motion for summary decision in lieu of Answer. A telephone conference was held on January 5, 2016. Petitioner was given

until January 29, 2016 to file a response to the motion. To date, petitioner has not responded to the motion.

## FACTUAL DISCUSSION

I **FIND** the following **FACTS** in this case.

On April 6, 2015, Fargo completed an application for an experience based endorsement for teacher of career and technical education (CTE) baking certificate of eligibility (CE). On April 17, 2015, she was advised that she had not completed the 4,000 of 8,000 hours of employment experience, the test requirement and the twenty-four hour requirement. On April 28, 2015, petitioner advised the Office of Licensure and Credentials (OLC) that she wanted to appeal their decision. OLC re-evaluated her application and re-affirmed its denial OLC provided Fargo with the procedures to appeal an adverse credentials evaluation and request review of alternate experience or education. The Board determines if experience and /or study present is equivalent to the required employment experience. It recommended she supply a narrative statement clearly outlining the one to one equivalency of her experience/coursework to the licensure deficiency.

On June 10, 2016 petitioner submitted documentation to the OLC. She submitted documentation of work experience with the Hudson County School of technology and asked that her education at the French Culinary Institute be considered. The appeal was submitted to the Board on July 30, 2015. On September 17, 2015, The Board adopted the written decision denying petitioner's request for CTE: Baking CE. The Board stated that teaching experience cannot be substituted for the four years of occupational experience. The Board determined that Fargo's work experience as a teacher's aide at Hudson County School of Technology and her educational experience at the French Culinary Institute could not substitute for a four thousand hour deficiency.

Petitioner has not responded to the motion for summary decision. Petitioner did not ask for an extension to submit her response. The last communication with petitioner was during the January 5, 2016 telephone conference.

## LEGAL ANALYSIS AND CONCLUSION

Respondent seeks summary decision in this matter. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of American, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party... are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In this matter there is no question of fact. The issues are whether respondent's denial of petitioner's application for CTE: baking CE was consistent with the applicable statutory and regulatory provisions.

N.J.A.C. 6A:11.3(b)(1) provides:

To be eligible for the CE, the candidate shall fulfill one of the following:
1. Experience-based endorsements: All candidates for an experienced-

based endorsement shall pass an examination in physiology, hygiene, and substance abuse issues pursuant to N.J.A.C. 6A:9B-5.9. If the candidate seeks an endorsement in a regulated occupation for which a State-issued occupational license, certificate, or registration is required for employment in or practice of the occupation, the candidate also shall hold the State-issued occupational license, certificate, or registration. The employing school district shall recommend for approval the candidate's experience pursuant to the criteria and procedures in this subsection. Candidates shall meet one of the following requirements:

i. Employment experience: The candidate shall present a minimum of four years of Department-approved and documented employment experience, which will be equivalent to 8,000 hours of employment. The employment experience shall be acquired within 10 years of the endorsement application and shall be verified by the applicant's employer(s).

(1) Teaching experience in the occupation cannot be used as a substitute for the required four years of occupational experience; however, the Department may consider teaching experience in an apprenticeship training program registered with the United States Department of Labor or equivalent state agency as evidence of eligible employment experience.

(2) The Department will identify industry credentials in consultation with experts from education and business. The industry credentials may be considered equivalent to the employment experience requirement in this subparagraph.

ii. Self-employment: The candidate shall present a notarized letter from a tax preparer and/or an attorney verifying the following:

(1) The candidate has filed State and/or Federal taxes for the self-employment using a Federal U.S. Census North American Industry Classification System (NAICS) that is appropriate for the endorsement; and

(2) The candidate's self-employment experience meets the minimum of four years of employment experience within 10 years of the certificate application, which will be equivalent to 8,000 hours of employment.

iii. Military experience: Candidates shall present a Military Discharge certificate (DD-214) indicating military qualifications and occupational training received to determine the extent of credit to be applied toward satisfying the employment experience requirements pursuant to (b)1i above.

Petitioner has not provided any evidence or documents that show that her education experience at the French Culinary Institute or her work as a teacher's aide at Hudson County School of Technology have a one to one correspondence with the certification requirements.

I **CONCLUDE** that petitioner has not shown that respondent's denial of her application for CTE: baking CE was inconsistent with the applicable statutory and regulatory provisions.

## ORDER

Based on the foregoing, it is **ORDERED** that respondent's motion for summary decision is **GRANTED** and the appeal is hereby **DISMISSED**.

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

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

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

3-2-16
DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency:

Date Mailed to Parties: MAR 7 2016

ljb

Laura Gardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

124-16

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Attorneys for the State Operated
School District of the City of Newark
File No. 650-10177

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| IN THE MATTER OF TENURE CHARGES OF EGBERT BURKE<br><br>and the<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | AGENCY REF. NO. 268-9/15<br><br><br><br>**STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Egbert Burke, residing at 153 Park Street, East Orange, NJ 07017 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of inefficiency to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Egbert Burke, State-Operated School District of the City of Newark, Essex County* ("Tenure Charges"), primarily based upon allegations that Respondent had not demonstrated proficient teaching ability and such charges were assigned

Docket No. 268 9/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator David Gregory ("Arbitrator") for a hearing; and

**WHEREAS**, the District is an *Abbott* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public by establishing certainty of result and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to refile and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the District, and Respondent reserves the right to defend same.

2. In consideration of the withdrawal of the charges, the Respondent Egbert Burke agrees to submit a binding and irrevocable resignation from all employment with the Newark Public

Schools, in a form attached hereto as Exhibit A. The resignation is based upon Mr. Burke receiving all salary at his regular rate of pay from the date of his suspension in September 2015 until January 31, 2016. In addition, Mr. Burke will remain on the health insurance plan of the Newark Public School until February 29, 2016. Other than salary and insurance, Mr. Burke waives all other payment, benefits or emoluments of employment with the Newark Public Schools.

3. Except as noted above, Respondent waives all claims of any nature against the District with regard to his employment with the District including fees, or other monetary relief, with the exception of workers' compensation claims for the term of his prior employment until the date of this Agreement. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective February 1, 2016, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employee or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation. The District will not oppose any application by Respondent for unemployment benefits.

4. In exchange for the consideration set forth in paragraph 2 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of

whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to the date of this Agreement. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his

employment, including but not limited to any claim for back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers' compensation claims.

5. Notwithstanding the terms of paragraph 9 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

6. Notwithstanding the terms of paragraph 4 of this Stipulation, Respondent does not hereby waive any right he may have to workers compensation benefits or pension benefits.

7. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

8. This Agreement shall not constitute a precedent in any matters involving other District employees.

9. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

10. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

11. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

12. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

13. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

14. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

15. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

16. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

17. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

18. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any

and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 12/17/15

ROBERT BURKE

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 12/29/15

By: CHRISTOPHER CERF
State District Superintendent

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 12/30/15

Robert M. Tosti
Attorney for State-operated School District
of the City of Newark

APPROVED:

Dated: January 7, 2016

David Gregory, Arbitrator

## CERTIFICATION

I, Egbert Burke, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 12/12/15

Egbert Burke

# EXHIBIT A

December 3, 2015

Christopher Cerf, State District Superintendent
NEWARK PUBLIC SCHOOLS
2 Cedar Street
Newark, NJ 07102

Re: In the Matter of the Tenure Charges Against Egbert Burke
Agency Ref 268-9/15

Dear Superintendent Cerf:

In accordance with our agreement, I hereby submit my resignation from employment as a Newark Public School teacher effective January 31, 2016.

Very truly yours,

Egbert Burke

/eb

125-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

***In the Matter of the Tenure Hearing of:***

**RATIBA AHMED,**
**STATE-OPERATED SCHOOL DISTRICT**
**OF THE CITY OF NEWARK, ESSEX COUNTY**

**Agency Docket #281-9/15**

**Walt De Treux, Esq., Arbitrator**

*Hearing Dates: 11/13/15; 12/22/15*
*Briefs Received: 3/4/16*
*Decision Date: 4/4/16*

**Appearances:** For the School District – Christina M. Michelson, Esq., *SCARINCI & HOLLENBECK, LLC*
For the Respondent – Nancy I. Oxfeld, Esq., *OXFELD COHEN, P.C.*

## Introduction and Statement of Relevant Facts

Respondent Ratiba Ahmed is certified as a K-12 teacher of mathematics. During the 2013-14 school year, Ahmed taught at the Dr. William H. Horton Elementary School; and during the 2014-15 school year, she taught at the Lafayette Street School. Ahmed was subject to a Corrective Action Plan (CAP) during both school years. The CAPs focused, in part, on timely submission of lesson plans, measurement of student growth, and reading assignments for professional development.

Despite the CAPs, Respondent received an Ineffective rating on her 2013-14 and 2014-15 Annual Summative Evaluations. As a result, the State-Operated School District of the City of Newark issued tenure charges against her. Charge One alleged inefficiency based on the evaluations. Charge Two alleged conduct unbecoming and

neglect of duty based on an alleged pattern of excessive absenteeism and a failure to effectively manage and supervise her classroom. Charge Three alleged a failure to adhere to District policies and procedures in the management of Respondent's classroom, as well as violation of the District policies on attendance.

On October 9, 2015, the New Jersey Department of Education declared that it "is unable to determine that the evaluation process has not been followed," and that "the balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary..." The same day, the undersigned was appointed to hear the tenure charges.

On November 13, 2015 and December 22, 2015, hearings were held at the law offices of Scarinci & Hollenbeck in Lyndhurst, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.

## Issue

*Has the State-Operated School District of the City of Newark established the allegations of inefficiency, unbecoming conduct, neglect of duty, and/or other just cause against Ratiba Ahmed as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?*

## Analysis and Decision

### Charge One – Inefficiency

On September 23, 2013, Respondent Ahmed was placed on a Corrective Action Plan (CAP) for the 2013-14 school year. School administration conducted Mini-Observations of Respondent six times in the first half of the school year and communicated with her on areas that needed improvement. She was also assigned a coach to provide guidance and feedback. An October 28, 2014 Long Observation resulted in an overall Ineffective rating and was followed by a Post-Observation Conference (POC). A February 14, 2014 Short Observation resulted in an Ineffective rating. A Mid-Year Review completed at the same time also rated Respondent as Ineffective overall and in each of the four areas of evaluation. Respondent's May 12, 2014 Annual Summative Evaluation concluded with an overall Ineffective rating and Ineffective ratings in each of the four evaluation areas.

In the 2014-15 school year, Ahmed was administratively excused/suspended from September 8, 2014 to mid-February 2015. On February 17, 2015, she was assigned to the Lafayette Street Elementary School and began teaching on February 24, 2015. A Corrective Action Plan was proposed on March 9, 2015. However,

Ahmed went on extended sick leave from March 10, 2015 to April 9, 2015. Upon her return on April 10, 2015, her CAP was finalized, and she received professional development, including training on the use of BloomBoard, assistance with creation and implementation of her lesson plans, and the assignment of a Math Teacher Coach.

On April 21, 2015, Respondent was rated Ineffective after a Long Observation by the Vice Principal; and she received a similar rating on May 13, 2015 after a Long Observation by the Principal. On June 1, 2015, a Short Observation by the Vice Principal resulted in an Ineffective Rating; and on June 15, 2015, she was rated Ineffective in her Annual Summative Evaluation.

Generally stated, the negative evaluation and ratings of Respondent focus on the quality of her instruction, her inability or refusal to draft adequate lesson plans, her failure to adequately measure student growth, and her inability to effectively manage the classroom. But the specifics of the evaluations and ratings have not been contested by the Respondent and need not be discussed in any detail. Rather, Respondent alleges that the inefficiency charges should be dismissed because the School District "failed...to appropriately provide Ms. Ahmed with a CAP and observations in time for Ms. Ahmed to have the opportunity to improve."

Under TEACHNJ, an inefficiency charge can be brought against a teacher if, as in Respondent's case, she received a final rating of Ineffective for two straight school years. An Arbitrator adjudicating the charges can only dismiss the charges for very specific reasons, including, as applicable in the present case,

> "the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan." N.J.S.A. 18A:6-17.2(a)1

TEACHNJ also imposes requirements on a School District seeking to remove a teacher for inefficiency. The requirements include the following,

> "Each teacher shall be observed...at least three times during each school year but not less than once during each semester." N.J.A.C. 6A:10-4-4(c)

The Administrative Code requires an additional observation if the teacher is on a CAP. However, the Code further provides at N.J.A.C. 6A-10-4.4(e)(1),

> "If a teacher is present for less than 40 percent of the total student school days in an academic year, he or she shall receive at least two observations to earn a teacher practice score."

According to the School District, Ahmed was absent for more than 90 days in the 2014-15 school year, representing less than 40% of the 191 total teacher school days. Accordingly, it contends that it only needed to make at least two observations of the Respondent.

But Respondent's challenge to the inefficiency charge is not based on the number of observations, but rather the timing of the observations. Respondent notes that a CAP was proposed on March 9, 2015, immediately prior to Ahmed going on extended sick leave from March 10 to April 9, 2015. The CAP was finalized on April 10, 2015, the day after her return to work. Thereafter, Respondent was observed on the following dates: April 21, 2015; May 13, 2015; June 1, 2015; and June 15, 2015. Respondent argues that the time period between the CAP and the final observation and the first and last observation were not sufficient to provide Respondent with the time needed to improve.

Respondent cites to the decision in the case of *In the Matter of the Tenure Hearing of Patsy Cuntrera, Passaic County Vocational School District,* Agency Docket No. 223-8/15 (Gandel, 2015). Cuntrera was observed in mid-October 2014, late April 2015, and two consecutive days in May 2015. Cuntrera had worked in the fall of 2014, but went on extended medical leave of absence from December 8, 2014 to February 17, 2015. She was suspended by the School District from February 25, 2015 to March 25, 2015 and was out again for approximately two weeks in mid-April. Arbitrator Gandel noted, "...evaluations are supposed to help the teacher with his strengths and weaknesses and to give him guidance so he can improve." With that purpose in mind, Arbitrator Gandel concluded, "there has to be a reasonable time period between evaluations to show improvement." The Arbitrator noted that in Cuntrera's situation, "...the timing of the evaluations, the second the day he returned from an extended leave of absence and suspension and the third the day he returned from another absence followed by the fourth on the very next day did not appear to represent a District that was trying to work with its staff member..."

Similarly, in *In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County,* Agency Docket No. 49-3/15 (Denenberg 2016), Respondent Ebert returned to work in May 2014 after a lengthy absence and was subject to a "series of observations...in rapid succession." Arbitrator Deneberg found that "[n]o time was left in between for the teacher to improve her performance on the basis of each preceding observation."

The School District is at a distinct disadvantage in evaluating a teacher who is absent for an extended portion of the school year. Unlike the District described in

the *Cuntrera* Award, the State-Operated School District of the City of Newark appears to have been making every reasonable effort to address Respondent's performance deficiencies. A CAP was proposed on March 9, 2015, soon after her return from administrative suspension. But finalization of the CAP is largely dependent on the teacher, and Ahmed went out on a month-long sick leave the day after the CAP was proposed. As a result, it was not finalized until April 10, 2015, the day after her return to work. Around that time, the District provided her with assistance and coaching and professional development reading assignments to improve her performance and cure her deficiencies.

The first observation occurred on April 21, 2015, only 7 school days (3 of which Ahmed was out sick) after the CAP was finalized. It found her lacking in all four areas of evaluation. The second evaluation occurred on May 13, 2015, approximately 16 school days (3 of which Ahmed was out sick) after the preceding observation. A Short Observation occurred approximately 12 school days later on June 1, 2015. The Annual Evaluation was completed on June 15, 2015, approximately 9 school days (4 of which Ahmed was out sick) after the Short Observation. Accordingly, Respondent was observed and evaluated four times over approximately 34 school days for which she was present.

TEACHNJ anticipates that the observations scheduled throughout the school year, the mid-year review, and the CAP will provide guidance and feedback so that an underperforming teacher will have the opportunity to improve performance and correct deficiencies with assistance from the District. Unlike the situations described in *Cuntrera* and *Ebert*, the truncated observation schedule was not

attributable to any mismanagement or bad faith on part of the District. Rather, the shortened time period was simply due to Respondent's frequent and lengthy absences from the school, initially due to an administrative suspension and later due to sick leave use.

Regardless of the reasons for the absence, Ahmed had a very limited time period in which to improve between the finalization of her CAP and her first observation (4 school days for which she was present); between her first and second observations (approximately 13 school days for which she was present); between her second and third observations (approximately 12 school days); and between her final observation and her Annual Summative Evaluation (5 school days for which she was present). The time span is simply not sufficient to allow the teacher to fully meet the goals of her CAP, for the School District to effectively assist her in improvement, and for her to achieve improvement sufficient to affect her evaluation ratings.

For these reasons, I find that the School District's evaluation of Respondent did not adhere substantially to the evaluation process in that the time period of the evaluations did not afford Ahmed the opportunity to correct her deficiencies and improve on her performance. Accordingly, the tenure charge of inefficiency is not sustained.

**Charges Two and Three – Conduct Unbecoming, Neglect of Duty, and Other Just Cause**

Charges Two and Three are related because they focus on Respondent's alleged excessive absenteeism and her alleged inability to effective manage and supervise her classroom. Respondent's attendance record is as follows:

**2011-12**: 46 days absent for sick leave;

**2012-13**: out on worker's compensation November 19, 2012 – June 28, 2013;

**2013-14**: 11 days absent for sick leave; out on worker's compensation March 2, 2014 – June 30, 2014;

**2014-15**: administrative suspension September 8, 2014 – February 24, 2015; 29 days sick leave from February 26, 2015 – June 30, 2015, including extended leave from March 10 – April 9.

In addition to her attendance record for which she received multiple warnings throughout 2014-15, Respondent was cited by the School District for the following:

- Failing to record grades for all students (January 14, 2014);
- Allowing students to leave her classroom without permission and failing to notify security (January 24, 2014);
- Creating a safety hazard by locking her classroom door (January 24, 2014);
- Failing to require students to remove hoodies in class and failing to teach while the class was in progress (January 30, 2014);

- Allowing students to leave the classroom without supervision (February 7, 2014);
- Leaving 25 students unattended in her classroom (May 20, 2015);
- Failing to request an assignment from the main office when her students were on a class trip (June 1, 2015); and
- Leaving her class unattended to observe other teachers conduct a lesson (June 15, 2015).

As the District notes in its brief, excessive absenteeism may lead to a termination of tenure rights even if the absences were excused or for legitimate reasons because of the negative impact such absences have on the educational program and the continuity of instruction. See, e.g., *Metallo v. Union City Board of Education,* 2003 N.J. Agen Lexis 227 (March 2003), aff'd by State Board, EDU No. 3454-01 (April 2004).

Beginning the 2011-12 school year and through the 2014-15 school year, Respondent missed a substantial amount of time from school – 46 days in 2011-12; approximately 7 months in 2012-13; more than 4 months in 2013-14; and a total of approximately 6 months in 2014-15. Arbitrator Michael Pecklers explained in *In the Matter of the Tenure Hearing between State Operated School District of the City of Newark, Essex County and Jajuana Vaughn,* Agency Docket No. 336-10/15 (Pecklers 2016) that the School District bears the "burden of making a prima facie showing that it has satisfied or established the sufficiency of the subject tenure charge by a preponderance of the credible evidence." (at 12) The sheer number of absences goes a long way in making a prima facie showing of excessive absenteeism.

But Respondent argues that the District's shoddy attendance record keeping precludes an accurate account of Ahmed's presence or absence during the school day. Specifically, Respondent focuses on the month of September 2014 and the months of January and February 2015.

The District introduced several different attendance records; and therein lies the confusion. The records are not consistent as to the reason for her absence in the contested time periods. For example, a "Time Detail" record indicates that Ahmed was "administratively excused" from September 1, 2014 through September 25, 2014 before going on Suspension Without Pay through January 23, 2015. An "Attendance Editor" document indicates that Ahmed was "Sick" on September 11, 12, 15, 16, 17, and 18.

Respondent came off Suspension Without Pay on January 23, 2015, but did not start working until February 24, 2015. (She was assigned to the Lafayette Street School on February 17, 2015.) A "Time Detail" document lists her as administratively excused in the last week of January 2015 and does not account for her time between February 1 and 13. It includes an unexplained notation of "Regular Settlement" for the week of February 16, and another "Time Detail" document indicates she returned to work on February 24, 2015.

Homere Breton, Executive Legal Assistant in the District's Talent Office, explained that the attendance documents reflect the type of report requested by the user. That is, the report only answers the query posed by the user. Accordingly, no single report conveniently sets forth Respondent's attendance record.

Despite that significant and disturbing shortcoming in the District's attendance record keeping, it is not particularly relevant to the present tenure charges. The issue for the tenure charges related to excessive absenteeism is whether Ahmed was absent on the many days in question. The records leave no doubt that Respondent was absent, and Respondent does not contend that she actually worked any of those days. The inconsistent record keeping in September 2014 and January-February 2015 only prevents a true understanding of the reasons for her absences. To be clear, the District has sufficiently demonstrated that Ahmed was absent during the relevant time periods in September 2014 and January and February 2015, although the exact reason for her absence has not been conclusively shown.

In *Vaughn,* Arbitrator Pecklers further explained "the burden of production shifts to Respondent to plead and establish her affirmative or exculpatory defenses." Respondent, who did not testify at hearing, did not offer any affirmative or exculpatory defenses other than her challenge to the sufficiency of the record keeping. But the Commissioner of Education enunciated the standard for termination of a tenured teacher for excessive absenteeism in *In the Matter of the Tenure Hearing of Lena White,* 92 N.J.A.R.2d (EDU) 157. The standard requires consideration of the particular circumstances of the absences, not just the number of absences; the impact that the absences had on the continuity of instruction; and some warning to the employee regarding the District's dissatisfaction with the pattern of absences. (at 161)

The total number of absences in and of itself demonstrates the impact on continuity of instruction. Absences of approximately 1-1/2 months, 7 months, 4 months, and 6 months in four consecutive school years indicates that students have experienced considerable interruption in the continuity of instruction. Further, Respondent was warned via memorandum and evaluations about her pattern of absenteeism beginning in 2012 and continuing through 2015. The only consideration to be examined is the particular circumstances of the absences.

Again, Respondent offered no testimony regarding the reasons for her absence. As can be seen from the District's records, the 46 absences in the 2011-12 school year are attributable to sick leave. The 7-month absence in 2012-13 was due to work-related injury, as was the 3-month absence in the 2013-14 (with an additional 11 days due to sick leave). The September 2014-February 2015 absence primarily related to Respondent's Suspension Without Pay, and she was absent an additional 29 days on sick leave from February 2015 through June 2015.

Although one can reasonably argue that absences due to work-related injuries should be given some consideration, the Commissioner of Education had held that "action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries." *In the Matter of the Tenure Hearing of Folger and the School District of the City of Orange,* Commissioner Decision EDU 147-00 (May 2000).

Four school years can be equated to approximately 40 months (i.e., 10 months per year). Respondent was absent for approximately 19 months out of 40, or just less than half of the four-year period. Tellingly, after her return to work on

February 24, 2015 after an approximate 6-month suspension without pay, Ahmed was absent on sick leave for 29 days, i.e., approximately one-quarter of the remaining school year.

The District has offered undisputed evidence that Respondent was excessively absent over the most recent four-year period. The pattern of those absences in the 2014-15 school year, left unexplained by Respondent, is particularly troubling. After a lengthy suspension without pay, she returned to work on February 24, 2015, took sick leave February 26 and 27, received a proposed CAP on March 9, and used sick leave from March 10 to April 8. After returning April 9, she again used sick leave from April 13-15. After being charged with excessive absenteeism on April 30, 2015 and facing a May 8, 2015 disciplinary hearing, Ahmed was absent on sick leave May 4, 5, and 6. After being fined one day's pay on May 8, 2015 for excessive absenteeism, she used an additional four days of sick leave between June 2 and June 17.

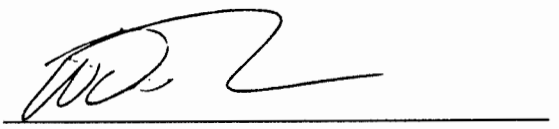
The record clearly demonstrates excessive absenteeism for the four-year period from the 2011-12 school year through the 2014-15 school year with particularly excessive absenteeism from the period February 24 – June 30, 2015.

In addition, as noted, the District offered evidence of classroom management and supervision issues on at least 8 occasions in the 2014-15 school year, for which Respondent was cited. Respondent offered no defense to those allegations other than to dismiss them as minor violations not warranting dismissal. Absent contrary evidence, the District has sufficiently demonstrated that Respondent has committed neglect of duty through these violations.

For all the reasons noted above, I find that the District has established the allegations of neglect of duty and other just cause as set forth in Tenure Charges Two and Three.[1] As Respondent has not shown, and has resisted, improvement in her attendance and classroom supervision issues particularly in the 2014-15 school year, I find that the charges warrant dismissal.

**Award**

The District has failed to establish the tenure charges alleging inefficiency and conduct unbecoming. The District has established the allegations alleging neglect of duty and other just cause as set forth in Tenure Charges Two and Three. Accordingly, those tenure charges are sustained, and dismissal is warranted.



WALT De TREUX

[1] I am not persuaded that the charges support an allegation of conduct unbecoming.

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

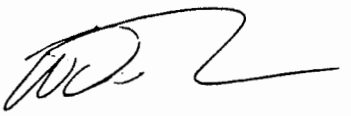
***In the Matter of the Tenure Hearing of:***

**RATIBA AHMED,**
**STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY**

**Agency Docket #281-9/15**

## Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX

126-16LM

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State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

April 5, 2016

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Re: *Board of Education of the Township of Jackson, Ocean County v. The Titusville Academy, Mercer County, et al. Agency Dkt. No. 379-12/15.*

Dear Counsel:

I have reviewed the petition of appeal and the papers filed in connection with the respective motions to dismiss filed by the respondents in this matter. The Jackson Township Board of Education (Jackson) filed a petition of appeal on December 28, 2015 seeking to recover tuition costs that it paid to the Titusville Academy for T.S. between September 2012 and January 2013, in the amount of $24,478.32. Jackson alleges that it inadvertently paid the tuition costs for T.S. at the time without investigating the proper residence of T.S. because the Department of Children and Families placed T.S. within the Jackson School District.

At some point thereafter, Jackson investigated the matter and now alleges that it appears that several other districts, who are all named as respondents, may have been responsible for T.S.'s tuition costs. On July 27, 2015, Jackson filed a complaint in the Ocean County Superior Court, Chancery Division, seeking a declaratory judgment to determine T.S.'s residency. On November 20, 2015, the Chancery Division dismissed Jackson's complaint for failure to exhaust its administrative remedies.





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Upon review and consideration of the submissions, I find that Jackson's petition of appeal was not timely filed in accordance with *N.J.A.C.* 6A:3-1.3(i). Pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing." Guidance as to what constitutes notice sufficient to trigger the running of this regulatory provision was provided by the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993). In *Kaprow, supra,* the Court found that adequate notice of a final order is one which is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow* at 587. The Court also examined the underlying purpose of the limitations period and the concept of adequate notice, stating,

> the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the [affected persons] have been alerted to the existence of facts that may equate in law with [their] cause of action... At the same time, [the notice] should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Id.*

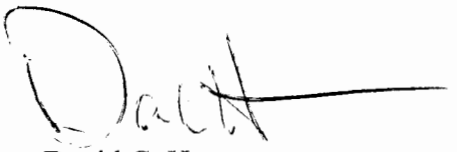
In June 2012, Jackson entered into an agreement with Titusville Academy to provide services for T.S. during the 2012-2013 school year. At the very least, Jackson was on notice that it was paying tuition for T.S. when it entered into the June 2012 agreement with Titusville Academy and when it did in fact pay the monthly tuition for T.S. between September 2012 and January 2013. Even if the triggering date for the limitations period was January 2013, when T.S was apparently disenrolled from the Jackson School District, the petition of appeal is untimely as it was not filed until over two years later.[1] If Jackson questioned the residency of T.S. or its tuition obligations, it should have raised the issue to the Department in 2012 or 2013 when it became clear that Jackson was paying the tuition for T.S. to attend Titusville Academy. Jackson's argument – that since neither the executive county superintendent nor the Commissioner has made a ruling on the residency of T.S. to date, there has been no final determination that has triggered the 90-day period – is disingenuous. Jackson was fully aware of the tuition that it was paying for T.S. in 2012 and 2013.

Finally, I find that the petitioning board has not presented any compelling reason or exceptional circumstance which would warrant relaxation of the timely filing requirement, citing only the fact that Jackson "inadvertently" made the tuition payments to Titusville Academy without investigating the residency issue. Moreover, Jackson's assertion that the other respondents failed to cooperate to resolve this matter amicably is also not a compelling reason to substantially relax the 90-day rule. Certainly Jackson could have filed a timely petition of appeal to preserve its rights while pursuing an amicable resolution.

[1] In July 2015, Jackson was clearly aware that there was a potential residency issue regarding T.S. because it filed a complaint with the Chancery Division. If I apply July 2015, when Jackson concedes that it had notice of a potential cause of action, as the triggering date this petition of appeal was still untimely filed beyond the 90-day time frame.

Accordingly, the respective motions to dismiss are hereby granted and the petition of appeal is dismissed as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i).[2]

Sincerely,



David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

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

| | | |
|---|---|---|
| J.S. ON BEHALF OF MINOR CHILD, A.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

*Pro se* petitioner challenged the respondent Board's determination that her child, A.S., was not entitled to a free public education in the Monroe Township schools. Petitioner asserted that she had a lease on an apartment in Monroe for the period from October 1, 2014 until September 30, 2015, and that she and A.S. lived there during that period. J.S. contended that she and A.S. subsequently moved in with her daughter in North Brunswick after her daughter was diagnosed with a serious medical condition. The Board maintained that a residency investigation was conducted after J.S. was continually picked up late from school by family members, and surveillance revealed that: the address provided to the school district was located in a 55 and older community; the apartment was largely unfurnished; and J.S. and A.S. routinely left for school in Monroe from an address in North Brunswick. The Board found that J.S. and A.S. have been – and continue to be – domiciled in North Brunswick, and A.S. was therefore not eligible to attend Monroe schools free of charge. The Board sought tuition reimbursement for the period of J.S.'s ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; in the instant case, the results of the Board's residency investigation show that J.S. and her child were domiciled in North Brunswick during the time period in question; petitioner failed to demonstrate by a preponderance of the credible evidence that her child was entitled to a free public education in Monroe; pursuant to *N.J.S.A.* 18A:38-1(b)(2), a school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend school in its district; and the daily tuition cost in Monroe schools was $68.91 for 2014-2015, and is $80.69 for the 2015-2016 school year. Accordingly, the ALJ concluded that A.S. was not entitled to attend school in Monroe free of charge, and the Board is owed tuition for the period of the child's ineligible attendance. The ALJ dismissed the petition with prejudice and ordered J.S. to reimburse the Board for tuition in the amount of $18,706.47, plus an additional $80.69 for each day that A.S. remains in Monroe's high school after February 29, 2016.

Upon review of the record and the Initial Decision, the Commissioner found that petitioner failed to sustain her burden of establishing that she was a domiciliary of Monroe during the period in question. Accordingly, the Initial Decision was adopted as the final decision in this matter and petitioner was directed to reimburse the Board in the amount of $ 18,706.47. The petition was dismissed.

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

April 5, 2016

OAL DKT. NO. EDU 07256-15
AGENCY DKT. NO. 92-4/15

| | | |
|---|---|---|
| J.S. ON BEHALF OF MINOR CHILD, A.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Monroe Township from November 3, 2014 to the present. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Monroe Township. Therefore, the Board is entitled to tuition reimbursement in the amount of $18,706.47 ($68.91 per day for 145 days and $80.69 per day for 108 days) for the time period from November 3, 2014 to February 29, 2016 – during which petitioner's minor child was ineligible to attend – plus $80.69 for each day beyond February 29, 2016 that the minor child remains in Monroe Township's schools.

[1] The Commissioner was not provided with a transcript of the February 16, 2016 hearing at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $18,706.47 – plus $80.69 for each day beyond February 29, 2016 that A.S. remains enrolled in the District's schools – for tuition costs incurred during the time period that A.S. was ineligible to attend school in Monroe Township. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/05/16

Date of Mailing: 4/06/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 07256-15
AGENCY DKT. 92-4/15

**J.S., ON BEHALF OF MINOR CHILD, A.S.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,**
Respondent.

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**J.S.**, on behalf of A.S., petitioner, pro se

**Mary Smith**, Esq., for respondent (Office of General Counsel, Monroe Township Schools)

Record Closed: February 18, 2016 Decided: March 4, 2016

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

## STATEMENT OF THE CASE PROCEDURAL HISTORY

Petitioner, J.S., the mother of the minor child A.S., appeals the determination of the Monroe Township, Middlesex County, Board of Education (the "Board") that A.S. does not reside within the Monroe Township school district and that tuition reimbursement is required. The Board alleges that the minor child A.S. was not residing

at the address provided by the petitioner and seeks repayment of tuition. At issue is whether A.S. is entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1.

On April 16, 2015, the Board notified J.S. that the child was ineligible to continue to attend school within the district. The petitioner filed a timely notice of appeal on or about April 24, 2015. The Board filed an answer on May 15, 2015. On May 19, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on February 16, 2016, and following the receipt of the Board's post-hearing submission, the record closed.

## TESTIMONY

Michael C. Gorski

Mr. Gorski has been employed by the Monroe Township Board of Education as the business administrator and Board secretary for six years. He previously served for ten years as the assistant business administrator and accounting supervisor. He holds a master's degree in education administration and a bachelor's degree in accounting, and is a licensed certified public accountant, a public school accountant and a certified school business administrator.

He testified that at the Board meeting of April 15, 2015, (R-2) the Board resolved to accept the recommendation of the finance committee, made at its February 25, 2015, meeting, that A.S. is not domiciled within the district and therefore not eligible to continue to attend district schools, and should be removed. J.S. was notified of this determination by the Board on April 16, 2015 (R-3). Mr. Gorski testified that the tuition cost per pupil for the 2014–2015 school year, during which A.S. was in the eighth grade at Monroe Township Middle School, was $12,404 (R-4). That number is then divided by 180 days of the school year to arrive at a per-diem cost per pupil.[1] He also testified that

[1] A per-diem cost of $68.91 for the 2014–2015 school year.

the estimated tuition for the 2015–2016 school year, during which A.S. is attending ninth grade at Monroe Township High School, is $14,525.[2]

Cherie McCoy

Ms. McCoy has served as a registrar for the Monroe Township Board of Education for ten years. She testified that when registering A.S. for school (R-6), J.S. provided a lease (R-7), which is between J.S. and K.K.[3] as tenants, in The Village at Stratford, LLC. McCoy testified that The Village at Stratford is an adult community and children are not allowed to live there. This is the home address the Board was given for A.S.

Ms. McCoy stated that questions arose as to A.S.'s residency when she received an email from the middle school (R-8) that indicated that A.S. was picked up every day between half an hour and forty-five minutes late by his mother, brother or sister and did not take the school bus. The email also indicated that the address provided was an adult community where children are not permitted to reside. School buses are also not permitted to pick up at or drop off to an adult community.

Stephen Naumik

Mr. Naumik has been employed by the district as its residency investigator and truancy officer for the past fifteen years. He was asked to do an investigation in December 2014 regarding A.S. Mr. Naumik commenced his investigation on December 16, 2015, by visiting the residence at 115 P. Drive in Monroe Township and explaining the nature of his visit. J.S. indicated that A.S. resided in the home. Mr. Naumik observed the two-bedroom apartment to be nearly empty. There was a mattress on the floor with no sheets and no pillows, and there were two articles of clothing in the closet. There were no books, backpacks or school supplies, and there was no indication whatsoever that a fourteen-year-old middle-school student resided in the apartment. There was a couch in the living room, but no lights, no television, no appliances on the

[2] A per-diem cost of $80.69 for the 2015–2016 school year.
[3] J.S. testified that K.K. is her sister.

kitchen counters, and no dishes or glasses, and the refrigerator was empty except for some restaurant leftovers. Mr. Naumik testified that J.S. stated that A.S. was at the library and that she would have him come home. A.S. arrived thirty-five minutes later with his sister S.S. He was not carrying any books, a backpack or any school supplies. Mr. Naumik added that the library is ten minutes from the 115 P. Drive address, yet it took over half an hour for A.S. and his sister to arrive. A.S. had been absent from school that day.

The next morning, on December 17, 2014, Mr. Naumik observed the 115 P. Drive address between 7:00 a.m. and 8:10 a.m., and no one entered or exited the residence during that time. A.S. was in school that day, according to the attendance records, and was not tardy.[4] (R-9.) Mr. Naumik continued his investigation with his January 14, 2015, residency report (R-13), which reflected his findings from three days of observation, January 12 through 14, 2015, where there was no sign of A.S. anywhere at the 115 P. Drive address from 6:45 or 6:55 a.m. through 8:15 a.m., and the attendance records reveal that A.S. was in school those days and was not tardy.

His investigation continued with his May 4, 2015, report (R-14), where he observed the 115 P. Drive address, as well as the address of 908 A. Drive in North Brunswick, N.J., which was believed to be where J.S. and A.S. actually lived. On April 30, May 1 and May 4, observations of the 115 P. Drive address starting between 6:15 and 6:50 a.m. through 7:45 to 8:15 a.m. revealed no sign of A.S., and he was present at school on all of those days. On May 4 through May 8, 2015, Mr. Naumik observed A.S. and his mother leaving the A. Drive address in North Brunswick each morning, entering J.S.'s vehicle, and then following the same route to A.S.'s school. A.S. was observed either by the witness or the school security system being dropped off each morning by J.S., and on each of those days he was present in school. On all of the mornings in question, A.S. and J.S. left the complex at 7:40 or 7:45 a.m. in a vehicle identified as belonging to J.S., a red GMC Hummer, and drove to school.

[4] The middle school day started at 8:10 a.m.

Continuing with his investigation, Mr. Naumik took pictures of the red Hummer parked at the North Brunswick address, and those pictures are identified by date on the back of each picture as having been taken on May 6, May 7 or May 8, 2015. (R-15.)

Continuing with his investigation into January 2016,[5] Mr. Naumik performed residency checks at both the 115 P. Drive location as well as the A. Drive, North Brunswick, location. On the morning of January 13 the vehicle was once again not at the 115 P. Drive address in Monroe Township, but rather was located at the North Brunswick address, and J.S. was observed leaving the premises with A.S. and driving him to school.

Mr. Naumik identified his subsequent report covering his investigation from January 27, 2016, through February 4, 2016. Each day he went to the 115 P. Drive address and the car belonging to J.S. was not there. Each day he then went to the North Brunswick address, and the car belonging to J.S. was at that location, and on each of those mornings J.S. and A.S. were observed leaving the complex in that vehicle and driving to school in Monroe Township via the same route. On each of those days A.S. was present in school. Based upon all his observations covering a period of several months, Mr. Naumik concluded that there was not a single indication going back to the commencement of the investigation in 2014 that A.S. has ever lived at the 115 P. Drive address in Monroe Township.

Peter Piro

Mr. Piro is employed by the Monroe Township Board of Education as director of security and oversees residency and truancy investigations. He is a former Monroe Township police officer and served sixteen years in the detective bureau and three years as a supervisor. Mr. Piro testified that he conducted some observations in this investigation. From May 3, 2015, through May 8, 2015, he observed the premises at 115 P. Drive and noted that the vehicle belonging to J.S. was not there on any of those dates starting at 6:40 or 6:45 in the morning, but had been located by Mr. Naumik

[5] A.S. was now enrolled in Monroe Township High School, where the school day begins at 7:27 a.m.

parked at 908 A. Drive, North Brunswick on those occasions. He also noted that pursuant to his instructions, a district security officer, Mr. Durski, observed A.S. being dropped off each day prior to school in a red Hummer driven by his mother, J.S. Mr. Piro performed a motor-vehicle check to confirm that this was her vehicle, and learned that it was. (R-21.) A subsequent report he prepared (R-22) noted that on January 21, 2016, as well as January 27, January 30, February 2 and February 8, 2016, at different times, he never once found the vehicle belonging to J.S. at the 115 P. Drive address; in fact, he has never seen her car in that parking lot, and there is no evidence that either J.S. or A.S. lives in Monroe Township.

J.S.

J.S. testified that she had sold her house in Sayreville on February 6, 2014, and moved in with her daughter in North Brunswick. She testified that her son A.S. finished the school year in Sayreville, and then attended school in North Brunswick for a few months after she moved there, beginning in September 2014. She testified that she signed a lease on October 1, 2014, for an apartment in an adult community in Monroe, and moved A.S. to school in Monroe in November 2014. She testified that she or her daughter would pick him up, because "there is no bus." J.S. agreed that the lease for the adult community was a one-year lease which expired on September 30, 2015, and that she has not entered into a new lease there. She stated that she moved out of that address when the lease ended because her daughter S.S., who is twenty-five years old, lost her job in October 2015 and was diagnosed with cancer around that time, so she moved in with her daughter in North Brunswick in October 2015 to help her. She testified that she has been living at 908 A. Drive, North Brunswick, N.J., ever since, with her daughter and her older son, K.S., who is thirty-one years old, and with A.S., who is fifteen. She agreed she has been driving A.S. to Monroe Township schools, and feels she established residency when she signed the lease for the adult community in October 2014.

J.S. agreed that she lived at the North Brunswick address before enrolling A.S. in Monroe schools and that she moved back there after her daughter was diagnosed. She stated that she did live in the 115 P. Drive apartment for one year between October 1,

2014, and September 30, 2015, and that A.S. lived there with her. She indicated that all her things are in storage and that is why the investigators saw an empty house. She also testified that she is planning to move back to Monroe and will be establishing residency.

J.S. also testified that A.S. has special needs and that Monroe Township offers opportunities not available elsewhere. She stated that he skipped a grade, and that it would be emotionally and mentally disturbing to A.S. if he had to change schools.

## FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The Board had good cause to question the residency of A.S. after receiving notification that the child was picked up between thirty and forty-five minutes late each day after school by his mother or sister, and did not take a school bus.

2. J.S. was provided notice of the Board challenge to residency on April 16, 2015.

3. Surveillance conducted over many months of 115 P. Drive in Monroe Township revealed that neither J.S. or A.S. resided there. The surveillance and the testimony demonstrated that the child was transported by his mother each day from 908 A. Drive, North Brunswick, N.J., to school in Monroe Township.

4. At all times at issue herein, A.S. resided with his mother in North Brunswick, N.J.

## LEGAL ANALYSIS AND CONCLUSIONS

The issue in this appeal is whether A.S. had been a domiciled student in the Monroe Township school district during the period of attending school in Monroe.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

From the evidence submitted, it is clear that A.S. had been domiciled in North Brunswick during the time he attended school in Monroe. J.S. failed to demonstrate, by a preponderance of the credible evidence, that A.S. is entitled to a free public education in Monroe Township. To the contrary, the Board has proven that he is not, as he is not domiciled there. N.J.A.C. 6A:22-3.1(a)(1) provides:

> A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

Based upon the facts adduced, I **CONCLUDE** that A.S. was domiciled in North Brunswick during the days he attended school in Monroe. He was observed leaving the North Brunswick address early in the morning, over the course of several days during an investigation that spanned many months, and driven to Monroe to attend school. Accordingly, A.S. was not entitled to attend school in Monroe and receive a free public education there pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). A.S. was not

entitled to a free public education in Monroe based upon the above. The per-diem rate for school year 2014–2015 was $68.91, and the per-diem rate for school year 2015–2016 is $80.69. Accordingly, respondent is entitled to reimbursement from J.S. for the cost of providing a public education to A.S. in the sum of $9,991.95 for the period November 3, 2014, until June 23, 2015, and in the sum of $8,714.52 for the current school year until February 29, 2016, plus a per-diem rate of $80.69 for each day beyond February 29, 2016, that A.S. remains in the district high school, and I so **CONCLUDE**.

## ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, J.S., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that J.S. reimburse respondent the total sum of $18,706.47 for tuition costs associated with the attendance of A.S. in Monroe from November 3, 2014, through February 29, 2016, and an additional $80.69 for each day thereafter that A.S. remains in the district high school.

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

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

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

March 4, 2016
DATE

**LESLIE Z. CELENTANO**, ALJ

Date Received at Agency: 3-4-16

Date Mailed to Parties: MAR 8 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

## APPENDIX

### Witnesses

For Petitioner:

J.S.

For Respondent:

Michael C. Gorski

Cherie McCoy

Stephen Naumik

Peter Piro

### Exhibits

For Petitioner:

None

For Respondent:

R-1 Monroe Township High School—Genesis system student data sheet

R-2 Excerpt from Board minutes of April 15, 2015

R-3 Letter from Dennis Ventrello, Interim Superintendent, to J.S., dated 4-16-15

R-4 2014–2015 Per-Pupil Cost—Tuition

R-5 Estimated Tuition Calculated Rates for Regular Programs 2015–2016

R-6 Monroe Township Schools Registration Form

R-7 The Village at Stratford, LLC, Lease Agreement

R-8 Email from Jaime Costanzo to Cherie McCoy re: non-resident student, dated 12-15-14

R-9 Student Daily Attendance Report 2014–2015

R-10 Student Daily Attendance Report 2015–2016

R-11 Ordinance of the Monroe Township Council related to Planned Retirement Communities

R-12 Truancy Referral Form dated 12-1614

R-13 Truancy Referral From dated 1-14-15

R-14 Truancy Referral Form dated 5-4-15

R-15 Pictures of red Hummer belonging to J.S.

R-16 Truancy Referral Form dated 1-13-16

R-17 Truancy Referral Form dated 1-27-16

R-18 Pictures dated 1-13-16 to 2-4-16

R-19 Picture of red Hummer belonging to J.S.

R-20 Truancy Referral Form dated 5-12-15

R-21 Motor Vehicle Registration Inquiry

R-22 Report prepared by Peter Piro

State of New Jersey
Department of Education

| | | |
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| In the Matter of the Tenure Charges | * | |
| against | * | ARBITRATION DECISION AND AWARD |
| ARDEENA LONG (Teacher) | * | |
| by | * | DOCKET NO. 262-9/15 |
| THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON | * | |

Before: Joel M. Weisblatt, Arbitrator

Appearances:

For the Teacher
Theodore E. Kyles, Jr. Esquire

For the District
Riker Danzig Scherer Hyland & Perretti
By: Brenda C. Liss, Esquire

# D E C I S I O N

## Introduction

On September 11, 2015, the New Jersey Department of Education, Bureau of Controversies and Disputes, (the "DOE") received the filing of the tenure charge against Ardeena Long (the "Respondent" or the "Teacher") filed by the State-Operated School District of the City of Paterson (the "District" or the "Petitioner"). The Respondent's answer was received by the DOE on October 16, 2015. Pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 2012, c. 26, the undersigned Arbitrator was appointed to serve, by the DOE, on October 23, 2015.

The arbitration hearing was initially opened on November 9, 2015. The parties indicated that certain global issues with respect to the District's implementation of the evaluation system were to be heard by Arbitrator Robert C. Gifford, consolidating three matters concerning tenure charges of inefficiency. Arbitrator Gifford's Interim Decision regarding the consolidated claims of three teachers (including the Respondent) as to the implementation of the evaluation system was issued on January 14, 2016. Although Arbitrator Gifford raised a

> The services of all teaching staff members employed prior to the effective date of P.L. 2012, c. 26, in the position of teacher…serving in any school district or under any board of education…shall be under tenure in good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause...

In the dispute at hand, the Board seeks the dismissal of the Teacher charging, "inefficiency." The Petitioner bears the burden of proving that there is a proper basis for such a result.

## Positions of the Parties

### Position of the District

The Petitioner contends that it has met its burden of proving that the Teacher was inefficient under the standards set forth in the statute, TEACHNJ. It points out that the Respondent received only a "partially effective" rating in two consecutive annual evaluations, establishing the proper basis for dismissal.

The District claims that the Teacher was extensively trained as to the evaluation rubric, including substantive and systematic elements of the process. It insists that the Respondent was provided an adequate opportunity to be involved in the CAP [Corrective Action Plan] process. The Petitioner maintains that the support provided to the Teacher, including post-observation conferences, did not result in sufficient consistent improvement in performance to meet the standards necessary for an "effective" evaluation.

The Petitioner stresses that the TEACHNJ statute provides for only four defenses to a charge of inefficiency. The four bases cited are: "(1) the

evaluation failed to adhere substantially to the evaluation process; (2) mistake of fact in the evaluation; (3) improper motive, including considerations of political affiliation, nepotism, union activity, discrimination as prohibited by law, or other conduct prohibited by law; and (4) the district's actions were arbitrary and capricious. N.J.S.A. 18A:6-17(a)."

The District asserts that the Teacher presented evidence only relating (1) adherence to the evaluation process and (4) arbitrary and capricious actions. It emphasizes that the statute requires that the facts presented relating to these defenses must have "materially affected" the outcome of the evaluation, citing N.J.S.A. 18A:6-17(b).

The District characterizes the Respondent's case as "excuses, pleas of ignorance and self-serving answers." It argues that these statements do not establish any material effect upon the evaluations. It maintains that any argument by the Teacher relating to the scoring system should have been presented at the interim proceeding held by Arbitrator Gifford, which, in turn, did not make a

global finding that the District's process was violative of the statute.

The Petitioner suggests that the Teacher's defenses should be limited to areas addressed in the answers to interrogatories, dated December 4, 2015. It maintains that the Teacher's response to inquiry, in interrogatories, as to facts relied upon for asserting defenses based upon the alleged failure to comply with the requirements of the law and arbitrary and capricious action:

> Answer 10. Many of the post-evaluation conferences for Respondent were out of time. Respondent was denied the opportunity to timely participate in the evaluation CAP process. The District failed to disclose to Respondent information as to the grading rubric used to calculate the annual summative rating. Information as to the scoring rubric was not disclosed to Respondent. These issues are subject to a continuing discovery and - as counsel is aware - are subject of a pending arbitral determination in companion inefficiency proceedings.

As a matter of law, the District seeks to limit the evidence considered in support of the Respondent's defenses to facts set forth in the answer to interrogatories.

The Petitioner asserts that the tenure charge of inefficiency should be upheld. It insists that the record supports the factual underpinning of the "partially

effective" annual summative evaluation ratings for 2013-14 and 2014-15. The District maintains that it has properly adhered to the requirements of the evaluation process. It argues that the evidence does not establish any failure to adhere to the requirements of the law. The Petitioner further insists that there is no evidence that any claimed failure on the part of the District had a material affect on the outcome of the evaluation.

The Petitioner stresses that the Teacher was provided ample opportunity to be engaged in the process at post-observation conferences and in the ongoing discussion of the CAP, designed to assist in addressing problem areas of performance. It relies upon the testimony of administrators who provided direction to the Teacher and performed the observations and evaluations.

The District claims that there is no evidence establishing arbitrary and capricious action with respect to the Respondent's summative evaluations. It maintains that, "the evidence presented shows that the charge of inefficiency against the Respondent was based on a reasonable, rational, and consistent assessment of her teaching performance."

The Petitioner concludes that, "the evidence in the record supports none of the defenses available to the Respondent under N.J.S.A. 18A:6-17.2(a); and does support a finding that Respondent was 'inefficient' on the basis of her two consecutive annual summative evaluation ratings of 'partially effective.'" The District believes that it has met its burden of proving the statutory tenure charge. It seeks to have the charge upheld and that the Respondent be dismissed from her position.

Position of the Teacher

The Respondent contends that the District did not sustain its burden to satisfy the statutory criteria required to support the charge of "inefficiency." The Teacher asserts that the Petitioner failed to adhere to the evaluation process.

The Respondent relies upon her own testimony that she did not collaborate in the development of the CAP [Corrective Action Plan]. The statutory requirement that the CAP be developed by the supervisor, "in collaboration with the teaching staff member" is emphasized, noting the definitional section of TEACHNJ. The Teacher insists that

the CAP must be developed by two people, the teaching staff member and the supervisor. The Respondent advances the argument that this is a fatal flaw in the process as it was applied to the Teacher, requiring the dismissal of the tenure charge.

The Respondent maintains that the District failed to adhere to the evaluation process in 2013-14 with respect to an absence of "co-observers" during the three observations conducted that year. Further, citing the framework for the evaluation process, it is claimed that there was a failure to conduct the requisite number (six) of walkthrough observations in 2013-14, with evidence of only three such walkthroughs. Similarly, these failures are asserted for the 2014-15 school year, as well.

The Respondent suggests that the District failed to provide a timely meeting (within 15 days) to discuss the CAP following the receipt of the 2013-14 summative evaluation ratings. The meeting did not occur, according to the Teacher, until September. The Respondent also asserts that the District failed to fulfill responsibilities that it set out for itself in the CAP.

The Teacher additionally suggests that the Petitioner "consistently failed to conduct timely post-observation conferences." The requirement cited calls for post-observation conferences within 15 working days, in the imperative "shall" form. The claim advanced is that observations conducted on: January 30, 2014; September 30, 2014; December 1, 2014; February 10, 2015; and April 23, 2015; did not have timely conferences. The Respondent further notes that the collective negotiations agreement between the District and the Paterson Education Association contains a provision requiring those conferences to be held within 5 work days of the observation. The Respondent argues that the Petitioner should be held to this higher standard.

The Teacher suggests that the Petitioner failed to prove that the evaluation rubric for 2013-14, or for 2014-15, was approved by the State Commissioner of Education. The Respondent contends that this is a fatal flaw in the application of the evaluation process rating the Teacher as "partially efficient." The Respondent also assails the claimed failure of the Petitioner to establish "School Improvement Panels" required by TEACHNJ. Additionally, the evaluation procedure is attacked for lacking a "transparent

and reliable" process. Specific elements of the scoring and rating system, including computer-driven calculations, are assailed by the Teacher. The Respondent argues that the, "partially effective rating given...is entitled to no weight."

The Respondent claims that the evaluation system used by the District is arbitrary and capricious. The District's explanation as to the differences between the ratings Proficient I and Proficient II or Progressing I and Progressing II is characterized as being without differentiation. The Teacher complains that the system is unclear and undefined. Similarly the method of scoring subcategories is criticized as unreliable.

The Teacher asserts that the Petitioner failed to demonstrate that the Teacher was properly trained in the evaluation rubric, as required by rule. The contention is that the record is devoid of evidence of appropriate training. The Respondent complains of a lack of support for the Teacher by the District.

The Respondent maintains that the violations noted above as to the evaluation process, as applied to the

Teacher, materially affected the outcome of the evaluation results. Reliance is heavily placed upon the Respondent's own testimony, "that had she been able to contribute to the design of the CAP, she would have ensured that the plan correlated to her class that included classified, learning disabled students." Further, the late post-observation conferences are blamed for "wasting time" during which adjustments could have been accomplished.

The Respondent insists that the penalty of dismissal from employment is not merited. The fact that this is not a misconduct case is stressed. Respondent insists that the termination of the Teacher to is too severe a penalty for the circumstances set forth in this record.

In conclusion, the Respondent contends that the District engaged in multiple violations of TEACHNJ with respect to the evaluation process leading to the two consecutive years of a "partially effective" summative evaluation rating. The score is characterized as "an inaccurate depiction of her performance." The Respondent assails the numerous flaws in the process and asserts that they "resulted in a material degradation of the evaluation process to which Ardeena Long was entitled." The

Respondent seeks that the tenure charge be dismissed and that the Teacher be returned to work.

**Discussion and Analysis**

The Teacher, Ardeena Long, was employed by the District for 35 years. From 2012 through the filing of these tenure charges (following the 2014-15 school year) she was assigned as an English teacher at the District's YES Academy. The charge of inefficiency is based upon a rating of "partially effective" in the annual summative evaluations at the end of two consecutive school years, 2013-14 and 2014-15.

The record establishes that the Teacher received a summative evaluation rating of "partially effective" for the 2013-14 school year [Exhibit D-7]. This rating was based on the weighted average of scores in seven standards (each with subsections) and a measure of the Student Growth Objectives [SGO]. The scores were reflective of three formal observations conducted during the 2013-14 school year, conducted on: October 29, 2013 [Exhibit D-4]; January 30, 2014 [Exhibit D-5]; and March 24, 2014 [Exhibit D-6].

The seven broad standards, referred to above, used by the District to evaluate the Teacher were:

1. Preparation for instruction
2. Use of data to inform instruction
3. Delivers quality instruction
4. Interventions to meet diverse needs
5. Classroom environment
6. Leadership
7. Professional responsibilities

Each standard might be subject to scoring in each formal observation, noting that some standards may not be addressed in every observation. Those addressed and scored are averaged for the year and weighted for a teacher practice score numerical factor. That weighted average is then placed on a scale to determine whether the teacher's performance has been: Ineffective, Partially Effective, Effective or Highly Effective. In 2013-14, the teacher practice score accounted for 85% of the overall summative rating; the remaining 15% was attributed to the SGO. With respect to the Teacher, the practice rating was partially effective and the SGO was highly effective; the overall rating was "partially effective."

The District presented Nicole Payne, the Principal of the YES Academy during 2013-14 and part of 2014-15, as a witness with respect to the evaluation of the Teacher. Ms. Payne was a particularly credible witness and she provided

significant detail with respect to the process and its application to the Respondent.

Ms. Payne personally conducted the 2013-14 observations on: October 29, 2013 [Exhibit D-4]; January 30, 2014 [Exhibit D-5]; and March 24, 2014 [Exhibit D-6]. She testified that she was accompanied by a co-observer, Wanda Kopic, on the March 24, 2014 occasion. Ms. Payne provided clear and convincing evidence that the three observation ratings for 2013-14 are an accurate reflection of the Teacher's performance in the classroom. Ms. Payne testified that the post-observation conferences for the 2013-14 observations occurred as follows:

October 29, 2013 - November 1, 2013
January 30, 2014 - March 11, 2014
March 24, 2014 - April 1, 2014

Further, she was equally convincing that the annual summative evaluation [Exhibit D-7] was an accurate reflection of the Teacher's performance for the year.

It is important to note that Ms. Payne explained that, following the issuance of the 2013-14 annual summative evaluation, she met with the Respondent on June 27, 2014 to discuss areas for improvement, for example, the use of data in teaching. Ms. Payne testified that she encouraged the

Teacher to improve, noting that the Teacher's performance was not that far below an effective rating. Ms. Payne indicated, that at the June 27, 2014 meeting, the Teacher did not disagree with any remark or score. Further, Ms. Payne explained that the Respondent did not indicate any lack of understanding of the evaluation process and the need to improve.

Ms. Payne testified that it was she who developed the 2014-15 Corrective Action Plan (CAP) for the Respondent [Exhibit D-8]. The CAP was discussed in a meeting on September 5, 2014, the Teacher, Ms. Payne and Tanya Greene were present. Ms. Payne described the fact that she and Ms. Greene (Ms. Payne's successor as Principal) went over each item of the CAP with the Teacher, providing an opportunity for questions or suggestions. Ms. Payne indicated that the Respondent did not suggest any changes in the CAP. Ms. Payne further testified that she believed the Teacher understood the relationship between the CAP and the evaluation process and the need for improvement.

Ms. Payne testified that the teaching staff, including the Respondent, was given extensive training as to the evaluation process. A power point presentation given on

June 6, 2013 [Exhibit D-B] is documentation of a key element in the training process. The Teacher was present for that training session. Exhibits D-2 and D-3 provide proof that the Respondent received the documentation provided by the District in each of the two years in question herein. These documents include the rubric and a handbook (reference manual) for the evaluation process. Numerous training sessions are documented in this record, throughout the relevant time period.

Ms. Payne testified that she co-observed the Respondent (with Ms. Greene) on September 30, 2014 and December 1, 2014. She credibly explained that she met with the Teacher for a post-observation conference within a few days of each observation, although she did not identify or document the specific date. Ms. Payne was certain that the post-observation conferences were held within a week of both the September 30, 2014 observation and the December 1, 2014 observation. The witness explained that the signature dates on the observation reports [Exhibits D-9 and D-11] were mechanical not reflective of the actual dates of the conferences.

Tanya Greene was also a particularly credible witness with respect to the Respondent's performance and the evaluation process. With respect to the September 30, 2014 observation rating, Ms. Greene established that the observation was scored collaboratively with Ms. Payne. She also provided convincing testimony that the post-observation conference occurred in a timely manner, not reflected by the electronic dating on the document.

Ms. Greene notes that, on November 24, 2014, there was a pre-observation conference with the Respondent before the December 1, 2014 observation. She explained that the standards for rating the Teacher's performance were discussed at this pre-observation session. The Respondent's participation is documented by Exhibit D-34.

Ms. Greene noted that the December 1, 2014 observation was also done jointly, with Ms. Payne in attendance. She testified that the post-observation conference occurred shortly after the observation date.

Ms. Greene testified that the ratings of performance for the September 30, 2014 [Exhibit D-9] and December 1, 2014 [Exhibit D-11] observations are accurate. She further

pointed out that certain aspects of each of these ratings were revised upward as a result of the discussions at the post-observation conferences with the Respondent. Ms. Greene testified that, on January 4, 2015, there was a mid-year CAP review meeting with the Respondent [documented in Exhibit D-31].

Danyel Cicarelli, a Supervisor of English and Language Arts, testified as to her involvement in the observation and evaluation process for the Teacher. Ms. Cicarelli was another credible witness presented by the District. She explained that she provided support for the Respondent during the 2014-15 school year in concert with Ms. Greene. She described certain efforts to gain better practices on the part of the Respondent including sending the Teacher to observe other classroom sessions as an example of best practices. Ms. Cicarelli generally observed that the Respondent seemed to understand the concept of best practices but that minimal change was observed in the Teacher's own classroom practices. A problematic example cited by Ms. Cicarelli was that the Respondent consistently answered her own questions in class rather than getting the students to work through the questions themselves.

Ms. Cicarelli performed the February 10, 2015 observation and the ratings are documented in Exhibit D-12. She testified that the ratings accurately reflect the Teacher's performance. Ms. Cicarelli explained that the Teacher exhibited some improvement but only of a limited nature. For example, Ms. Cicarelli observed that the lesson was better planned but not well-executed. Ms. Cicarelli stated that the observation report [Exhibit D-12] was posted and available to the Teacher on February 13, 2015; the post-observation conference was held jointly by Ms. Cicarelli and Ms. Greene on February 24, 2015. Once again the ratings were adjusted in response to the Teacher's input at the post-observation conference.

The April 23, 2015 observation of the Teacher was conducted by both Ms. Greene and Ms. Cicarelli. The two observers compared notes and reached a consensus as to the ratings of that performance, reflected in the ratings of Exhibit D-13. There was a pre-observation conference held on April 21, 2015 [documented by Exhibit D-35]. Ms. Greene credibly testified that the ratings of the April 23, 2015 observation are an accurate reflection of the Teacher's performance on that date.

The record establishes that the Teacher received a summative evaluation rating of "partially effective" for the 2014-15 school year [Exhibit D-14]. This rating was based on the weighted average of scores in seven standards (each with subsections) and a measure of the Student Growth Objectives [SGO]. The scores were reflective of four formal observations conducted during the 2014-15 school year, conducted on: September 30, 2014 [Exhibit D-9]; December 1, 2014 [Exhibit D-11]; February 10, 2015 [Exhibit D-12] and April 23, 2015 [Exhibit D-13].

Ms. Greene prepared the 2014-15 annual summative evaluation of the Respondent [Exhibit D-14]. This process involved the inputting of the ratings of four observations conducted in 2014-15. Calculations as to the weighted averages of the performance values and the overall rating of practice and SGO [now 80% practice and 20% SGO] were entered into a computer program and the report was generated based on a pre-determined formula. Once again, the Teacher received an evaluation below effective; she was rated "partially effective." This was the second consecutive annual summative rating at "partially effective" leading to the tenure charge of inefficiency.

TEACHNJ clearly and comprehensively delineates the considerations for the arbitrator deciding a dispute involving the charge of "inefficiency." N.J.S.A. 18A:6-17.2 *Considerations for arbitrator in rendering decision* provides:

> **23.a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:**
>
> **(1) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan;**
>
> **(2) there is a mistake of fact in the evaluation;**
>
> **(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or**
>
> **(4) the district's actions were arbitrary and capricious.**
>
> **b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.**

Section 25 referenced above is set forth in N.J.S.A. 18A6-17.3 and it provides that a teacher rated "partially

effective" in two consecutive annual summative evaluations is subject to a tenure charge of "inefficiency."

The issues presented in this arbitration relate entirely to subsections (1) and (4) above, whether the District failed to substantially adhere to the evaluation process and whether the District's actions were arbitrary and capricious. The Arbitrator determines that there is no issue presented as to a mistake of fact as referenced in subsection (2) or as to an improper consideration as referenced in subsection (3).

The Arbitrator finds that the District met its burden of proving that it has adhered substantially to the evaluation process. The District observed the Teacher on three occasions in 2013-14, applying a structured system for rating teacher performance that appears to have been applied to the Respondent in a reasonably consistent manner. There were multiple observers involved in the observation process and the Teacher was properly given post-observation conferences.

The 2013-14 annual summative evaluation [Exhibit D-7] appears to reflect the ratings of the three observation

reports [Exhibits D-4, D-5, D-6]. Principal Payne met with the Respondent following the issuance of the 2013-14 annual summative evaluation to discuss its implications. Ms. Payne provided convincing evidence that she encouraged the Respondent, noting that the performance rating was not too far off the mark. The District provided ample evidence that the Teacher was given the opportunity for support to improve her position.

Although the CAP was initially drafted by Ms. Payne, there is clear evidence that the Respondent was given opportunity for collaborative input into the CAP, specifically at a meeting held September 5, 2014. The District also proved that it provided numerous training programs about the evaluation system and that it provided a continuing effort to assist teaching staff members to understand the process. This training was available to the Respondent and in many cases there is evidence that the Teacher attended such sessions.

The Teacher was observed on four occasions in 2014-15. Three of the four sessions were conducted by multiple observers. The District produced convincing testimony that the ratings of the four observations accurately reflected

the observers' assessment of the Respondent's performance. Each observation was followed by a proper post-observation conference. The record strongly supports the District's contention that it provided support and direction to the Respondent in order to assist her in improving performance.

It is significant to focus on the testimony of Ms. Greene to gain and understanding of the problems observed in the Teacher's performance. Ms. Greene testified that the Teacher used suggestions when given direction but did not follow up with her own initiative. The Respondent exhibited periods of improvement but her performance lacked the necessary consistency to achieve "effective" ratings.

The Arbitrator finds that the District has also proved that the evaluation process, as applied to the Respondent, was not arbitrary and capricious. It has presented clear and convincing evidence [although the standard necessary is only "by a preponderance of the evidence"] that the administrative and supervisory staff involved in evaluating the Respondent have followed a systematic approach to rating her performance, applying substantive standards for assessing her performance.

Further, the record establishes that the District has provided numerous training opportunities to the Respondent in order to inform her about the nature of the evaluation process. These have included elements designed to provide an understanding of the rating methodology and the scoring system.

It is important to reiterate that there was an interim arbitration proceeding held before Arbitrator Gifford in a consolidation of cases, including this one. That arbitration was designed to deal with global claims as to the evaluation process, independent of the specific facts relating to each Respondent. The parties stipulated to have those global claims handled in a single consolidated decision that was issued on January 14, 2016. There was no finding in that proceeding, that there were global elements of the evaluation process in violation of TEACHNJ.

At this stage, the Arbitrator turns to a discussion of specific points raised by the Respondent. Each has been carefully considered as part of the process to reach the determinations herein.

The Arbitrator rejects the concept that there was a fatal flaw in the corrective action plan as a result of a claimed absence of collaboration. There was specific credible testimony from two witnesses (Ms. Payne and Ms. Greene) that the Teacher was given an opportunity for input into the CAP at a meeting held on September 5, 2014. This meeting satisfied the collaborative requirement.

The Arbitrator rejects the Teacher's claim that there was a failure to use co-observers in the process. There is clear and credible evidence that there were co-observers in many of the formative observations and that the ratings were often reached by consensus of the co-observers.

The Respondent insists that there is not documentation that the requisite number of walkthroughs performed by supervisors during the process. The Arbitrator, noting that there were walkthroughs (albeit fewer documented than the handbooks delineate), does not agree that this constitutes a substantial deviation from the evaluation process. Further, there in nothing to even suggest that, noting adherence in all other areas, this minor shortfall had a material affect on the outcome of the evaluations.

The Respondent assails the timeliness of the post-observation conferences as substantial failure of adherence to the evaluation process. The Arbitrator finds that the evidence does not support that contention. The rules call for a post-observation conference within 15 work days of the observation. There District presented credible evidence that nearly every observation was followed with a timely post-observation conference. The notable exception might have been the March 11, 2014 post-observation conference for the January 30, 2014 observation. There is nothing about this single delay to suggest that it was a substantial deviation from the process or that it had any material affect on the Teacher's evaluations. The Teacher's testimony that she would have performed better with more timely post-observation conferences was simply not compelling or credible.

The Respondent suggests that the collective negotiations agreement between the District and the Paterson Education Association establishes a five work day time frame is not given consideration in this statutory proceeding. The Arbitrator's jurisdiction in this dispute is derived from the TEACHNJ statute and the determinations herein are made within that structure.

The contentions of the Respondent that the Petitioner failed to prove that the rubric was approved by the Commissioner of Education and that there is a process failure relating to the establishment of School Improvement Panels raise global issues that should have been presented to the arbitrator in the interim global proceeding. Therefore, those claims are rejected in the case at hand.

The Teacher's contentions about the scoring system are not convincing. The process appears to have objective intent. There is nothing to suggest that its application to the Teacher was either skewed or inaccurate. There is no evidence of any indication that the scoring system is arbitrary and capricious.

The Teacher assails the rating system, maintaining that there was no adequate explanation as to the differences between Progressing I and Progressing II or between Proficient I and Proficient II. These differences were reasonably explained by the District's witnesses as a matter of degree and consistency.

The Respondent attacks the imposition of the penalty of dismissal as unreasonable. The Arbitrator finds that, under TEACHNJ, the statutory provisions provide for the dismissal of a teacher with two consecutive "partially effective" annual summative evaluations [see N.J.S.A. 18A:6-17.3]. This record establishes that the Respondent received two such evaluations. The penalty contention must be rejected.

In conclusion, the District has met its burden of proving that the Respondent has received "partially effective" annual summative evaluations in 2013-14 and 2014-15. It has provided convincing evidence that the evaluations were properly conducted under the statute [TEACHNJ]. The charge of "Inefficiency" shall be sustained and the dismissal of the Respondent shall be upheld.

**A W A R D**

For the reasons set forth in this Decision and Award, finding that the District has met the burden of proving that the Respondent has received "partially effective" annual summative evaluations in 2013-14 and 2014-15, providing convincing evidence that the evaluations were properly conducted under the statute [TEACHNJ], IT IS HEREBY ORDERED that the charge of "Inefficiency" is sustained and the dismissal of the Respondent is upheld.

Dated: April 3, 2016

Skillman, N.J.

Joel M. Weisblatt, Arbitrator

On this 3rd day of April 2016, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law

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OAL DKT. NO. EDU 03062-16
AGENCY DKT. NO. 62-2/16

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|---|---|---|
| LORENZO RICHARDSON, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| VIDYA GANGADIN, JERSEY CITY BOARD OF EDUCATION PRESIDENT, AND RAMON RIVERA, BOARD ATTORNEY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/06/16

Date of Mailing: 4/07/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 03062-16
AGENCY DKT. NO. 62-2/16

**LORENZO RICHARDSON,**
Petitioner,
v.
**VIDYA GANGADIN, CITY OF JERSEY CITY BOARD OF EDUCATION PRESIDENT, AND RAMON RIVERA, BOARD ATTORNEY,**
Respondents.

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**Lorenzo Richardson**, pro se

**Stephen J. Edelstein**, Esq., and **Kyle J. Trent**, Esq., for Vidya Gangadin (Schwartz Simon Edelstein & Celso, attorneys)

**Christina M. Michelson**, Esq., for Ramon Rivera (Scarinci Hollenbeck, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

Lorenzo Richardson (hereinafter "petitioner") filed a petition with the Commissioner of Education seeking various forms of relief in regard to the renewal or

nonrenewal of the Superintendent's contract which is due to expire on June 30, 2016. In conjunction with the petition, petitioner filed a motion for emergent relief.

The matter was transmitted to the Office of Administrative Law on February 29, 2016, for determination as a contested case. City of Jersey City Board of Education (hereinafter "Board") President Vidya Gangadin (hereinafter "respondent") filed papers in opposition to the motion for emergent relief, and Ramon Rivera joined therein. An oral argument in regard to petitioner's motion for emergent relief was conducted on March 8, 2016, at the Office of Administrative Law in Newark, New Jersey.

Petitioner filed his motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In his verified petition, petitioner made various factual assertions supported by exhibits. Respondent submitted a statement of facts supported by her certification with attached exhibits. The parties differ as to their conclusions and certain assertions as to motivations, but the statements of fact reflect essentially the same course of events. Respondent's statement of facts is concise and accurate and is adopted herein. Net of emphasis, citations to certifications, conclusions and comments as to petitioner's motivations the facts as set forth in respondent's statement are as follows:

The present dispute surrounds the Board's continued employment of Dr. Marcia V. Lyles as its Superintendent of Schools. The Board hired Dr. Lyles as its Superintendent and executed a contract with a term from August 2012 through June 30, 2016. Petitioner Lorenzo Richardson is a member of the Board.

Respondent Vidya Gangadin has served as Board President at all times relevant to the present action. Board Bylaw 9121, Election and Duties of President, vests authority in the Board President regarding the creation of the Board's agendas. By Board practice, other Board members may contact the Board President prior to the creation and publication of an agenda to request that the President include an item. Additionally, under Board Bylaw 9323/9324, Agenda Preparation/Advance Delivery of Meeting Material, any Board member is free to make a motion during a regular meeting to add an item to the agenda of that meeting. Such a motion must be seconded by another Board member for it to be considered by the entire Board, and a majority of the Board voting and present must then agree to consider the item for it to be added to the agenda.

Regular Board meetings are typically scheduled for the third Thursday of each month. On the third Tuesday of the month, the Board holds a caucus meeting during which time the Board members discuss what agenda items should be included on the regular meeting's agenda. In addition to regular Board meetings, Board Bylaw 9321, Time, Place, Notification of Meetings, provides for special meetings "at the request of the president or upon a petition signed by a majority of the board members[.]"

At the Board's caucus meeting on December 15, 2015 to discuss the Agenda items for the December 17, 2015 Board meeting, petitioner and one other Board member, Gerald Lyons, requested that an item be added to the Agenda for the December 17, 2015 Board meeting which would nonrenew Superintendent Lyles' contract. As per their request, the Agenda for the December 17, 2015 Board meeting included a Resolution addressing the nonrenewal of Superintendent Lyles' contract.

Neither Petitioner nor Mr. Lyons attended the regular Board meeting on December 17, 2015. Nor did either individual participate in that meeting via telephone conference, although that would be permitted by Board practice and policy. In their absence - because three (3) of the nine (9) board members have conflicts which prevent them from voting on resolutions involving the Superintendent's contract – only four (4) Board members could participate in any vote regarding Dr. Lyles employment. Mr. Richardson and Mr. Lyons would have been able to vote if they had attended. Given the absence of both petitioner and Mr. Lyons from the Board's December 17, 2015 meeting, Board President Gangadin exercised her authority as Board President and removed the item they requested addressing the nonrenewal of Superintendent Lyles' contract from the agenda for that meeting.

Although fully empowered to do so, none of the Board members attending the Board's December 17, 2015 regular meeting made any motion to add an item to the agenda of that meeting to address the renewal or nonrenewal of Dr. Lyles' contract. The Board did not address Dr. Lyles' contract via any resolution on December 17, 2015.

At the January 21, 2016 regular meeting, Mr. Lyons moved to place an item on the agenda which would have extended the Superintendent's contract. Mr. Richardson seconded that motion, but the motion failed.

Following the Board's January 21, 2016 regular meeting, petitioner contacted Board President Gangadin via email on or about January 26, 2016. He requested the inclusion of an item on the agenda for the Board's February 18, 2016 regular meeting which would renew the Superintendent's contract, the opposite of his Resolution from December. Shortly after Board President Gangadin received petitioner's email request, another Board member, Ellen Simon, who was apparently upset at perceived political "gamesmanship" being played by petitioner and Mr. Lyons regarding Dr. Lyles' contract, requested that the original resolution calling for the nonrenewal of Dr. Lyles' contract proposed by petitioner for inclusion on the December agenda should be included on the February agenda.

After considering the agenda item requests by petitioner and Ms. Simon, Board President Gangadin declined to include either Resolution on the Board's February 18, 2016 regular meeting agenda with the understanding that at the meeting a Resolution to put either item on the agenda could be made.

A copy of the agenda for the Board's February 18, 2016 regular meeting was made available to Board members and the public in advance of that meeting. During the Board's February 18, 2016 regular meeting, petitioner made a motion to add an item to the agenda to renew Dr. Lyles' contract. Board President Gangadin permitted petitioner an extended period of time to discuss his rationale in making said motion. No Board member seconded petitioner's motion, and the motion failed. The Board did not address Dr. Lyles' contract via any resolution on February 18, 2016.

The Board never provided Dr. Lyles with written notice that she would not be reappointed at the end of her current contractual term.

Consideration of petitioner's motion for emergent relief will begin with the second factor which is whether the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b). Petitioner relies on N.J.S.A. 18A:17-15, which provides that a board of education may by contract appoint a superintendent of schools "by the recorded roll call vote of the full membership of the board." Both petitioner and respondent cite N.J.S.A. 18A:17-20.1, which provides as follows:

> At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. the board notifies the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term, provided that such notification shall be given prior to the expiration of the first or any subsequent contract by a length of time equal to 30 days for each year in the term of the current contract.

A general principle of statutory interpretation is that a specific provision controls over a general one. This case involves a reappointment of a school superintendent. Because N.J.S.A. 18A:17-20.1 specifically relates to reappointments, it is the applicable statute in this case.

In accordance with N.J.S.A. 18A:17-20.1, the superintendent is deemed reappointed, unless the board by contract appoints him to a different term or the board notifies the superintendent in writing that he will not be reappointed at the end of the current term. This statute further provides that such notification shall be given prior to the expiration of the contract by a length of time equal to thirty days for each year in the term of the contract. In this case, the term of the contract was effectively four years. Therefore, the notification would be required by March 1 or 2, 2016, which would be 120 (30 x 4) days prior to the expiration of the contract.

Petitioner maintains that Board members must take responsibility for evaluating and appointing the Superintendent and that this cannot be done by default. Petitioner reasons that the Board members are required to vote on the reappointment. As relief, petitioner seeks an order of the Commissioner allowing the six non-conflicted Board members to convene a special meeting and vote on the Superintendent's contract on or before the March 1, 2016, deadline. Alternatively, petitioner would have the Commissioner extend the statutory deadline to March 18, 2016, and mandate that the resolution proposed by petitioner and Mr. Lyons be placed on the March 17, 2016 Board meeting agenda to allow the six non-conflicted Board members to vote on the Superintendent's contract.

Petitioner's arguments are inconsistent with N.J.S.A. 18A:17-20.1. This statue plainly contemplates that a superintendent may be deemed reappointed without a vote. In fact, action by the Board is necessary to prevent a Superintendent from being deemed to be reappointed to another contract term. It follows that petitioner has not demonstrated that the legal right underlying his claim is settled. Indeed, petitioner's position is directly contrary to the provisions of N.J.S.A. 18A:17-20.1.

Petitioner offers an alternative argument based upon N.J.S.A. 18A:17-20.1. Petitioner maintains that language in the Superintendent's current contract provides written notice in accordance with N.J.S.A. 18A:17-20.1. The current contract contains a provision which states as follows:

> The Board agrees that by December 31, 2015 it shall notify the Superintendent in writing whether it desires to renew this Agreement for an additional period of time, and of the terms and conditions proposed for that period. Failure to notify the Superintendent by that date of an intention to renew will mean that an offer of renewal is not being made.

Petitioner maintains that the Board did not so notify the Superintendent and that therefore the Superintendent had written notice that an offer of renewal was not being made. This argument is also inconsistent with N.J.S.A. 18A:17-20.1, which requires an affirmative act by the Board in the form of written notification. The Board cannot modify the requirements of the statute with terms in a contract. It follows that petitioner's argument is without merit and that there is no legal right underlying this argument.

Another consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient. Here, petitioner's views with respect to the renewal of the superintendent's contract may not prevail, but there is no real harm to him.

The next factor is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. Here, petitioner lacks a legal theory to support his petition, as his contentions are contrary to N.J.S.A. 18A:17-20.1. It follows that petitioner has not demonstrated a likelihood of prevailing on the merits.

The final requirement is that when the equities and interests of the parties are balanced, petitioner will suffer greater harm than respondent will suffer if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)4. Here, petitioner has not established that he will suffer any real harm in this case. Further, it must be noted that the individual who

could suffer real harm is the Superintendent who was not named as a party in this proceeding. It follows that petitioner has not established that he will suffer greater harm, if the requested relief is not granted.

In order to prevail on a motion for emergent relief, the movant must satisfy all four requirements under N.J.A.C. 6A:3-1.6(b). Here, petitioner does not satisfy any of the four requirements. Under the circumstances, I **CONCLUDE** that petitioner does not satisfy the applicable standard for emergent relief. Accordingly, it is **ORDERED** that petitioner's request for emergent relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 9, 2016

DATE

**RICHARD McGILL**, ALJ

ljb

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6066
Fax No. (973) 648-2358

**Richard McGill**
*Administrative Law Judge*

March 9, 2016

David C. Hespe, Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500

Re: Lorenzo Richardson v. Vidya Gangadin and Ramon Rivera,
Hudson County
OAL Dkt. No. EDU 03062-16
Agency Dkt. No. 62-2/16

Dear Commissioner Hespe:

Enclosed please find a copy of an order entered regarding an application for emergent relief in the above-mentioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective in forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency heard.

Very truly yours,

Richard McGill
Administrative Law Judge

RM/ljb
Enclosure
C: Lorenzo Richardson
Stephen J. Edelstein, Esq.
Christina M. Michelson, Esq.
Robert J. Giordano, ALJ/MOD

132-16

| | | |
|---|---|---|
| M.M., on behalf of minor child, V.H.A, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son in November 2015, seeking a determination that V.H.A. was entitled to a free public education in West Orange Schools for the period between June 1, 2015 and November 30, 2015. The Board contended that – based on the results of a residency investigation – petitioner had been domiciled in East Orange during the period in question. Subsequent to the Board's determination of non-residency, however, petitioner moved back into the West Orange school district on November 30, 2015. Accordingly, the Board counterclaimed for tuition for the period from June 1, 2015 to November 30, 2015. The matter was transmitted to the Office of Administrative Law (OAL). Two pre-hearing telephone conferences were scheduled in February 2016, but petitioner failed to answer despite having received proper notice. Subsequently, counsel for the Board appeared at the scheduled hearing on February 29, 2016, but petitioner failed to appear and offered no explanation for her non-appearance.

The ALJ found, *inter alia,* that: pursuant to *N.J.S.A.* 18A:38-1, petitioner has the burden of proof in a determination of residency ineligibility; petitioner failed to participate in scheduled proceedings and provided no excuse for her failure to appear; petitioner did not file an answer to the Board's counterclaim for tuition. The ALJ concluded that the determination of the Board that V.H.A. was not domiciled in West Orange during the period in question should be upheld, and the petition of appeal dismissed pursuant to *N.J.A.C.* 1:1-14.4. The ALJ further concluded that the Board has demonstrated entitlement to tuition reimbursement in the amount of $5,309.44 for the period of ineligible attendance. Accordingly, the ALJ dismissed the petition with prejudice and granted the Board's request for tuition reimbursal.

Upon review, the Commissioner concurred with the ALJ findings and conclusions, and adopted the Initial Decision as the final decision in this matter. Accordingly, the Commissioner ordered that petitioner shall reimburse the Board in the amount of $5,309.44 in tuition costs for the period of V.H.A.'s ineligible attendance in West Orange schools.

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

April 7, 2016

132-16

OAL DKT. NO. EDU 20235-15
AGENCY DKT. NO. 356-11/15

| | | |
|---|---|---|
| M.M., on behalf of minor child, V.H.A, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, M.M. shall reimburse the Board $5,309.44 in tuition costs for V.H.A.'s ineligible attendance in the District from June 1, 2015 to November 30, 2015.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/07/16
Date of Mailing: 4/08/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 20235-15
AGENCY DKT. NO. 356-11/15

**M.M., ON BEHALF OF MINOR CHILD, V.H.A.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWHSHIP OF WEST ORANGE, ESSEX COUNTY**
Respondent.

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**M.M.** on behalf of **V.H.A.**, pro se (no appearance)

**Stephen J. Christiano**, Esq., for respondent

Record Closed: February 29, 2016 Decided: March 10, 2016

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the determination of the respondent, West Orange Board of Education ("the Board"), that she is not domiciled in its district. The Board initially sought to remove petitioner's child, V.H.A., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demanded tuition reimbursement based

on petitioner having moved out of its district on June 1, 2015. Subsequent to the determination of the Board, however, petitioner moved back in to the subject district on November 30, 2015. As a result, the Board demands tuition reimbursement from June 1, 2015, until November 30, 2015.

Petitioner filed an appeal with the Department of Education ("the Department") on November 30, 2015. The Board filed an answer on December 8, 2015. The matter was transmitted to the Office of Administrative Law as a contested case on December 16, 2015. A telephone prehearing conference was scheduled for February 1, 2016, and a Notice of Telephone Prehearing dated January 8, 2016, was sent to the parties. The Notice, as well as all subsequent notices, was sent to petitioner at the address listed in her pro se appeal. When the telephone call was made on February 1, 2016, to the telephone number listed in her pro se appeal, petitioner either terminated the call, or the connection was lost. The call was placed again; petitioner did not answer. A second telephone prehearing conference was scheduled for February 8, 2016. The parties were notified of same by telephone on February 5, 2016, and also by a Notice of Telephone Prehearing of even date. On February 8, 2016, the petitioner was telephoned five times, but failed to answer. Two voice messages were left for petitioner, but she failed to respond by telephoning the undersigned. A Notice of Plenary Hearing, dated February 10, 2016, was then sent to the parties advising them of the February 29, 2016, hearing date. Counsel for the Board appeared on February 29, 2016. Petitioner failed to appear.

## FINDINGS OF FACT

At hearing, the Board offered a packet of documentary evidence (R-1), and the testimony of its Residency Investigator, Gerard Drappi, in support of its claim to tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I **FIND** the following **FACTS**:

1. V.H.A. was and continues to be a general education elementary school student (Grades 1--5) in the West Orange Schools.

2. The Board determined that petitioner was not domiciled in West Orange commencing June 1, 2015. The Board subsequently determined that petitioner moved back in to West Orange on November 30, 2015.

3. During the time period from June 1, 2015 through November 30, 2015, when petitioner was not domiciled in West Orange, V.H.A. attended school for 61 days.

4. The annual per pupil cost for a general education elementary school, Grades 1 - 5 student is $15,668.

5. The daily tuition rate for a general education elementary school student in Grades 1 - 5 is $87.04. This is calculated by dividing the per pupil cost by 180.

6. As of February 29, 2016, the amount of tuition owed to the Board for V.H.A.'s period of ineligible attendance is $5,309.44.

## LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner has failed to appear and prosecute her appeal of the Board's decision. She has failed to advise me of the reason for the nonappearance. Therefore, I **CONCLUDE** that the determination of the Board that V.H.A. was not domiciled in West Orange during the period of time from June 1, 2015 to November 30, 2015, should be upheld and the petition of appeal dismissed pursuant to N.J.A.C. 1:1-14.4.

The Board asserts that it is entitled to be reimbursed for tuition for the period of V.H.A.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board relative to its tuition claim. The Board's proofs are convincing and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $5,309.44, for the period from June 1, 2015 through November 30, 2015.

## ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $5,309.44.

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

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

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

March 10, 2016
DATE

Joan Bedrin Murray
**JOAN BEDRIN MURRAY**, ALJ

Date Received at Agency: 3-10-16

Date Mailed to Parties: MAR 11 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

# APPENDIX

## List of Witnesses

For Petitioner

None

For Respondent

Gerard Drappi

## Exhibits

For Petitioner

None

For Respondent

R-1 Packet of information from Board of Education

133-16

*In the Matter of Tenure Hearing of*

**Bruce Turner,**
**State-Operated School District**
**of the City of Camden,**
**Camden County**

Agency Docket No. 275-9/15

**Opinion and Award**

**Tia Schneider Denenberg**, *Arbitrator*

APPEARANCES

FOR THE PETITIONER:

Benjamin S. Teris, *Attorney*
Therese M. Taraschi, *Attorney*
Brown & Connery, LLP

FOR THE RESPONDENT:

Cosmas P. Diamantis, *Attorney*
Zeller & Wieliczko, LLP

This dispute initially concerned charges of inefficiency, unbecoming conduct and other just cause, dated August 21, 2015.[1] They were brought against tenured teacher Bruce Turner under Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3 as follows:

[1] For ease of reference, the creation date of each document has been cited, rather than the Department of Education stamp. In this matter there is no allegation of failure to comply with time limits.

1. The Camden City Board of Education entered into a Consent Order with the Commissioner of Education in March of 2013 to allow for full State intervention to begin on the last day of the school year in June 2013. The State of New Jersey began operating the Camden City School District ("the District") on June 26, 2013. Over the past two school years, the District evaluated all its teachers in accordance with the "Teacher Effectiveness and Accountability for the Children of New Jersey Act" ("TEACHNJ").

**CHARGE ONE - INEFFICIENCY (TEACHNJ N.J.S.A. 18A:6-17.3)**

2. The District brings this inefficiency charge against Bruce Turner pursuant to N.J.S.A. 18A:6-17.3 based on his two consecutive "partially effective" summative evaluations.

3. Mr. Turner is an inefficient teacher who lacks the ability to effectively perform his daily responsibilities. This is simply not acceptable in a State-operated school district which is trying to effectuate important reforms, including the elimination of school teachers who fail or refuse to grasp the concept of being an efficient and effective teacher. Mr. Turner must be dismissed.

- ***Practical Portion: The Danielson Framework***

4. Beginning in the 2013-2014 academic year, the TEACHNJ legislation and accompanying regulations were implemented statewide in New Jersey. In part, that law pertains to the evaluation process for tenured teachers and the subsequent process of removal for inefficiency.

5. The statute requires that only certain Department of Education approved practice evaluation rubrics be used in the evaluations of teachers. The Camden City School District has opted to use the Charlotte Danielson Framework for Teaching evaluation rubric, which has been approved by the Department of Education.

6. The Charlotte Danielson Evaluation Rubric identifies four (4) domains which are to be evaluated: (l) planning and preparation; (2) classroom environment; (3) instruction; and (4) professional responsibilities. Each of these domains includes a number of subdomains. Under the rubric, employees are scored in each subdomain on a scale of 1 to 4, 1 being "ineffective," 2 being "partially effective," 3 being "effective," and 4 being "highly effective." All subdomain scores within a particular domain are then averaged, yielding the employee's score for that domain. In turn, the scores from each domain are averaged, yielding the employee's overall score for the practical portion of the summative evaluation score. In the Camden City School District, the practical portion of the overall evaluation was weighted at 85% of the total summative rating for the 2013-2014 academic year and at 80% of the total rating for the 2014-2015 academic year.

7. Teachers and evaluators in the District received training and instruction with regard to the Danielson Evaluation Rubric.

8. Information regarding the evaluation process including observation information, pre- and post-conference information, summative ratings, etc. are recorded and stored electronically in the TeachScape software program.

9. All teachers and evaluators received training and instruction on TeachScape.

- ***Student Growth Achievement Portion: Student Growth Objectives (SGOs)***

10. In addition to the practical portion of the teacher's summative rating, each teacher rating is required to include a measure of student growth achievement such as student growth objectives ("SGO"). In the Camden City School District the student growth achievement measure was weighted at 15% of the overall score for the 2013-2014 academic year and at 20% of the overall score for the 2014-2015 academic year.

- ***Year 1: The 2013-2014 Evaluation Process and Requirements***

  o ***Practical Portion***

11. N.J.A.C. 6A:10-4.4(c) requires that teachers be observed at least three (3) times in the first year with each observation lasting at least twenty (20) minutes.

12. Mr. Turner was observed four (4) times during the 2013-2014 academic year on the following dates by the following evaluators:

    a. Observation #1: December 2, 2013 by Nicole Harrigan-Nash;
    b. Observation #2: February 6, 2014 by David Corvi;
    c. Observation #3: March 31, 2014 by Cliff Kendeall;
    d. Observation #3: April 1, 2014 by Charles Dawson.[2]

    See attached documents bates stamped CCSD BT 17 through 46.

13. Each of Mr. Turner's observations lasted for the required twenty (20) minutes. Id.

14. N.J.A.C. 6A: 10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) working days after the observation.

15. It is the practice of District evaluators to conduct post-observation conferences within the timeframe required and, upon information and belief, each evaluator conducted post-observation conferences in accordance or substantial compliance with the regulation.

16. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced

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[2] These evaluators were all employed in a supervisory role in the school district during the 2013-2014 school year and hold certificates issued by the New Jersey Department of Education. Ms. Harrigan Nash, a Teacher Trainer and Evaluator at that time, holds a Standard Supervisor Certificate issued in June, 2007; Mr. Corvi, a Principal, holds a Provisional Principal Certificate, dated May, 2013; Cliff Kendeall, a Teacher Trainer and Evaluator at that time, holds a Standard Principal Certificate, dated February, 2010; and Charles Dawson, a Vice Principal, holds a Standard Principal Certificate, dated July, 2013.

and preceded by a pre-observation conference.

17. In the 2013-2014 academic year, Mr. Turner participated in a pre-conference on November 21, 2013, which, upon information and belief, was in compliance with the timing requirements set forth in the regulations. See attached documents bates stamped CCSD BT 17, 56.

18. N.J.A.C. 6A:10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and one occur during the second half of the school year.

19. During the 2013-2014 academic year, at least one of Mr. Turner's observations occurred in the first half of the school year and at least one occurred in the second half.

20. Every evaluator signed every observation report electronically.

21. Finally, in addition to reviewing the observation report at the post-observation conference, every teacher in the school district, including Mr. Turner, had access to each of their observations as soon as they were uploaded via the TeachScape program and continued to have such access throughout the remainder of the academic year.

o ***Student Growth Achievement Portion***

22. Pursuant to N.J.A.C. 6A:10-4.1(b) and -4.1(c), each teacher shall have a measurement of student growth achievement such as an SGO.

23. Mr. Turner's SGO scores for the 2013-2014 academic year were a "4" and a "4." See attached documents bates stamped CCSD BT 59.

o ***2013-2014 Summative Rating/Conference***

24. After weighing each component of the evaluation, Mr. Turner's summative rating was calculated to be "2.49," which is only "partially effective." See attached documents bates stamped CCSD BT 1 through 8.

25. Pursuant to N.J.A.C. 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on May 30, 2014 and the summative form was signed by the Mr. Turner and Mr. Corvi on May 30, 2014. See attached documents bates stamped CCSD BT 16.

o ***Professional Development***

26. During the 2013-2014 academic year, all teachers, including Mr. Turner, were provided with professional development opportunities both generally and specific to the areas of improvement needed for each teacher individually. See attached documents bates stamped CCSD BT 153.

o *Corrective Action Plan*

27. A teacher rated "partially effective" or "ineffective" on his or her summative evaluation must be placed on a corrective action plan ("CAP") pursuant to N.J.A.C. 6A:10-2.5(a).

28. Mr. Turner's CAP went into effect on September 16, 2014 and, upon information and belief, both the teacher and the supervisor participated in its creation. See attached documents bates stamped CCSD BT 60 through CCSD BT 65.

• *Year 2: The 2014-2015 Evaluation Process and Requirements*

o *Practical Portion*

29. N.J.A.C. 6A: 10-2.5(n) requires that teachers who are on a CAP be observed at least four (4) times with each observation lasting at least twenty (20) minutes. Additionally, multiple (more than one) evaluators must perform observations of a teacher on a CAP. N.J.A.C. 6A:10-2.5(l).

30. Mr. Turner was observed four (4) times in the 2014-2015 academic year on the following dates by the following evaluators:

a. Short Observation #1: October 6, 2014 by David Corvi;
b. Short Observation #2: October 23, 2014 by Charles Dawson;
c. Short Observation #3: December 16, 2014 by David Corvi;
d. Short Observation #4: February 4, 2015 by Christie Whitzell.[3]

See attached documents bates stamped CCSD BT 77 through CCSD BT 109.

31. Upon information and belief, each observation lasted for the required twenty minutes and Mr. Turner was evaluated by more than one evaluator during the 2014-2015 academic year. Id.

32. N.J.A.C. 6A:10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) working days after the observation.

33. It is the practice of District evaluators to conduct post-observation conferences within the timeframe required and, upon information and belief, each of Mr. Turner's evaluators conducted such post-observation conferences in accordance with the regulation.

34. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced and preceded by a pre-observation conference.

35. During the 2014-2015 academic year, Mr. Turner participated in pre-conferences as part of his weekly coaching sessions, which, upon information and belief, were in compliance with the

[3] Ms. Whitzell was employed in a supervisory role in the district during the 2014-2015 school year and holds a Standard Supervisor Certificate, dated July, 2002.

timing requirements set forth in the regulations.

36. N.J.A.C. 6A: 10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and at least one occur during the second half of the school year.

37. During the 2014-2015 academic year, at least one of Mr. Turner's observations occurred in the first half of the school year and at least one occurred in the second half.

38. Finally, in addition to reviewing the observation report at the post-observation conference, every teacher in the school district, including Mr. Turner, had access to each of their observations as soon as they were uploaded via the TeachScape program and continued to have such access throughout the remainder of the academic year.

o ***Student Growth Achievement Portion***

39. Pursuant to N.J.A.C. 6A:10-4.1(b) and -4.1(c), each teacher shall have a measurement of student growth achievement such as an SGO.

40. Mr. Turner's SGO scores for the 2014-2015 academic year were a "4" and a "4." See attached documents bates stamped CCSD BT 111 through 114.

o ***Corrective Action Plan***

41. As previously indicated, a teacher rated "partially effective" or "ineffective" during an academic year must be placed on a corrective action plan ("CAP") pursuant to N.J.A.C. 6A:10-2.5(a) for the next academic year. During the year for which the CAP applies, the teacher and the supervisor are required to meet by February 15th in order to review the teacher's mid-year progress in accordance with the CAP. N.J.A.C. 6A:10-2.5(m).

42. Mr. Turner and Principal Corvi had a mid-year conference on February 13, 2015. See attached documents bates stamped CCSD BT 66 through 76.

o ***Professional Development***

43. During the 2014-2015 academic year, all teachers were provided with professional development opportunities both generally and specific to the areas of improvement needed for each individual teacher.

44. Mr. Turner was also provided with support through weekly coaching sessions designed to help him improve.

45. Mr. Turner, however, did not make any effort [to] improve and, on numerous occasions, was either late or failed to attend the coaching sessions.

o ***2014-2015 Summative Rating/Conference***

46. After weighing each component of the evaluation, Mr. Turner's summative rating was calculated to be "2.26," which was ***again*** partially effective and a ***regression*** from his 2013-2014 summative evaluation. See attached documents bates stamped CCSD BT 9 through 16.

47. Pursuant to N.J.A.C. 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on June 6, 2015 and the summative form was signed by Principal Corvi on that date. Mr. Turner unprofessionally refused to sign. See attached documents bates stamped CCSD BT 9 through CCSD BT 16.

- *Conclusion: Inefficiency*

48. The District has evaluated Mr. Turner in accordance with the law and provided him with the tools to be successful. Nonetheless, he has shown to be both unable and unwilling to improve.

49. Due to Mr. Turner's consecutive "partially effective" ratings for the 2013-2014 and 2014-2015 academic years, tenure charges must be brought against Turner. The District accordingly submits that Mr. Turner should be dismissed for inefficiency.

**CHARGE TWO: CONDUCT UNBECOMING A SCHOOL EMPLOYEE**

50. Throughout his career Mr. Turner has engaged in a pattern of inappropriate and insubordinate behavior.

51. On February 1, 2001, Mr. Turner received a notice for failure to attend a staff meeting.

52. On November 2, 2001, Mr. Turner received a warning for stealing milk from the cafeteria.

53. On October 30, 2002, Mr. Turner received a warning for inappropriately using lunchroom tables for soccer, which posed a safety risk to students.

54. On February 12, 2004, Mr. Turner received a notice regarding a parent's concern about student with asthma not receiving proper support.

55. On April 26, 2005, Mr. Turner received a notice regarding his hostility toward a student.

56. On May 18, 2006, Mr. Turner received a notice regarding failure to comply with directions from his principal.

57. On September 29, 2006, Mr. Turner received a warning regarding his failure to timely submit substitute lesson plans.

58. On October 20, 2006, Mr. Turner received a warning regarding his failure to timely submit lesson plans.

59. On March 14, 2007, Mr. Turner received warning regarding a confrontational conversation he had with a parent in front of students.

60. On January 9, 2007, Mr. Turner received a warning regarding his failure to timely submit substitute lesson plans.

61. On October 3, 2007, Mr. Turner received a warning regarding failure to report to timely retrieve students following lunch.

62. On October 3, 2007, Mr. Turner received a warning for failure to perform lunchroom duties.

63. On October 3, 2007, Mr. Turner received a warning for failure to report to his duties after he received the warning letter regarding failure to timely retrieve students.

64. On October 4, 2007, Mr. Turner received a warning regarding failure to timely submit substitute lesson plans.

65. On December 3, 2007, Mr. Turner received a warning regarding his excessive absenteeism and tardiness.

66. On December 20, 2007, Mr. Turner received a notice regarding his failure to update his bulletin board.

67. On March 14, 2008, Mr. Turner received a warning for failure to perform lunchroom duties.

68. On June 14, 2013, Mr. Turner received a warning for excessive absenteeism.

69. On October 9, 2013, Mr. Turner received a warning for failure to attend special areas' training.

70. On February 14, 2014, Mr. Turner received a warning for failure to timely submit substitute lesson plans.

71. On May 30, 2014, Mr. Turner received a letter to file regarding failure to perform lunchroom duties.

72. On September 23, 2014, Mr. Turner received a notice regarding his failure to attend a coaching conference.

73. On January 13, 2015, Mr. Turner ***again*** received notice regarding his failure to attend a coaching conference.

74. On January 20, 2015, Mr. Turner ***again*** received a notice regarding his failure to attend coaching conference;

75. On January 22, 2015, Mr. Turner ***again*** received a notice regarding failure to attend coaching conference;

76. On January 23, 2015, Mr. Turner ***again*** received a notice regarding his failure to attend coaching conference;

77. On January 23, 2015, Mr. Turner received a formal notice outlining his repeated failure to attend weekly coaching conferences.

78. On March 20, 2015, Mr. Turner received a warning regarding failure to report to lunch duty.

79. The above listed instances of unbecoming conduct are illustrative rather than exhaustive.

80. Mr. Turner's pattern of unbecoming conduct in the aggregate warrants his permanent dismissal from employment with the District.

**CHARGE THREE - OTHER JUST CAUSE**

81. Mr. Turner's inefficiency and unbecoming conduct, when combined, constitute other just cause warranting his permanent dismissal from employment with the District.
[Petitioner Exhibit 1]

Accompanied by a statement of evidence, the charges were served on the teacher on August 21, 2015, and he was suspended without pay [Petitioner Exhibit 1].[4] The teacher filed a position statement, dated September 8, 2015 [Petitioner Exhibit 2]. With regard to Charge One—Inefficiency— he alleges that "the District has failed to substantially comply with required evaluation procedures...assigned ineffective or partially ineffective scores in one or more observations conducted during the 2013-2014 and 2014-2015 School Years...has made one or more mistakes of fact in one or more observations conducted during the 2013-2014 and 2014-2015 School Years...[and] each of my Student Growth Objectives...for the 2013-2014 and 2014-2015 School Years were scored 'high effective' with a numerical score of '4' for each SGO." As a result of these failures, "my 2013-2014 and 2014-2015 Summative Evaluations have been materially affected" [Statement of Position of Bruce Turner, pp. 1-3].

The teacher asserts that the second and third charges, Conduct Unbecoming a School Employee and Other Just Cause, are "meritless, without support in the record. Notwithstanding, the District has failed to comply with its Disciplinary Policy (3150) by not providing me with progressive discipline in the form of suspensions and/or increment withholdings for my alleged conduct unbecoming...and do not warrant my dismissal from the District" [Statement of Position of Bruce Turner, pp. 9-10].

On September 17, 2015, the teacher was served with notice of the District's intent to certify tenure charges with the Commissioner of Education, and charges were filed that day [Petitioner Exhibit 3]. On October 12, 2015, the parties were notified by M. Kathleen

[4] This ruling takes into account the complete record, which includes numerous submissions. In the interest of economy, not all submissions will be identified individually.

Duncan, Director, Bureau of Controversies and Disputes, of the New Jersey Department of Education, that

> following receipt of respondent's answer on October 2, 2015, the...charges have been reviewed pursuant to *N.J.S.A. 18A:6-17.3c.* Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to *N.J.S.A. 18A:6-17.2.* subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges brought pursuant to *N.J.S.A. 18A:6-16* –which are not dismissed as the result of a motion –under the preponderance of the evidence standard.
>
> Accordingly, on this date, the charges are being referred to Arbitrator Tia Schneider Denenberg pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26* and *P.L. 2015, c. 109.*

**BACKGROUND**

The arbitrator conducted conference calls with the parties to discuss scheduling and other preliminary matters. Motions concerning discovery requirements were submitted.

Hearings were held on December 9, December 10, December 11, and December 21, 2015. The following witnesses testified under oath or affirmation:

FOR THE PETITIONER:

Nicole Harrigan, Principal
Clifford D. Kendeall, Lead Educator
Charles Dawson, Vice Principal
Christie Whitzell, Senior Lead Educator (Grades K to 3)
David M. Corvi, Principal, Forest Hill-Camden City School

FOR THE RESPONDENT:

Robert Eisberg, Teacher (retired)
Josephine Jones, Teacher (retired)
Bruce Turner, Teacher

On the last day of hearing (December 21, 2015), the parties appeared as scheduled before the undersigned to resume taking testimony. During the direct examination of the teacher, the parties engaged in settlement discussions outside the hearing room. The teacher's counsel announced that "we have agreed to terms that will effectively resolve this matter. We would like to put those terms on the record and we will be submitting a formal agreement for your review following this hearing" [Tr., p. 701]. In response to the arbitrator's question about the regulations governing settlements, the district's counsel read the following into the record:

> Any proposed withdrawal or settlement whether submitted to the commissioner or arbitrator, so it says or the arbitrator. And then I have to, the district has to lay out the various, we have to send you the, well, the documentation or the charges so you have already seen the tenure charges, but part of the package. Then we have to explain the circumstances justifying settlement and withdrawal of the charges and we will detail that as briefly as possible in our submission, consent of both the charge and the charging parts and we both will have consent, indication that Mr. Turner entered into the agreement with a full understanding of his rights which we will put, lay out on the record, showing that the agreement is in the public interest. The district can briefly state on the record why it's in the public interest, but we will do it very shortly in the form of our submission to yourself and, Mr. Turner, you have to be advised that the commissioner may forward the tenure charges to the State Board of Examiners and that they will review it. I'm sure your counsel has advised him of that as well [Tr., pp. 702-703].

The teacher's counsel acquiesced, and the teacher testified that he had no questions. The arbitrator asked the parties to set a deadline for submission of the settlement agreement in writing for her review. They chose January 8, 2016 [Tr., p. 705].

In order to ensure that the teacher understood and agreed with the terms of the settlement, the parties jointly conducted the following voir dire examination, which began with his counsel:

Q. Mr. Turner...I will be discussing with you the terms of the settlement that we have discussed just outside this conference room today.
A. Yes.
Q. Is it your understanding that the matter has, that you have settled the matter with the school district?
A. Yes.
Q. Is it your understanding that the school district will pay you a lump sum of $45,000?
A. Yes.
Q. And that lump sum is subject to an adjustment from the New Jersey Department of Pensions and Benefits which will turn out, which will equal your buy back of seven and some years getting you to 25 years of pension benefits?
A. Yes.
Q. In exchange for that you will agree to sign a general release?

A. Yes.
Q. And that general release you will be releasing any and all claims that you have against the Camden City School District regarding the allegations that were raised in the tenure charges?
A. Yes.
Q. And --
MR. TERIS: And anything up to from the beginning ever to the date that the general release is executed, all claims?
Q. Correct, all claims from prior to and up to the date the actual release is signed?
MR. TERIS: Yes.
A. Yes.
Q. You understand that you have a right to a hearing?
A. Yes.
Q. And you understand that you are waiving that right to a hearing in exchange for this settlement?
A. Correct.
Q. You had time to consult with me regarding the settlement terms?
A. Yes.
Q. And you agree that the settlement is in the best interest of at least yourself?
A. Yes.
Q. Are you under the influence of any drugs or alcohol today?
A. No.
Q. Off the record one second.
(Discussion off the record.)
MR. TERIS: Mr. Turner, you understand that probably it would be beneficial to yourself that we issue the check in 2016?
THE WITNESS: Correct.
MR. TERIS: The district is not responsible for any taxes that you may have to pay? That's your responsibility, you understand that?
THE WITNESS: Yes.
Q. And also my office will coordinate with the Camden City School District's counsel regarding the adjustment whatever that number will be.
THE ARBITRATOR: Right.
Q. And in lieu also you will be resigning and/or retiring effective immediately upon the receipt of the payment from the Camden City School District?
A. Yes.
MR. DIAMANTIS: Madam Arbitrator, I will defer to you unless you have any questions.
THE ARBITRATOR: It is always a victory for everyone when you get a settlement because everybody knows what they have. For arbitrators the only thing we can do is promise an honest call based on the evidence and the statutory framework, but sometimes we're even surprised where we go. So it's much better, as we say a good settlement is something that you don't get everything you want, but it satisfies enough of the parties' needs so it seems to be fair and, as I say, I look forward to receiving the actual terms in a timely manner. I will inform the commissioner now that it is coming and hopefully by the first week in January we will clear it up and everybody can go on with life [Tr, pp. 706-709].

On December 23, 2015, Mr. Teris emailed to Mr. Diamantis:

> Attached please find a draft settlement agreement and consent order withdrawing the matter. Please sign the consent order as soon as possible. Please review the settlement agreement and let me know if you have any changes or concerns. I understand the date of retirement may have to change due to the fact the Superintendent may not be able to sign the agreement until next week.
>
> [Respondent Brief, February 10, 2016, Tab L]

Later that day, Mr. Diamantis responded:

> Attached are my edits to the Settlement Documents. Mr. Turner will execute the documents tomorrow as discussed. Let me know if you have any issues with the proposed changes. Otherwise, I will assume they are acceptable.
>
> [Ibid., Tab M]

The next morning, Mr. Teris emailed back:

> Looks good to me. I will explain to my client after Mr. Turner signs. The revisions are minor and I don't anticipate any issues.
>
> [Ibid., Tab N]

On December 28, 2015, the teacher forwarded to the district his Letter of Resignation/Retirement as of December 24, 2015; an executed Consent Order to Withdraw the Tenure Charges; and an executed Settlement Agreement and Release [Appended below, Ibid., Tab N].

On January 14, 2016, the arbitrator emailed the parties, reminding them that the award due date was January 25 and that the "file can't be closed until I have the agreement." In an email response, the district's counsel announced a breakdown in the settlement. The next day he requested a date to resume hearings and conclude the arbitration—effectively notifying the arbitrator that the district no longer recognized the settlement. The teacher objected to the request and sought enforcement of the settlement, as detailed on the record on December 21, 2015, if he did not receive the expected payment by the end of the day.

The arbitrator requested and received from the commissioner an extension of the proceeding until April 1, 2016. The parties filed motions and counter motions on whether the settlement was in effect. The respondent also filed an emergent motion for reinstatement to the payroll, which was opposed by the district. Each party had a full opportunity to argue these motions; the last submissions were received by the arbitrator on March 24, 2016.

**DISCUSSION**

Despite reaching an apparent settlement agreement on December 21, 2015, the last hearing day, the district petitioned for continuation of the arbitration hearings on the ground that "the tenure charges...remain unresolved." It asserts that "no settlement agreement exists," presumably meaning no written agreement approved by the commissioner (or his designee) and the district superintendent. The district also contends that the commissioner (and thus the arbitrator as designee) "lacks authority to enforce settlement agreements" [Letter to arbitrator from district counsel, February 2, 2016]. The district further asserts that this matter has been referred to arbitration by the commissioner "on the tenure charges—not any other issue" [District opposition to respondent's motion, March 1, 2016, pp. 1-2]. The teacher insists that the agreement of December 21 is valid, binds both parties, and represents the final resolution of the tenure charges. Therefore, the arbitration has reached its conclusion, the teacher contends.

There is no question that on December 21 the parties fashioned an agreement to settle the dispute about the tenure charges. Specific terms were enunciated and placed on the stenographic record, along with an examination of the teacher intended to establish that he was fully aware of the terms and accepted them voluntarily. The parties and the arbitrator adjourned with the understanding that those terms would be incorporated in a consent order as the outcome of the dispute.

An agreement, even an oral one, has customarily been regarded as a binding contractual obligation, provided that the terms are clear. There appears to be no substantial reason to depart from that principle in regard to the agreement reached on December 21. The district's attempt to disavow the settlement is not grounded in a misunderstanding about the terms or a failure to achieve a meeting of the minds. Indeed, it was the district that drafted the written version of the agreement, which described the teacher's resignation letter as "irrevocable." The respondent signed and submitted the letter. If the agreement became binding on him at that moment, it surely must have become binding on the district as well.

After December 21, the district developed reservations about a single term: the amount it was obliged to pay the teacher in return for his resignation. The sum was $45,000; the district sought to reduce that amount by $14,000, ostensibly because of unemployment compensation payments of which it had been unaware.

That is not, however, a sufficient reason for unilateral withdrawal from a *bona fide* agreement. Unemployment payments are common in tenure disputes, and the district was sent an official Notice of Determination (October 26, 2015), which ruled that the teacher

was eligible for benefits from September 20, 2015.[5] Unemployment compensation had not been an aspect of the tenure dispute itself, judging by the parties' briefs and supporting evidence. Furthermore, it is likely that without the settlement the cost to the district in salary for the teacher would exceed $14,000, since he would be reinstated to the payroll after the statutory 120 days of suspension. The litigation costs to finish the case would generate additional expense, and the district's objective of removing a teacher it regards as inefficient would be left in doubt.

Consequently, the undersigned arbitrator finds that the reasoning in the *Connors-Ryan* decision[6] of the Education Department is applicable to the district's attempt to withdraw from the agreed settlement:

> The party seeking the extraordinary remedy of reopening a case or issues previously resolved by a voluntary settlement must demonstrate by clear and convincing proof that the agreement was the result of fraud, undue influence or duress, or mutual mistake as to a material fact. Other standard reasons for rescission of settlement agreements include substantial failure of consideration, nonperformance or breach or other such compelling circumstances. A settlement cannot be vacated because the party later determines that he or she had made a bad deal or because he finds the contract less profitable to him than he had anticipated when the contract was made.

Given the lack of "compelling circumstances" in this instance, the district's attempt to withdraw from the settlement agreement must be rejected.

The sole remaining question is whether the settlement meets the *Cardonick* standards. Statutory language in N.J.A.C. 6A:3-5.6(a) provides as follows:

> Any proposed...settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
> 2. Explication of the circumstances justifying settlement or withdrawal;
> 3. Consent of both the charged and charging parties;
> 4. Indication the charged party entered into the agreement with full understanding of his or her rights;

---

[5] The notice was addressed to the Camden Board of Education c/o Helen Wapenski as well as to the employee [Respondent Brief, Exhibit S].

[6] *Kathleen Connors-Ryan v. Board of Education of Freehold Regional High School District*, New Jersey Department of Education, Office of Administrative Law, April 15, 1993.

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

As analyzed in detail below, the settlement agreement satisfies each of the *Cardonick* standards:

No. 1–When the settlement was reached, the arbitration proceeding was well advanced. The district and the teacher had ample opportunity, during four days of hearing, to present the charges, the defenses and the supporting evidence. The stenographic record of the proceedings (more than 700 pages), along with the attached exhibits, amounts to extensive documentation of all aspects of the case. The settlement took place after the parties were in possession of the salient facts.

No. 2–The circumstances were favorable for a settlement, inasmuch as neither party could determine the likelihood of its prevailing in the arbitration. The settlement brought a degree of certainty about the outcome that benefitted both sides. Moreover, the settlement saved considerable expense while achieving significant goals for each side: the district could ensure that the teacher would leave its employ, and the teacher preserved his pension benefits.

No. 3–The consent of both the charged and charging parties was confirmed by both parties on the hearing record. Since it originated with the district, the written version of the agreement demonstrated the employer's acceptance, and the teacher signified his by signing the resignation letter and settlement agreement on December 24, 2015. His counsel signed the consent order to withdraw tenure charges on December 28, 2015.

No. 4–There is ample evidence that the charged party entered into the agreement with full understanding of his rights, since the teacher was questioned on the record about his knowledge of those rights and what he was surrendering. He was examined by attorneys from both sides, and the transcript indicates that he was well aware of the costs and benefits of accepting the agreement.

No. 5–Among the statute's objectives is the expeditious resolution of tenure disputes. A settlement advances that purpose, shortening the time needed to achieve an outcome. In the arbitration process a settlement is typically welcome and considered superior to an imposed decision, because the parties play an active role in fashioning the terms.

No. 6–Under the terms of the settlement, the teacher was advised that the Commissioner may forward the tenure charges to the State Board of Examiners and that they will review it [Tr., pp. 701-703]," an action that could impact his certification.

Since the settlement satisfies each of the *Cardonick* standards and there is no persuasive justification for withdrawal by the district, the arbitrator approves the settlement.

For the reasons discussed above, and after considering all arguments and the entire record, the arbitrator concludes that the just, practical, and proper outcome of the tenure dispute is to give effect to the settlement agreement, as recorded under oath in the stenographic transcript of the hearing of December 21, 2015, and elaborated in the signed documents that are appended to this award. Inasmuch as the respondent resigned from his position, effective December 24, 2015, his motion for reinstatement to the payroll becomes moot.

**Tia Schneider Denenberg**
*Arbitrator*

**Dated:** April 1, 2016

*In the Matter of the Tenure Hearing of*

**Bruce Turner,**
**State-Operated School District**
**of the City of Camden,**
**Camden County**

Agency Docket No. 275-9/15

## Arbitrator's Award

*The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:*

The tenure charges against teacher Bruce Turner shall be resolved according to the terms of the settlement agreement reached by the parties on December 21, 2015, as recorded under oath in the hearing transcript of that date and elaborated in the Consent Order and Settlement Agreement. The terms include resignation/retirement of the teacher from his tenured position, effective December 24, 2015, and payment to him by the district of $45,000 by January 15, 2016. The payment shall be made immediately upon receipt of this award.

**Tia Schneider Denenberg**
*Arbitrator*

Dated: April 1, 2016

*State of New York*
*County of Columbia*

*On this 1st day of April, 2016, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.*

**Kristy Lee Brailey**
*Notary Public State of New York*
*No. 01BR6326865*
*Qualified in Columbia County*
*Commission Expires June 29, 2019*

Mr. Bruce Turner
15 Washington Avenue
Turnersville, NJ 08012

December 24, 2015

Paymon Rouhanifard, State Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Re: Resignation/Retirement Effective the Close of Business on December 24, 2015

Dear Mr. Rouhanifard:

Please be advised that I am resigning and/or retiring from the Camden City Public School District and my position as a Physical Education and Health Teacher, effective the close of business on December 24, 2015.

Very truly yours,

Bruce Turner

# SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Bruce Turner ("Turner") and the Camden City School District (the "District"). Together, Turner and the District may be referred to herein as "the Parties."

**WHEREAS,** Bruce Turner is a teacher of Health and Physical Education

**WHEREAS,** the District certified tenure charges against Turner to the Commissioner of Education for inefficiency, unbecoming conduct, and other just cause;

**WHEREAS,** the Parties mutually desire to resolve this matter;

**NOW, THEREFORE, IT IS HEREBY AGREED** by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

(a) Bruce Turner shall provide the District immediately, through its counsel, Brown & Connery, LLP, with an irrevocable letter of intent to retire on December 24, 2015;

(b) The District shall not oppose or contest any application by Turner for unemployment compensation benefits. The District shall, however, be entitled to respond to any forms or inquiries from any governmental agencies with respect to Turner's unemployment compensation claim and shall be entitled to notify said governmental agencies of, among other things, this Agreement.

3. Dismissal of Tenure Charges: The District shall take all necessary actions with the Commissioner of Education or his designee to withdraw the tenure action against Turner bearing agency reference number 275-9/15.

4. Settlement Payment:

(a) The District shall pay Turner the total sum of forty-five thousand dollars $45,000 ("Settlement Payment").

(b) The District shall issue the Settlement Payment by way of a check payable to "Bruce Turner" between January 1, 2016 and January 15, 2016 following the receipt of: (1) IRS W-9 Forms for Turner and (2) an executed Child Support Judgment Certification.

(c) The Settlement Payment shall be reported on an IRS 1099 Form. Turner assumes sole responsibility for all applicable state, federal and local taxes required to be paid with respect to the Settlement Payment. In addition, Turner agrees that if any taxing authority seeks or

deems due and owing from the District any taxes, interest, penalties or other amounts with respect to the Settlement Payment, he will indemnify and hold harmless the District for any sums it may be required to pay, and he will reimburse the District for any attorney's fees and costs it incurs in defending against such claims.

(d) The Settlement Payment shall be the total amount borne by the District under this Agreement. The District shall have no obligation to make any other payment to Turner including, but not limited to, any form of back pay and any reimbursement for accumulated unused sick leave.

5. General and Mutual Release: Turner releases the District, and the District releases Turner, from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Turner, or the District, has, ever had, or may have had, against the District, or Turner, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Turner, or the District, asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Turner, or the District, is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

6. Covenant Not to Sue: Turner warrants he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Turner agrees that he will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Turner's behalf, Turner agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Turner agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Turner agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

7. Claims Not Released: Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Turner is not waiving: (a) claims that were filed or could be filed under any state workers' compensation or unemployment law or any claim arising from a breach of this agreement; or (b) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Turner represents that he is not aware of any present basis for such claims. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 5, Turner agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 6, above.

8. Older Workers Benefit Protection Act: The releases in section 4 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Turner specifically acknowledges that:

(a) He has been advised to consult with an attorney of his choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that he understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which he is not otherwise entitled and is adequate and sufficient to support his promises, covenants and releases as set forth in this Release;

(d) He has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period he will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) He has been advised that during the **seven (7) day** period following his execution of the Settlement Agreement and the Release, he may revoke her acceptance of this Agreement by delivering written notice to counsel for the District (as identified below), and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
**Brown & Connery, LLP**
360 Haddon Ave.
Westmont, NJ 08108

9. Not Eligible for Rehire: Turner acknowledges and agrees that his employment with the District is irrevocably severed upon the effective date of this Agreement and that he is ineligible for re-hire as an employee of the District. Turner agrees not to apply for re-employment with the

District. If, for some reason, the District receives an application for Turner's employment, the District shall have no obligation to consider or review his application for employment.

10. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

11. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

12. No Contingencies: The effectiveness of this agreement shall not be contingent on any event not articulate herein, including but not limited to any applications Turner may file with the Teachers' Pension and Annuity Fund to purchase pension service credit and/or for retirement. Turner understands the District has no control over the approval or denial of any such applications and he cannot revoke this Agreement based upon same.

13. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

14. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

15. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

16. Individuals Bound: This Settlement Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

17. Breach: Bruce Turner understands that if he breaches any provision of this Agreement, the District will file an action to enforce this Agreement.

18. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Bruce Turner:

Bruce Turner
15 Washington Avenue
Turnersville, NJ 08012

With a copy to:

Cosmas P. Diamantis, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 0810

19. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

**[Signatures on following page]**

**BY SIGNING THIS AGREEMENT, BRUCE TURNER ACKNOWLEDGES:**

A. **HE HAS READ IT;**

B. **HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;**

C. **HE AGREES WITH EVERYTHING IN IT;**

D. **HIS ATTORNEY NEGOTIATED IT WITH HISKNOWLEDGE AND CONSENT;**

E. **HE HAS CONSULTED WITH HIS ATTORNEY ABOUT IT; AND**

F. **HE SIGNS IT KNOWINGLY AND VOLUNTARILY.**

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties hereby execute this Agreement.

**Bruce Turner**

**Date:** 12/22/15

**Paymon Rouhanifard**
**State District Superintendent**
**Camden City School District**

**Date:**

BROWN & CONNERY, LLP
Louis R. Lessig, Esquire
Benjamin S. Teris, Esquire
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for Petitioner Camden City School District

| | |
|---|---|
| IN THE MATTER OF THE TENURE CHARGES AGAINST BRUCE TURNER, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN | **BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**<br><br>Agency Ref. No.: 275-9/15<br><br>**CONSENT ORDER TO WITHDRAW TENURE CHARGES** |

**WHEREAS**, the State-Operated School District of the City of Camden ("District") opened the above captioned matter by certifying tenure charges against Bruce Turner ("Turner") with the Commissioner of Education ("Commissioner");

**WHEREAS**, the Commissioner assigned this action to be adjudicated before Arbitrator Tia Schneider Denenberg;

**WHEREAS**, the parties mutually desire resolution of the matter in terms of withdrawal of the tenure charges, and approval of the proposed settlement agreement, attached hereto;

**WHEREAS**, the parties submit this Consent Order pursuant to N.J.A.C. 6A:3-5.6, and the Cardonick standards established by the State Board of Education in the matter of In re Cardonick, State Board Decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846).

Now it is on this _____ day of December 2015, **ORDERED** and **AGREED** as follows:

1. The District originally charged Turner, a certificated and tenured Teacher of Health and Physical Education with inefficiency, unbecoming conduct, and/or other just cause;

2. After several days of hearing, the Parties have reached a mutual agreement whereby both the District and Turner will receive finality;

3. Thus, withdrawal and settlement of the matter are justified;

4. The parties mutually desire the charges be withdrawn and the proposed settlement agreement approved;

5. Upon execution of the proposed settlement agreement Turner shall retire from his position as a Physical Education Teacher within the District;

6. The District will issue Turner a settlement payment;

7. Respondent seeks to enter into the proposed settlement agreement, and acknowledges that he has;

a. Read the proposed settlement agreement;

b. Understands it and knows he is giving up important rights;

c. Agrees with everything in it;

d. His attorney negotiated it with his knowledge and consent;

e. He has consulted with his attorney about it, and;

f. He shall sign it knowingly and voluntarily;

8. The proposed settlement agreement is in the public's interest, as the circumstances in the matter justify resolution in that a tenured teacher, who the District has rated less than efficient, will irrevocably sever his employment with the District and release the District from any potential liabilities;

9. Turner acknowledges that he has been duly advised by his attorneys, of the Commissioner of Education's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Date:_____

Tia Schneider Denenberg
Arbitrator

**THE PARTIES, BY AND THROUGH THEIR ATTORNEYS, CONSENT TO THE FORM, CONTENT, AND ENTRY OF THIS CONSENT ORDER:**

Date:_____

Benjamin S. Teris, Esquire
Brown & Connery, LLP
Attorneys for the Camden City School District

Date: 12/29/15

Cosmas P. Diamantis, Esquire
Zeller & Wieliczko, LLP
Attorneys for Bruce Turner

134-16

**COMMISIONER OF EDUCATION**
**NEW JERSEY DEPARTMENT OF EDUCATION**

**Agency Docket No.:**
**Tenure Hearing** 372-12/15
**Ralph H. Colflesh, Jr., Esq./ Arbitrator**

**IN THE MATTER OF TENURE CHARGES AGAINST PHILLIPS WILLIAMS**

**BY THE TRENTON BOARD OF EDUCATION, MERCER COUNTY, NEW JERSEY**

Appearances
For the Trenton Board of Education:
*Adam S. Herman, Esq.*
*Adams Gutierrez & Lattiboudere, LLC*
*Newark, New Jersey*
For Phillips Williams:
*Edward A. Cridge, Esq.*
*Mellk O'Neill*
*Princeton, New Jersey*

**WHEREAS,** on November 16, 2015,the Assistant Superintendent of Schools for the Trenton Board of Education ("the Board") filed Tenure Charges against Phillips Williams, a tenured teacher then employed by the Board; and,

**WHEREAS,** on December 14, 2015, the Board, having found probable cause to credit evidence presented in support of the said Charges and that the Charges, if true, warranted her dismissal or reduction in salary; and,

**WHEREAS,** on December 21, 2015 the Board forwarded said Charges to the Commissioner of Education; and,

**WHEREAS,** on January 5, 2016 Phillips Williams responded to the Charges with the Commissioner, denying in material part the substance of the Charges, thereafter causing this matter to be referred to arbitration pursuant to NJSA 18A:6-16, as amended by P. L. 2012, c. 26 and P.L. 2015, c. 109; and,

**WHEREAS,** on January 19, 2016 the undersigned was duly appointed by said law and relevant regulations to arbitrate the parties' dispute concerning the Charges; and

**Whereas,** on February 23, 2016 Phillips Williams voluntarily resigned his position with the Board as memorialized in the attached and notarized letter of resignation; and,

**Whereas** on March 2, 2016 the undersigned reviewed the said resignation and found them it be in conformance with law; and,

**Whereas,** on March 21, 2016 the Board resolved to accepted Phillips Williams' resignation and noticed the undersigned thereof;

**NOW THEREFORE,** undersigned enters the following

## AWARD

This matter is settled with the voluntary resignation of Phillips Williams, which is deemed by the undersigned to be irrevocable, and the resolution of the Board accepting such irrevocable resignation from employment.

4/6/16
Date

Ralph H. Colflesh, Jr., Esq., Arbitrator

Mr. Phillips Williams
3151 South Babcock Street
Apt. 204
Melbourne, FL, 32901
(908)-797-4283

February 23, 2016

Ms. Lucy Feria, Interim Superintendent
Trenton Public Schools Board of Education
108 North Clinton Avenue
Trenton, New Jersey 08609

Re: Letter of Resignation

Dear Superintendent Feria:

Please accept my resignation from my position as a teaching staff member with the Trenton Board of Education. I am resigning as the result of a leukemia diagnosis and other serious health issues. This resignation shall be effective on the 61st day following your receipt of this letter, or, if the Board of Education is willing to accept my resignation on less than 60 days' notice, on March 21, 2016.

Thank you.

Sincerely,

Phillips Williams

Witnessed before me this 23 day of February, 2016

Notary Public

CLAUDIA G [illegible]
Notary Public - State of Florida
My Comm. Expires Jul 15, 2016
Commission # EE [illegible]47

# TRENTON BOARD OF EDUCATION

## Resolution to Accept Resignation

**BE IT RESOLVED:** that the Trenton Board of Education, upon the recommendation of the Superintendent of Schools, hereby accepts the **Resignation of Phillips Williams,** Science Teacher at Dunn Middle School, effective March 22, 2016.

Jason Redd
Board President

Jayne S. Howard
Business Administrator/Board Secretary

March 21, 2016

136-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

| | |
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| In the Matter of the Tenure Charges Against | Agency Dkt. No. 373-12/15 |
| **DAVID OKIN,** Respondent, | JS Case No. 4389 |
| and | **OPINION AND AWARD** |
| **TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY,** School District. | |

**Before JOHN E. SANDS, Impartial Arbitrator**

## OPINION

On January 29, 2016 the New Jersey State Department of Education's Bureau of Controversies and Disputes designated me to arbitrate the above matter in accordance with N.J.S 18A:6-17.1. Pursuant to that authority I reviewed the parties' Charges and Answer, ordered pre-hearing information exchange, and set hearing dates of March 22, April 15, and April 16, 2016. On March 11, 2016 the parties advised me that they were in the process of negotiating a settlement of all issues and canceled the March 22nd hearing date.

On April 7, 2016 the parties sent me a fully executed and certified copy of their Stipulation of Settlement that Respondent David Okin had signed

and certified on March 17th, Board President Jason Redd had signed on April 4th, and Board Attorney Adam Herman had certified on April 6th.

I have again reviewed the Charges and Answer, relevant law, and the terms of the parties' Stipulation of Settlement, including the preamble's recited reasons supporting their decision to enter it. Upon that review and my knowledge of the complexity and likely expenses of litigating this matter, I approve this Settlement Agreement, which I attach as Exhibit A and incorporate herein as if fully set forth, as an appropriate resolution of all issues of this matter.

By reason of the foregoing, I issue the following

**AWARD**

I approve the attached Stipulation of Settlement as an appropriate resolution of all issues of this matter and incorporate its terms in this Award by reference as if fully set forth.

Dated: April 8, 2016
Roseland, New Jersey

**JOHN E. SANDS**

**ACKNOWLEDGMENT**

STATE OF NEW JERSEY)
>ss.:
COUNTY OF ESSEX )

On April 8, 2016, JOHN E. SANDS, whom I know, came before me and acknowledged that he had executed the foregoing as and for his Opinion and Award in the above-captioned matter.

Hilda M. Cortes-Rivera
A Notary Public of New Jersey
My Commission expires October 10, 2018

# Exhibit A

Arnold M. Mellk, Esq. (NJ Bar ID No. 272001971)
Edward A. Cridge, Esq. (NJ Bar ID No. 02646-9211)
MELLK O'NEILL
10 Nassau Street, 2nd Floor
Princeton, New Jersey 08542
P: 609-924-0700 / F: 609-924-4622 / E: edcridge@gmail.com
Attorneys for Respondent David Okin

| | |
|---|---|
| IN THE MATTER OF THE TENURE CHARGES AGAINST DAVID OKIN,<br><br>TRENTON PUBLIC SCHOOLS BOARD OF EDUCATION, MERCER COUNTY | STATE OF NEW JERSEY<br>DEPARTMENT OF EDUCATION<br><br>Agency Dkt. No. 373-12/15<br><br>*Administrative Action*<br><br>**SETTLEMENT AGREEMENT** |

The Trenton Board of Education (the "District"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey 08609, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and David Okin, having an address at 117 Ashbrook Road, Cherry Hill, New Jersey 08034 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teacher employed by the District; and

**WHEREAS** the District certified tenure charges of Unbecoming Conduct and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against David Okin, Trenton Board of Education* ("Tenure Charges"), and such charges were assigned Docket No. 373-12/15 and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to

warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator John E. Sands, Esq., ("Arbitrator") for a hearing; and

**WHEREAS**, Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, the District with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, including several students, and the concern that students will be removed from school to testify and that school administrators will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent agrees to serve a six (6) month suspension without pay, thereafter to resume his teaching duties, upon the formal approval of this stipulation of settlement by the Trenton Board of Education; and

**WHEREAS**, Respondent agrees to accept an assignment as a teaching staff member at any school or department within the District that the District finds to be appropriate and in the best interest of the District;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Respondent shall serve a six (6) month suspension without pay from December 15, 2015 through June 15, 2016. This suspension shall serve as the entire discipline for Respondent with respect to these tenure charges. Respondent agrees not to, and waives any right to, challenge or otherwise contest this suspension.

2. Respondent shall be placed on paid administrative leave from June 16, 2016 through June 30, 2016. Respondent will be restored to the payroll at his correct salary effective as of June 16, 2016, and shall receive back pay / benefits for any time between that date and the day when he is restored to the payroll.
3. Upon resumption of his teaching duties, Respondent agrees to accept an assignment as a teaching staff member at any school or department within the District that the District finds to be appropriate and in the best interest of the District.
4. Respondent also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.
5. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for the period from December 15, 2015 through June 30, 2016. Respondent releases and waives any claim which he may have to any pay from the District from December 15, 2015 through June 15, 2016.
6. The District agrees to dismiss the instant tenure charges with prejudice, subject to the approval required in Paragraph 20.
7. In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges as against the School District any and all claims or causes of action, known or unknown, suspected

or unsuspected, arising through the date of his execution of this Agreement, including, without limitation, any claim for attorneys' fees, costs or other monetary relief; discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay,

personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent also agrees to withdraw any and all pending complaints or actions that have been or may have been filed against the School District or any of its employees or representatives. Notwithstanding this release of claims / causes of action, Respondent retains all of the rights and protections of a tenured staff member of the District.

8. Notwithstanding Paragraphs 4 and 7 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims, Respondent agrees not to seek or accept any resulting relief whatsoever.
9. The District hereby represents and agrees that this Agreement represents full and final discipline for any act or omission of Respondent alleged in the tenure charges.
10. The parties acknowledge and agree that entry into this Agreement does not constitute an acknowledgement or admission by either party as to the truth, accuracy, merit, or demonstrability of the allegations set forth in Tenure Charge Number Seven and Tenure Charge Number Eight. The allegations set forth in Tenure Charge Number Seven and Tenure Charge Number Eight shall not be considered or relied upon for purposes of progressive discipline in any future proceeding.
11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act

and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

12. This agreement shall not constitute a precedent in any matters involving other District employees.

13. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

14. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

15. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

16. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

17. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

18. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

19. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

20. This Stipulation of Settlement is also subject to formal Board of Education approval.

21. Upon formal approval of this stipulation of settlement by the District and the Arbitrator, a copy of same will be placed in Respondent's personnel file.

Dated: 3-17-16

DAVID OKIN

TRENTON BOARD OF EDUCATION

Dated: 4/4/16

By: JASON REDD
Board President

## CERTIFICATION

I, David Okin, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 3-17-16

David Okin

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 4/6/16

Adam S. Herman, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Trenton Board of Education

APPROVED:

Dated: 4/8/16

John E. Sands, Esq., Arbitrator

137-16

AGENCY DKT. NO. 52-2/16
SEC DKT. NO. T02-15

| | | |
|---|---|---|
| IN THE MATTER OF TOM IACOVONE, | : | |
| HOPE COMMUNITY CHARTER SCHOOL, | : | COMMISSIONER OF EDUCATION |
| CAMDEN COUNTY. | : | DECISION |

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends that respondent be removed from Hope Community Charter School's Board of Trustees. Respondent did not reply to the Commission's Order to Show Cause, nor did he file exceptions or furnish any proof of having attended the required training. Finally, respondent did not appeal the Commission's underlying finding of a violation pursuant to *N.J.A.C.* 6A:4.

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

Accordingly, respondent is hereby removed from office as a school official found to have violated the School Ethics Act, effective immediately.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/16
Date of Mailing: 4/11/16

[1] The Commission recommended that the respondent be removed for a period of three years or the remaining term of the respondent's office, whichever is longer. Under *N.J.A.C.* 6A:28-10.12(a), if a violation of the School Ethics Act is found, "the Commission may recommend to the Commissioner the reprimand, censure, suspension, or removal of the school official." There is no provision that permits the Commission to recommend a penalty that includes the removal of a school official for three years. Therefore, the respondent is removed from the Hope Community Charter School Board of Trustees immediately without any future restrictions.

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

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| **IN THE MATTER OF** | : | **BEFORE THE SCHOOL** |
| **TOM IACOVONE** | : | **ETHICS COMMISSION** |
| ***HOPE COMMUNITY CHARTER SCHOOL,*** | : | **DECISION FOR** |
| ***CAMDEN COUNTY*** | : | **FAILURE TO COMPLETE TRAINING** |
| | : | **DOCKET NO. T02-15** |

## PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission (Commission) at its December 15, 2015 meeting and mailed on December 16, 2015 to the above-named Respondent, alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), prepared and offered by the New Jersey School Boards Association (NJSBA).

Since March 1, 2012, Respondent has served as a trustee of the Hope Community Charter School, located in the City of Newark, County of Essex. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the NJSBA.

The NJSBA annually advises all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes. The NJSBA provides the required training and notifies members and trustees of the dates and times of the sessions, and continuously publishes that information in School Board Notes. The NJSBA also offers training on its website, which may be completed anytime from any location at the convenience of the board member or charter trustee.

For the 2014 training cycle, which for charter school trustees ran from July 1, 2014 to June 30, 2015[1], Respondent was required to complete the Governance I training program. Respondent failed to complete his required training within the timeframe for the 2014 training cycle. The NJSBA informed the Commission by email dated November 17, 2015 that for the 2014 training cycle, the NJSBA notified Respondent, the Business Administrator, and the Chief School Administrator of the Respondent's charter school of his mandatory training requirement during calendar year 2015 on the following dates: March 23 and May 12, before the time to timely train expired, and again on July 22, August 18, August 25, and September 15, among other dates, after Respondent had failed to timely complete his training, to give him the opportunity to comply with his training obligation.

Furthermore, in the certification submitted to the Commission at its January 26, 2016 meeting, the NJSBA's Manager of Training and Professional Department attested that the NJSBA took the following actions in an effort to ensure member and trustee compliance with the mandated training requirements:

[1] As established by NJSBA, the training cycle for public school district board of education members is from January 1 to December 31 of each year, whereas the training period for charter school trustees is from July 1 to June 30 of the following year. Thus, for charter school trustees, the 2014 training cycle ran from July 1, 2014 to June 30, 2015.

- On October 5, 2014, the Respondent was registered to take Governance I training and an email with the link was sent to his registered email address.

- On March 23, 2015 and May 12, 2015, prior to the end of the 2014 training cycle, the NJSBA communicated with charter school trustees by email regarding the mandated training requirements for the 2014 training period.

- On July 1, 2015, after the 2014 training cycle closed, the NJSBA provided the School Ethics Commission with a report of charter trustees who had failed to complete the required training for the 2014 training period, which included Respondent.

- On July 2, 2015, the NJSBA emailed Respondent advising him that he had yet to complete the Governance I training program required during the 2014 training period, and included a link to the online training module in the email.

- On July 22, 2015, the NJSBA sent an additional email to all charter school trustees regarding the mandated training requirement, included a link to the online training module in the email.

- On October 1, 2015, the NJSBA emailed Respondent advising him that he had yet to complete the Governance I training program required during the 2014 training period, and included a link to the online training module in the email.

- On November 18, 2015, the NJSBA notified the School Business Administrator (SBA) for the Hope Charter School advising the SBA that Respondent had failed to complete the required training.

- On November 23, 2015, the NJSBA communicated through email with the Hope Community Charter School and as a result sent an email to Tom Iacovone with the link and instructions for completing to the Respondent with the Governance I training.

The October 1, 2015 NJSBA notice was marked ***"Urgent: Action Needed"*** in an email to all school board members and charter school trustees who had not completed the mandatory training. In the October 2015 email, the NJSBA advised school board members and charter school trustees that failure to complete the mandated training might result in disciplinary action ordered by the Commission, up to and including removal from their respective board.

Further, the NJSBA notified the Commission by email on November 17, 2015, that it expressly notified Respondent by email that Respondent was non-compliant with the training requirement and urged Respondent to complete the mandated training no later than November 25, 2015. This notice also explained that failure to complete the training would result in the issuance of an Order to Show Cause requiring Respondent to explain why Respondent failed to complete the required training and potentially compelling Respondent to appear before the Commission. In addition, the November 2015 notice also advised Respondent that the penalty for failing to comply included removal from the charter board of trustees.

In addition to the communication efforts undertaken by the NJSBA, the School Ethics Commission, the Department of Education County Offices and the Department of Education's Office

of Charter Schools also communicated with the Respondent, regarding the mandated training requirement.

Specifically, in September 2015, the Commission reported to Respondent's County Office of Education (County) that the NJSBA identified that Respondent failed to complete the 2014 training program within the required training period. Working in conjunction with the Commission, the County Office emailed the Chief School Administrator of Respondent's school that Respondent remained delinquent in completing the training requirement. This notice also provided the opportunity to inform the Commission of any errors in its data. None was received.

Additionally, on October 29, 2015, the New Jersey Department of Education's Office of Charter Schools emailed Respondent directly to notify him that he was non-compliant with the training requirements, and also advised Respondent that the Commission requires the training to be completed to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal.

As a final notice of non-compliance, on November 30, 2015, the Commission directly emailed Respondent, advising that the Commission requires completion of the training to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal from office.

The December 15, 2015 Order to Show Cause sent to Respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that Respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The Respondent did not reply to the Commission's Order and the NJSBA's Manager of Training and Professional Development certified that as of January 26, 2016, Respondent had failed to complete the required training for the 2014 training cycle.

## ANALYSIS

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

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

## DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Tom Iacovone failed to comply with N.J.S.A. 18A:12-33 and the Commission finds him in violation of N.J.S.A. 18A:12-33.

Mr. Iacovone received repeated notifications of the long-standing training requirement and has had ample opportunities to attend in-person training or to complete on-line training. Mr. Iacovone did not provide any response to the Commission's Order. The Commission believes that, based on his failure to complete his training requirement for the 2014 training cycle and his failure to respond to the Order, the appropriate penalty is **removal.** This penalty underscores to this Respondent, and all those similarly situated board members and charter school trustees, that the Commission will impose a penalty on those officials for their failure to comply with the statutory obligation to complete the training requirement within the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the Respondent be **removed** as a member of the Hope Community Charter School Board of Trustees for a period of three years or for the remaining term of Mr. Iacovone's office, whichever is longer.

At its meeting on January 26, 2016, the Commission voted to find Respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

**PENALTY**

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the Respondent be **removed** from the above-named Board as a result of Respondent's failure to complete the Governance I training program within the required time period for the 2014 training period, **effective immediately after the issuance of the Commissioner of Education's Decision affirming the penalty, for a period of one three-year term or the remaining term of Mr. Iacovone's office, whichever is longer.**

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. The school official may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's

recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairman
School Ethics Commission

Mailing Date: February 24, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director

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| **IN THE MATTER OF** | : | **BEFORE THE** |
| **TOM IACOVONE** | : | **SCHOOL ETHICS COMMISSION** |
| ***HOPE COMMUNITY*** | : | **RESOLUTION OF REMOVAL FOR** |
| ***CHARTER SCHOOL,*** | : | **FAILURE TO COMPLETE TRAINING** |
| ***CAMDEN COUNTY*** | : | **DOCKET NO. T02-15** |
| | : | |

**WHEREAS,** Tom Iacovone is a trustee of the Hope Community Charter School; and

**WHEREAS,** at its meeting on December 15, 2015, the Commission issued an Order directing Mr. Iacovone to Show Cause why he failed to complete the Governance I training program provided by the New Jersey School Boards Association within the required time period for the 2014 training cycle as required by N.J.S.A. 18A:12-33; and

**WHEREAS,** Mr. Iacovone failed to a respond to the Order as to why he failed to take the training during the 2014 training cycle; and

**WHEREAS,** the New Jersey School Boards Association certified on January 26, 2015 that Mr. Iacovone failed to complete the Governance I training program, which was required for the 2014 training cycle pursuant to N.J.S.A. 18A:12-33 and should have been completed by June 30, 2015; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission found that Mr. Iacovone violated N.J.S.A. 18A:12-33 for failure to complete his training requirement; and

**WHEREAS**, at its meeting on January 26, 2016, the Commission recommended that the Commissioner of Education impose a penalty of removal on the Respondent; and

**WHEREAS,** at its meeting on February 23, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

**NOW THEREFORE BE IT RESOLVED,** that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director

AGENCY DKT. NO. 55-2/16
SEC DKT. NO. T05-15

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| IN THE MATTER OF TINIA BERGER, | : | |
| NEWARK PREP CHARTER SCHOOL, | : | COMMISSIONER OF EDUCATION |
| ESSEX COUNTY. | : | DECISION |
| | : | |

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends that respondent be removed from Newark Prep Charter School's Board of Trustees. Respondent did not reply to the Commission's Order to Show Cause, nor did she file exceptions or furnish any proof of having attended the required training. Finally, respondent did not appeal the Commission's underlying finding of a violation pursuant to *N.J.A.C.* 6A:4.

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

Accordingly, respondent is hereby removed from office as a school official found to have violated the School Ethics Act, effective immediately. [1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/16
Date of Mailing: 4/11/16

[1] The Commission recommended that the respondent be removed for a period of three years or the remaining term of the respondent's office, whichever is longer. Under *N.J.A.C.* 6A:28-10.12(a), if a violation of the School Ethics Act is found, "the Commission may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official." There is no provision that permits the Commission to recommend a penalty that includes the removal of a school official for three years. Therefore, the respondent is removed from the Newark Prep Charter School Board of Trustees immediately without any future restrictions.

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

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| **IN THE MATTER OF TINIA BERGER** *NEWARK PREP CHARTER SCHOOL, ESSEX COUNTY* | : | **BEFORE THE SCHOOL ETHICS COMMISSION** |
| | : | **DECISION FOR FAILURE TO COMPLETE TRAINING** |
| | : | **DOCKET NO. T05-15** |

## PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission (Commission) at its December 15, 2015 meeting and mailed on December 16, 2015 to the above-named Respondent, alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), prepared and offered by the New Jersey School Boards Association (NJSBA).

Since January 1, 2013, Respondent has served as a trustee of the Newark Prep Charter School, located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the NJSBA.

The NJSBA annually advises all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes. The NJSBA provides the required training and notifies members and trustees of the dates and times of the sessions, and continuously publishes that information in School Board Notes. The NJSBA also offers training on its website, which may be completed anytime from any location at the convenience of the board member or charter trustee.

For the 2014 training cycle, which for charter school trustees ran from July 1, 2014 to June 30, 2015[1], Respondent was required to complete the Governance II training program. Respondent failed to complete her required training within the timeframe for the 2014 training cycle. The NJSBA informed the Commission by email dated November 17, 2015 that for the 2014 training cycle, the NJSBA notified Respondent, the Business Administrator, and the Chief School Administrator of the Respondent's charter school of her mandatory training requirement during calendar year 2015 on the following dates: March 23 and May 12, before the time to timely train expired, and again on July 22, August 18, August 25, and September 15, among other dates, after Respondent had failed to timely complete her training, to give her the opportunity to comply with her training obligation.

Furthermore, in the certification submitted to the Commission at its January 26, 2016 meeting, the NJSBA's Manager of Training and Professional Department attested that the NJSBA took the following actions in an effort to ensure member and trustee compliance with the mandated training requirements:

[1] As established by NJSBA, the training cycle for public school district board of education members is from January 1 to December 31 of each year, whereas the training period for charter school trustees is from July 1 to June 30 of the following year. Thus, for charter school trustees, the 2014 training cycle ran from July 1, 2014 to June 30, 2015.

- On October 5, 2014, the Respondent was registered to take Governance II training and an email with the link was sent to her registered email address.

- On March 23, 2015 and May 12, 2015, prior to the end of the 2014 training cycle, the NJSBA communicated with charter school trustees by email regarding the mandated training requirements for the 2014 training period.

- On July 1, 2015, after the 2014 training cycle closed, the NJSBA provided the School Ethics Commission with a report of charter trustees who had failed to complete the required training for the 2014 training period, which included Respondent.

- On July 8, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance II training program required during the 2014 training period, and included a link to the online training module in the email.

- On July 22, 2015, the NJSBA sent an additional email to all charter school trustees regarding the mandated training requirement, included a link to the online training module in the email.

- On October 1, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance II training program required during the 2014 training period, and included a link to the online training module in the email.

- On November 18, 2015, the NJSBA notified the School Business Administrator (SBA) for the Newark Prep Charter School advising the SBA that Respondent had failed to complete the required training.

- On November 23, 2015, the NJSBA communicated through email with the Newark Prep Charter School and as a result sent an email to Tinia Berger with the link and instructions for completing to the Respondent with the Governance II.

The October 1, 2015 NJSBA notice was marked ***"Urgent: Action Needed"*** in an email to all school board members and charter school trustees who had not completed the mandatory training. In the October 2015 email, the NJSBA advised school board members and charter school trustees that failure to complete the mandated training might result in disciplinary action ordered by the Commission, up to and including removal from their respective board.

Further, the NJSBA notified the Commission by email on November 17, 2015, that it expressly notified Respondent by email that Respondent was non-compliant with the training requirement and urged Respondent to complete the mandated training no later than November 25, 2015. This notice also explained that failure to complete the training would result in the issuance of an Order to Show Cause requiring Respondent to explain why Respondent failed to complete the required training and potentially compelling Respondent to appear before the Commission. In addition, the November 2015 notice also advised Respondent that the penalty for failing to comply included removal from the charter board of trustees.

In addition to the communication efforts undertaken by the NJSBA, the School Ethics Commission, the Department of Education County Offices and the Department of Education's Office

of Charter Schools also communicated with the Respondent, regarding the mandated training requirement.

Specifically, in September 2015, the Commission reported to Respondent's County Office of Education (County) that the NJSBA identified that Respondent failed to complete the 2014 training program within the required training period. Working in conjunction with the Commission, the County Office emailed the Chief School Administrator of Respondent's school that Respondent remained delinquent in completing the training requirement. This notice also provided the opportunity to inform the Commission of any errors in its data. None was received.

Additionally, on October 29, 2015, the New Jersey Department of Education's Office of Charter Schools emailed Respondent directly to notify her that she was non-compliant with the training requirements, and also advised Respondent that the Commission requires the training to be completed to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal.

As a final notice of non-compliance, on November 30, 2015, the Commission directly emailed Respondent, advising that the Commission requires completion of the training to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal from office.

The December 15, 2015 Order to Show Cause sent to Respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that Respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The Respondent did not reply to the Commission's Order and the NJSBA's Manager of Training and Professional Development certified that as of January 26, 2016, Respondent had failed to complete the required training for the 2014 training cycle.

## ANALYSIS

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

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

## DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Tinia Berger failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33.

Ms. Berger received repeated notifications of the long-standing training requirement and has had ample opportunities to attend in-person training or to complete on-line training. Ms. Berger did not provide any response to the Commission's Order. The Commission believes that, based on her failure to complete her training requirement for the 2014 training cycle and her failure to respond to the Order, the appropriate penalty is **removal**. This penalty underscores to this Respondent, and all those similarly situated board members and charter school trustees, that the Commission will impose a penalty on those officials for their failure to timely comply with the statutory obligation to complete the training requirement, and the Commission will not continue to allocate additional administrative and adjudicative time tracking attendance at a training program well after the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the Respondent be **removed** as a member of the Newark Prep Charter School Board of Trustees for a period of three years or the remaining term of Ms. Berger's office, whichever is longer.

At its meeting on January 26, 2016, the Commission voted to find Respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

**PENALTY**

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the Respondent be **removed** from the above-named Board as a result of Respondent's failure to complete the Governance II training program within the required time period for the 2014 training period, **effective immediately after the issuance of the Commissioner of Education's Decision affirming the penalty for a period of one three-year term or the remaining term of Ms. Berger's office, whichever is longer.**

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. The school official may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's

recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

Mailing Date: February 24, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director

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| **IN THE MATTER OF** | : | **BEFORE THE** |
| **TINIA BERGER** | : | **SCHOOL ETHICS COMMISSION** |
| ***NEWARK PREP*** | : | **RESOLUTION OF REMOVAL FOR** |
| ***CHARTER SCHOOL,*** | : | **FAILURE TO COMPLETE TRAINING** |
| ***ESSEX COUNTY*** | : | **DOCKET NO. T05-15** |
| | : | |

**WHEREAS,** Tinia Berger is a trustee of the Newark Prep Charter School; and

**WHEREAS,** at its meeting on December 15, 2015, the Commission issued an Order directing Ms. Berger to Show Cause why she failed to complete the Governance II training program provided by the New Jersey School Boards Association within the required time period for the 2014 training cycle as required by N.J.S.A. 18A:12-33; and

**WHEREAS,** Ms. Berger failed to a respond to the Order as to why she failed to take the training during the 2014 training cycle; and

**WHEREAS,** the New Jersey School Boards Association certified on January 26, 2015 that Ms. Berger failed to complete the Governance II training program, which was required for the 2014 training cycle pursuant to N.J.S.A. 18A:12-33 and should have been completed by June 30, 2015; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission found that Ms. Berger violated N.J.S.A. 18A:12-33 for failure to complete his training requirement; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission recommended that the Commissioner of Education impose a penalty of removal on the Respondent; and

**WHEREAS,** at its meeting on February 23, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

**NOW THEREFORE BE IT RESOLVED,** that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo

Joanne M. Restivo, Acting Executive Director

AGENCY DKT. NO. 56-2/16

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| IN THE MATTER OF ANN PETROCELLI, | : | |
| LINK COMMUNITY CHARTER SCHOOL, | : | COMMISSIONER OF EDUCATION |
| ESSEX COUNTY. | : | DECISION |
| | : | |

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its December 15, 2015 Order to Show Cause, but prior to the Commission's January 26, 2016 meeting; therefore, a penalty of censure is recommended. Respondent filed exceptions to the Commission's decision, challenging the Commission's recommended penalty, but did not institute an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation. The Commission filed reply exceptions.

In her exceptions, respondent argues that based on prior decisions by the Commission, the Commissioner should reduce the recommended penalty of censure to a penalty of reprimand. Specifically, respondent cites case law indicating that the Commission has previously recommended a penalty of reprimand in matters where a respondent completed the requisite training after the Commission issued the Order to Show Cause, but prior to the Commission's meeting date. Respondent further notes that in most cases where the Commission previously recommended a penalty of censure, the facts may be distinguished from this matter as the board member or trustee in those cases did not complete the training prior to the Commission's meeting, but rather prior to the Commissioner's final decision. *See, e.g., In the*

*Matter of Corynda Hagamin, Camden's Promise Charter School, Camden County*, Commissioner Decision No. 15-11SEC, decided January 10, 2011. Accordingly, respondent urges that the penalty be reduced to a reprimand.

In reply, the Commission argues that a penalty of censure is appropriate, given the extensive outreach it provided to respondent prior to the issuance of the Order to Show Cause and the multiple opportunities respondent had to complete the training. Specifically, the Commission contends that the cases cited by respondent are distinguishable because the notice provided to respondent of the obligation to complete the training – no less than 17 times – did not happen in previous cases. The Commission also points out that there is no evidence that respondent did not receive the Commission's communications. As respondent never availed herself of the multiple opportunities to comply with *N.J.S.A.* 18A:12-33, the Commission contends that a penalty of censure is appropriate.

Upon review, the Commissioner concurs with respondent that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the Commission's meeting date – the penalty has been a reprimand.[1] The Commissioner's determination of an appropriate sanction "inevitably requires consideration of penalties imposed in the past for similar conduct." *In the Matter of the Tenure Hearing of*

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[1] *See, e.g., In the Matter of Magda Nieves, Camden's Promise Charter School, Camden County*, Commissioner Decision No. 12-11SEC, decided January 10, 2011; *In the Matter of Jacqueline Phillips-Agins, Village Charter School, Mercer County*, Commissioner Decision No. 14-11SEC, decided January 10, 2011; *In the Matter of Linda Sterling, TEAM Academy Charter School, Essex County*, Commissioner Decision No. 17-11SEC, decided January 10, 2011; *In the Matter of Derek Capana, TEAM Academy Charter School, Essex County*, Commissioner Decision No. 18-11SEC, decided January 10, 2011; *In the Matter of Laurel Dumont, Newark Educators Charter School, Essex County*, Commissioner Decision No. 19-11SEC, decided January 10, 2011; *In the Matter of Deborah Burns, Academy Charter High School, Monmouth County*, Commissioner Decision No. 20-11SEC, decided January 10, 2011; *In the Matter of Richard Morales-Wright, Academy Charter High School, Monmouth County*, Commissioner Decision No. 24-11SEC, decided January 10, 2011; *In the Matter of Maria Littles, Chesilhurst Board of Education, Camden County*, Commissioner Decision No. 25-11SEC, decided January 10, 2011; *In the Matter of Adam Szpreingel, LEAP Academy Charter School, Camden County*, Commissioner Decision No. 28-11SEC, decided January 10, 2011; *In the Matter of Gerald Murray, Woodbine Board of Education, Cape May County*, Commissioner Decision No. 29-11SEC, decided January 10, 2011.

*Brigitte Geiger, School District of the Township of Mount Olive, Morris County*, No. A-1409-13T2 (App. Div. Nov. 18, 2015), at 20.[2] As such, the Commissioner finds that a penalty of reprimand is appropriate in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. As suggested by the court in the *Geiger* opinion, however, this shall serve as notice to the regulated community that similar conduct in the future may result in more severe penalties. Respondent is also admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/16

Date of Mailing: 4/12/16

[2] Although, pursuant to *R.* 1:36-3, unpublished opinions are not precedential or binding upon any court, the Appellate Division remanded this matter and directed the Commissioner to impose a lesser sanction consistent with those in prior matters.

[3] The Commission recommended that any failure in the future to comply with the statutory requirement to complete training shall result in the removal of the respondent from her position on the Board for a period of three years. Under *N.J.A.C.* 6A:28-10.12(a), if a violation of the School Ethics Act is found, "the Commission may recommend to the Commissioner the reprimand, censure, suspension, or removal of the school official." There is no provision that permits the Commission to recommend a penalty that includes the automatic removal of a school official for three years for future violations. Therefore, the respondent is reprimanded as a school official found to have violated the School Ethics Act without any future restrictions.

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

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| | : | **BEFORE THE SCHOOL** |
| | : | **ETHICS COMMISSION** |
| **IN THE MATTER OF** | : | |
| **ANN PETROCELLI** | : | |
| ***LINK COMMUNITY*** | : | **DECISION FOR FAILURE TO** |
| ***CHARTER SCHOOL,*** | : | **COMPLETE TRAINING** |
| ***ESSEX COUNTY*** | : | **IN A TIMELY MANNER** |
| | : | |
| | : | **DOCKET NO. T06-15** |
| | : | |

## PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission (Commission) at its December 15, 2015 meeting and mailed on December 16, 2015 to the above-named Respondent, alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), prepared and offered by the New Jersey School Boards Association (NJSBA).

Since March 26, 2014, Respondent has served as a trustee of the Link Community Charter School, located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the NJSBA.

The NJSBA annually advises all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes. The NJSBA provides the required training and notifies members and trustees of the dates and times of the sessions, and continuously publishes that information in School Board Notes. The NJSBA also offers training on its website, which may be completed anytime at the convenience of the board member or charter trustee.

For the 2014 training cycle, which for charter school trustees ran from July 1, 2014 to June 30, 2015[1], Respondent was required to complete the Governance I training program. Respondent failed to complete her required training within the timeframe for the 2014 training cycle. The NJSBA informed the Commission by email dated November 17, 2015 that for the 2014 training cycle, the NJSBA notified Respondent, the Business Administrator, and the Chief School Administrator of the Respondent's charter school of her mandatory training requirement during calendar year 2015 on the following dates: March 23 and May 12, before the time to timely train expired, and again on July 22, August 18, August 25, and September 15, among other dates, after Respondent had failed to timely complete her training, to give her the opportunity to comply with her training obligation.

Furthermore, in the certification submitted to the Commission at its January 26, 2016 meeting, the NJSBA's Manager of Training and Professional Department attested that the NJSBA

[1] As established by NJSBA, the training cycle for public school district board of education members is from January 1 to December 31 of each year, whereas the training period for charter school trustees is from July 1 to June 30 of the following year. Thus, for charter school trustees, the 2014 training cycle ran from July 1, 2014 to June 30, 2015.

took the following actions in an effort to ensure member and trustee compliance with the mandated training requirements:

- On October 5, 2014, the Respondent was registered to take Governance I training and an email with the link was sent to her registered email address.

- On March 23, 2015 and May 12, 2015, prior to the end of the 2014 training cycle, the NJSBA communicated with charter school trustees by email regarding the mandated training requirements for the 2014 training period.

- On July 1, 2015, after the 2014 training cycle closed, the NJSBA provided the School Ethics Commission with a report of charter trustees who had failed to complete the required training for the 2014 training period, which included Respondent.

- On July 2, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance I training program required during the 2014 training period, and included a link to the online training module in the email.

- On July 22, 2015, the NJSBA sent an additional email to all charter school trustees regarding the mandated training requirement.

- On October 1, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance I training program required during the 2014 training period, and included a link to the online training module in the email.

- On November 18, 2015, the NJSBA notified the School Business Administrator (SBA) for the Link Community Charter School advising the SBA that Respondent had failed to complete the required training.

- On December 9, 2015 and December 21, 2015, the NJSBA sent an email to the Respondent with the Governance I link and instructions.

The October 1, 2015 NJSBA notice was marked ***"Urgent: Action Needed"*** in an email to all school board members and charter school trustees who had not completed the mandatory training. In the October 2015 email, the NJSBA advised school board members and charter school trustees that failure to complete the mandated training might result in disciplinary action ordered by the Commission, up to and including removal from their respective board.

Further, the NJSBA notified the Commission by email on November 17, 2015, that it expressly notified Respondent by email that Respondent was non-compliant with the training requirement and urged Respondent to complete the mandated training no later than November 25, 2015. This notice also explained that failure to complete the training would result in the issuance of an Order to Show Cause requiring Respondent to explain why Respondent failed to complete the required training and potentially compelling Respondent to appear before the Commission. In addition, the November 2015 notice also advised Respondent that the penalty for failing to comply included removal from the charter board of trustees.

In addition to the communication efforts undertaken by the NJSBA, the School Ethics Commission, the Department of Education County Offices and the Department of Education's Office of Charter Schools also communicated with the Respondent, regarding the mandated training requirement.

Specifically, in September 2015, the Commission reported to Respondent's County Office of Education (County) that the NJSBA identified that Respondent failed to complete the 2014 training program within the required training period. Working in conjunction with the Commission, the County Office emailed the Chief School Administrator of Respondent's school that Respondent remained delinquent in completing the training requirement. This notice also provided the opportunity to inform the Commission of any errors in its data. None was received.

Additionally, on October 29, 2015, the New Jersey Department of Education's Office of Charter Schools emailed Respondent directly to notify her that she was non-compliant with the training requirements, and also advised Respondent that the Commission requires the training to be completed to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal.

As a final notice of non-compliance, on November 30, 2015, the Commission directly emailed Respondent, advising that the Commission requires completion of the training to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal from office.

The December 15, 2015 Order to Show Cause sent to Respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that Respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The Respondent replied to the Commission's Order within the required time period, wherein Respondent claimed she did not receive the NJSBA mail because they were "going to the wrong address." The Respondent also provided an affidavit from the Head of the Link Community Charter School, who stated that the Respondent was having technical difficulties completing her training, but admitted that the Respondent had received notices via mail and email regarding the need for the Respondent to complete the training. Finally, Respondent advised the Commission on January 11, 2016, that she completed the required training on December 30, 2015. The NJSBA's Manager of Training and Professional Development verified said completion.

**ANALYSIS**

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

There is no dispute that Respondent did not complete her required Governance I training within the 2014 training cycle. Further, there is no dispute that Respondent did not provide the Commission with proof of completion of the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33.

Though the NJSBA reported to the Commission on January 19, 2016 that the Respondent completed the training on December 30, 2015, the Respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

**DECISION**

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Ann Petrocelli failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Petrocelli received repeated notifications of the long-standing training requirement and has had ample opportunities to attend in-person training or to complete on-line training. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be **censured** as a result of respondent's failure to complete the Governance I training program within the required time period for the 2014 training period. This penalty underscores to this Respondent, and to all similarly situated board members and charter school trustees, that the Commission will impose a penalty on those officials for their failure to comply with the statutory obligation to complete the training requirement within the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the Respondent be **censured** as a member of the Link Community Charter School Board of Trustees. Accordingly, any continued failure in the future to comply with the statutory requirement to complete training shall result in removal from her position on the Board of trustees for a three-year period.

At its meeting on January 26, 2016, the Commission voted to find Respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

**PENALTY**

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the Respondent be **censured** as a result of Respondent's failure to complete the Governance I training program within the required time period for the 2014 training period. Moreover, any continued failure in the future to comply with the statutory requirement to complete training shall result in removal from her position on the Board of trustees for a three-year period.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. The school official may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies

and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairman
School Ethics Commission

Mailing Date: February 24, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director

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| **IN THE MATTER OF** | : | **BEFORE THE** |
| **ANN PETROCELLI** | : | **SCHOOL ETHICS COMMISSION** |
| ***LINK COMMUNITY*** | : | **RESOLUTION OF CENSURE FOR** |
| ***CHARTER SCHOOL,*** | : | **FAILURE TO COMPLETE TRAINING** |
| ***ESSEX COUNTY*** | : | **IN A TIMELY MANNER** |
| | : | **DOCKET NO. T06-15** |

**WHEREAS,** Ann Petrocelli is a trustee of the Link Community Charter School; and

**WHEREAS,** at its meeting on December 15, 2015, the Commission issued an Order directing Ms. Petrocelli to Show Cause why she failed to complete the Governance I training program provided by the New Jersey School Boards Association within the required time period for the 2014 training cycle as required by N.J.S.A. 18A:12-33; and

**WHEREAS,** Ms. Petrocelli filed a response to the Order but did not provide a sufficient reason as to why she failed to take the training during the 2014 training cycle; and

**WHEREAS,** the New Jersey School Boards Association reported that Ms. Petrocelli completed the Governance I training program on December 30, 2015, which was required for the 2014 training cycle pursuant to N.J.S.A. 18A:12-33 and should have been completed by June 30, 2015; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission found that Ms. Petrocelli violated N.J.S.A. 18A:12-33 for failure to timely complete her training requirement; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission recommended that the Commissioner of Education impose a penalty of censure on the Respondent; and

**WHEREAS,** at its meeting on February 23, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

**NOW THEREFORE BE IT RESOLVED,** that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director

142-16

142-16SEC

AGENCY DKT. NO. 54-2/16

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| IN THE MATTER OF CYNTHIA WILLIAMS, | : | |
| NEWARK PREP CHARTER SCHOOL, | : | COMMISSIONER OF EDUCATION |
| ESSEX COUNTY. | : | DECISION |
| | : | |

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its December 15, 2015 Order to Show Cause, but prior to the Commission's January 26, 2016 meeting; therefore, a penalty of censure is recommended. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the Commission's underlying finding of violation, pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the Commission's meeting date – the penalty has been a reprimand.[1] The Commissioner's determination of an appropriate sanction "inevitably requires consideration of penalties imposed in the past for similar conduct." *In the Matter of the Tenure Hearing of Brigitte Geiger, School District of the Township of*

[1] *See, e.g., In the Matter of Magda Nieves, Camden's Promise Charter School, Camden County*, Commissioner Decision No. 12-11SEC, decided January 10, 2011; *In the Matter of Jacqueline Phillips-Agins, Village Charter School, Mercer County*, Commissioner Decision No. 14-11SEC, decided January 10, 2011; *In the Matter of Linda Sterling, TEAM Academy Charter School, Essex County*, Commissioner Decision No. 17-11SEC, decided January 10, 2011; *In the Matter of Derek Capana, TEAM Academy Charter School, Essex County*, Commissioner Decision No. 18-11SEC, decided January 10, 2011; *In the Matter of Laurel Dumont, Newark Educators Charter School, Essex County*, Commissioner Decision No. 19-11SEC, decided January 10, 2011; *In the Matter of Deborah Burns, Academy Charter High School, Monmouth County*, Commissioner Decision No. 20-11SEC, decided January 10, 2011; *In the Matter of Richard Morales-Wright, Academy Charter High School, Monmouth County*, Commissioner Decision No. 24-11SEC, decided January 10, 2011; *In the Matter of Maria Littles, Chesilhurst Board of Education, Camden County*, Commissioner Decision No. 25-11SEC, decided January 10, 2011; *In the Matter of Adam Szpreingel, LEAP Academy Charter School, Camden County*, Commissioner Decision No. 28-11SEC, decided January 10, 2011; *In the Matter of Gerald Murray, Woodbine Board of Education, Cape May County*, Commissioner Decision No. 29-11SEC, decided January 10, 2011.

*Mount Olive, Morris County*, No. A-1409-13T2 (App. Div. Nov. 18, 2015), at 20.[2] As such, the Commissioner finds that a penalty of reprimand is appropriate in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. As suggested by the court in the *Geiger* opinion, however, this shall serve as notice to the regulated community that similar conduct in the future may result in more severe penalties. Respondent is also admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/16

Date of Mailing: 4/12/16

[2] Although, pursuant to *R.* 1:36-3, unpublished opinions are not precedential or binding upon any court, the Appellate Division remanded this matter and directed the Commissioner to impose a lesser sanction consistent with those in prior matters.

[3] The Commission recommended that any failure in the future to comply with the statutory requirement to complete training shall result in the removal of the respondent from her position on the Board for a period of three years. Under *N.J.A.C.* 6A:28-10.12(a), if a violation of the School Ethics Act is found, "the Commission may recommend to the Commissioner the reprimand, censure, suspension, or removal of the school official." There is no provision that permits the Commission to recommend a penalty that includes the automatic removal of a school official for three years for future violations. Therefore, the respondent is reprimanded as a school official found to have violated the School Ethics Act without any future restrictions.

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

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| **IN THE MATTER OF CYNTHIA WILLIAMS** *NEWARK PREP CHARTER SCHOOL, ESSEX COUNTY* | : : : : : : : : : : | **BEFORE THE SCHOOL ETHICS COMMISSION**<br><br>**DECISION FOR FAILURE TO COMPLETE TRAINING IN A TIMELY MANNER**<br><br>**DOCKET NO. T04-15** |

## PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission (Commission) at its December 15, 2015 meeting and mailed on December 16, 2015 to the above-named Respondent, alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), prepared and offered by the New Jersey School Boards Association (NJSBA).

Since July 1, 2012, Respondent has served as a trustee of the Newark Prep Charter School, located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the NJSBA.

The NJSBA annually advises all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes. The NJSBA provides the required training and notifies members and trustees of the dates and times of the sessions, and continuously publishes that information in School Board Notes. The NJSBA also offers training on its website, which may be completed anytime at the convenience of the board member or charter trustee.

For the 2014 training cycle, which for charter school trustees ran from July 1, 2014 to June 30, 2015[1], Respondent was required to complete the Governance II training program. Respondent failed to complete her required training within the timeframe for the 2014 training cycle. The NJSBA informed the Commission by email dated November 17, 2015 that for the 2014 training cycle, the NJSBA notified Respondent, the Business Administrator, and the Chief School Administrator of the Respondent's charter school of her mandatory training requirement during calendar year 2015 on the following dates: March 23 and May 12, before the time to timely train expired, and again on July 22, August 18, August 25, and September 15, among other dates, after Respondent had failed to timely complete her training, to give her the opportunity to comply with her training obligation.

[1] As established by NJSBA, the training cycle for public school district board of education members is from January 1 to December 31 of each year, whereas the training period for charter school trustees is from July 1 to June 30 of the following year. Thus, for charter school trustees, the 2014 training cycle ran from July 1, 2014 to June 30, 2015.

Furthermore, in the certification submitted to the Commission at its January 26, 2016 meeting, the NJSBA's Manager of Training and Professional Department attested that the NJSBA took the following actions in an effort to ensure member and trustee compliance with the mandated training requirements:

- On March 23, 2015 and May 12, 2015, prior to the end of the 2014 training cycle, the NJSBA communicated with charter school trustees by email regarding the mandated training requirements for the 2014 training period.

- On July 1, 2015, after the 2014 training cycle closed, the NJSBA provided the School Ethics Commission with a report of charter trustees who had failed to complete the required training for the 2014 training period, which included Respondent.

- On July 6, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance II training program required during the 2014 training period, and included a link to the online training module in the email.

- On July 22, 2015, the NJSBA sent an additional email to all charter school trustees regarding the mandated training requirement.

- On October 1, 2015, the NJSBA emailed Respondent advising her that she had yet to complete the Governance II training program required during the 2014 training period, and included a link to the online training module in the email.

- On November 18, 2015, the NJSBA notified the School Business Administrator (SBA) for the Newark Prep Charter School advising the SBA that Respondent had failed to complete the required training.

- On December 9, 2015, Respondent emailed the NJSBA, seeking assistance with access to the online training.

The October 1, 2015 NJSBA notice was marked ***"Urgent: Action Needed"*** in an email to all school board members and charter school trustees who had not completed the mandatory training. In the October 2015 email, the NJSBA advised school board members and charter school trustees that failure to complete the mandated training might result in disciplinary action ordered by the Commission, up to and including removal from their respective board.

Further, the NJSBA notified the Commission by email on November 17, 2015, that it expressly notified Respondent by email that Respondent was non-compliant with the training requirement and urged Respondent to complete the mandated training no later than November 25, 2015. This notice also explained that failure to complete the training would result in the issuance of an Order to Show Cause requiring Respondent to explain why Respondent failed to complete the required training and potentially compelling Respondent to appear before the Commission. In addition, the November 2015 notice also advised Respondent that the penalty for failing to comply included removal from the charter board of trustees.

In addition to the communication efforts undertaken by the NJSBA, the School Ethics Commission, the Department of Education County Offices and the Department of Education's Office of Charter Schools also communicated with the Respondent, regarding the mandated training requirement.

Specifically, in September 2015, the Commission reported to Respondent's County Office of Education (County) that the NJSBA identified that Respondent failed to complete the 2014 training program within the required training period. Working in conjunction with the Commission, the County Office emailed the Chief School Administrator of Respondent's school that Respondent remained delinquent in completing the training requirement. This notice also provided the opportunity to inform the Commission of any errors in its data. None was received.

Additionally, on October 29, 2015, the New Jersey Department of Education's Office of Charter Schools emailed Respondent directly to notify her that she was non-compliant with the training requirements, and also advised Respondent that the Commission requires the training to be completed to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal.

As a final notice of non-compliance, on November 30, 2015, the Commission directly emailed Respondent, advising that the Commission requires completion of the training to avoid the issuance of an Order to Show Cause against Respondent for non-compliance, which carries the penalty of reprimand, censure, suspension or removal from office.

The December 15, 2015 Order to Show Cause sent to Respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that Respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The Respondent did not reply to the Commission's Order within the required time period; however, the NJSBA's Manager of Training and Professional Development certified thereafter that Ms. Williams completed the requisite training on December 16, 2015.

**ANALYSIS**

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

There is no dispute that Respondent did not complete her required Governance II training within the 2014 training cycle. Further, there is no dispute that Respondent failed to timely respond to the Commission's Order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Although the NJSBA reported to the Commission that the Respondent completed the training on December 16, 2015, the Respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

## DECISION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Cynthia Williams failed to comply with N.J.S.A. 18A:12-33 and the Commission finds her in violation of N.J.S.A. 18A:12-33. Ms. Williams received repeated notifications of the long-standing training requirement and has had ample opportunities to attend in-person training or to complete on-line training. Ms. Williams did not provide a timely response to the Commission's Order, and the Commission believes that, based on her failure to timely complete the training and to timely respond to the order, the appropriate penalty is **censure**. This penalty underscores to this Respondent, and to all similarly situated board members and charter school trustees, that the Commission will impose a penalty on those officials for their failure to comply with the statutory obligation to complete the training requirement within the timeline established in N.J.S.A. 18A:12-33. Therefore, the Commission recommends to the Commissioner of Education that the Respondent be **censured** as a member of the Camden's Pride Charter School Board of Trustees. Accordingly, any continued failure in the future to comply with the statutory requirement to complete training shall result in removal from her position on the Board of trustees for a three-year period.

At its meeting on January 26, 2016, the Commission voted to find Respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

## PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the Respondent be **censured** as a result of Respondent's failure to complete the Governance II training program within the required time period for the 2014 training period. Moreover, any continued failure in the future to comply with the statutory requirement to complete training shall result in removal from her position on the Board of trustees for a three-year period.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. The school official may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4 within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairman
School Ethics Commission

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo, Acting Executive Director
Mailing Date: February 24, 2016

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| **IN THE MATTER OF** | : | **BEFORE THE** |
| **CYNTHIA WILLIAMS** | : | **SCHOOL ETHICS COMMISSION** |
| ***NEWARK PREP*** | : | **RESOLUTION OF CENSURE FOR** |
| ***CHARTER SCHOOL,*** | : | **FAILURE TO COMPLETE TRAINING** |
| ***ESSEX COUNTY*** | : | **IN A TIMELY MANNER** |
| | : | **DOCKET NO. T04-15** |

**WHEREAS,** Cynthia Williams is a trustee of the Newark Prep Charter School; and

**WHEREAS,** at its meeting on December 15, 2015, the Commission issued an Order directing Ms. Williams to Show Cause why she failed to complete the Governance II training program provided by the New Jersey School Boards Association within the required time period for the 2014 training cycle as required by N.J.S.A. 18A:12-33; and

**WHEREAS,** Ms. Williams filed a response to the Order but did not provide a sufficient reason as to why she failed to take the training during the 2014 training cycle; and

**WHEREAS,** the New Jersey School Boards Association reported that Ms. Williams completed the Governance II training program on December 16, 2015, which was required for the 2014 training cycle pursuant to N.J.S.A. 18A:12-33 and should have been completed by June 30, 2015; and

**WHEREAS,** at its meeting on January 26, 2016, the Commission found that Ms. Williams violated N.J.S.A. 18A:12-33 for failure to timely complete her training requirement; and

**WHEREAS**, at its meeting on January 26, 2016, the Commission recommended that the Commissioner of Education impose a penalty of censure on the Respondent; and

**WHEREAS,** at its meeting on February 23, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

**NOW THEREFORE BE IT RESOLVED,** that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on February 23, 2016.

Joanne M. Restivo

Joanne M. Restivo, Acting Executive Director

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| FELICIA PUGLIESE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner was removed from her tenured position subsequent to the issuance of an arbitrator's decision on February 15, 2013, which sustained tenure charges of inefficiency. Following appeal proceedings, the Appellate Division issued a decision entitled *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark,* 440 *N.J. Super* 501 (App. Div. May 19, 2015), which remanded the matter to the Commissioner, and – as a result – the tenure charges filed against the petitioner are once again pending before the same arbitrator. Petitioner asserted herein that she has been suspended without pay from her position as a tenured teacher in respondent's school district since September 12, 2012; that the tenure charges against her are still pending and remain unresolved; and, accordingly, she requested full salary beginning from the 121st day of her suspension, as required by the plain language of *N.J.S.A.* 18A:6-14, and prospectively until the pending tenure charges are resolved. The school district asserted that the Appellate Division's remand of this matter was not a reversal of the original arbitration decision, and that when tenure charges have been sustained on the original hearing, the suspension may be continued unless and until that determination is reversed. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Appellate Division's decision remanding the case to the Commissioner effectively reversed the original arbitration decision; had there been no remand to the Commissioner, petitioner would be entitled to her job back; however, the arbitration of this matter began "anew" with the Commissioner's re-assignment of this matter to the arbitrator. The ALJ concluded that petitioner is entitled under *N.J.S.A.* 18A:6-14 to reinstatement of salary retroactive to the 121st day after her unpaid suspension commenced, even though she is not entitled to reinstatement to her teaching post. Accordingly, the ALJ granted petitioner's motion for summary decision, and denied respondent's opposing motion.

Upon comprehensive review, the Initial Decision of the OAL was rejected in part. The Commissioner concurred that petitioner is entitled to back pay, less mitigation, for the period beginning on the 121st day of her suspension through the date of the original arbitration decision, which sustained the tenure charges against her. However, the Commissioner found and determined that: the Appellate Division's remand of this matter did not dismiss the tenure charges against petitioner; rather, the matter was remanded as part of the petitioner's appeal process – which is still ongoing; under TEACHNJ, the February 2013 arbitrator decision was a final decision and accordingly ended the petitioner's entitlement to full pay under the 120-day provision. If petitioner is ultimately successful in having tenure charges reversed on appeal, she would at that juncture be entitled to full back pay, up to the date of reinstatement to her teaching position.

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

OAL DKT. NO. EDU 14409-15
AGENCY DKT. NO. 194-7/15

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|---|---|---|
| FELICIA PUGLIESE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the State-Operated School District of the City of Newark (District) and the petitioner, Felicia Pugliese's reply thereto.

This matter involves a request by the petitioner for full salary and benefits retroactive to the 121st day after she was suspended without pay while tenure arbitration proceedings are ongoing. The stipulated facts and the procedural history were thoroughly outlined in the Initial Decision and will not be repeated here; however, a brief summary of the procedural history is required to provide the necessary context for the instant matter. On February 15, 2013, Arbitrator Daniel Brent issued a decision sustaining tenure charges filed against the petitioner and removing the petitioner from her tenured position with the District. The petitioner appealed the February 15, 2013 decision to the New Jersey Superior Court Chancery Division, who confirmed Arbitrator Brent's award. Thereafter, the petitioner filed an appeal with the Superior Court, Appellate Division. On May 19, 2015, the Appellate Division issued a decision remanding the matter to the Commissioner with directions to provide certain

guidance to arbitrators in tenure cases. *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark,* 440 *N.J. Super* 501 (App. Div. May 19, 2015). As a result of the remand by the Appellate Division, the tenure charges filed against the petitioner are currently again pending before Arbitrator Brent.

The Administrative Law Judge (ALJ) found that – based on the Appellate Division's May 19, 2015 decision – the arbitration must begin "anew" and as a result, under *N.J.S.A.* 18A:6-14, the petitioner is entitled to reinstatement of her salary retroactive to the 121st day after her unpaid suspension commenced and up until Arbitrator Brent issues a second decision on the pending tenure charges. The ALJ also determined that since the matter was remanded, the petitioner is not entitled to reinstatement of her teaching post.

In its exceptions, the District contends that the Initial Decision should be rejected because the ALJ incorrectly interpreted *N.J.S.A.* 18A:6-14. The District argues that without a dismissal of the tenure charges against the petitioner or a reversal of the sustained charges, no portion of *N.J.S.A.* 18A:6-14 authorizes the resumption of salary or back pay to the 121st day of petitioner's suspension. The District maintains that the decisions that the ALJ relied upon to support her ruling are inapplicable because they were issued prior to the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey Act, *N.J.S.A.* 18A:6-117 *et seq.* (TEACHNJ).

The District stresses that the tenure charge hearing procedures and specifically the procedural posture of this case are different because of the enactment of TEACHNJ. Prior to TEACHNJ tenured employees were entitled to full pay after the 120th day of suspension until the Commissioner rendered a final decision – even if an ALJ recommended sustaining the tenure charges. Now, in contrast, arbitrator decisions are "final and binding", subject to judicial review

and enforcement as provided in the New Jersey Arbitration Act, *N.J.S.A.* 2A:24-7 through -10. Further, pre-TEACHNJ case law provides no justification for ignoring the final sentence of *N.J.S.A.* 18A:6-14, which provides that when the charge is sustained on the original hearing, the suspension may be continued unless and until that determination is reversed. Finally, the District asserts that the ALJ failed to properly address its arguments as to the ripeness of this dispute.

In reply, the petitioner contends that the Initial Decision is correct and should be adopted in its entirety. The petitioner argues that the District inexplicably misconstrues the Appellate Division's decision in an attempt to demonstrate that the court's remand of the case to the Commissioner to be considered "anew" somehow means that the initial arbitration award is still intact. The ALJ properly determined that the February 15, 2013 decision of Arbitrator Brent was reversed by the Appellate Division and therefore is null, void and has no force or effect. The petitioner emphasizes that upon remanding the matter, the court directed the Commissioner to "inform the arbitrator what legal standards to utilize, after which the arbitrators must review the facts anew within this legal framework." The petitioner maintains that the ALJ was correct in concluding that the determination which sustained the tenure charges has been appealed, sustained, appealed, and then reversed. Therefore – because there has yet to be a determination of the charges by Arbitrator Brent – in accordance with the plain language of *N.J.S.A.* 18A:6-14, the petitioner is entitled to her salary beginning on the 121st day of her suspension and until such time as the tenure charges against her are resolved.

The petitioner also contends that the pre-TEACHNJ cases relied upon by the ALJ are applicable to the instant case because the substance of *N.J.S.A.* 18A:6-14 requiring payment be made to a teacher whose tenure charges are outstanding after 120 days remains unchanged. That an arbitrator's decision under TEACHNJ is now a final decision does not change the fact

that Arbitrator Brent's February 15, 2013 decision was reversed and remanded. Moreover, since the charges against the petitioner have been reversed and remanded, the last sentence of *N.J.S.A.* 18A:6-14 does not apply despite the District's argument to the contrary. Finally, the petitioner states that the ALJ's interpretation of *N.J.S.A.* 18A:6-14 is consistent with the statute's purpose and legislative history. The Legislative purpose of the statute is to provide financial assistance to the employee who finds herself in protracted legal proceedings until the tenure charges are decided. Therefore, the Initial Decision should be adopted and the petitioner should receive her full salary retroactive to the 121st day of her unpaid suspension, plus any increments she would have been entitled to, and prospectively until a determination on the tenure charges is made by Arbitrator Brent.

As a threshold matter, the Commissioner finds that the petitioner is entitled to her full salary, subject to mitigation from any substituted employment or unemployment compensation, from day 121 of her suspension until Arbitrator Brent issued his original arbitration award on February 15, 2013, which sustained the inefficiency tenure charges filed against the petitioner and removed her from her tenured position.[1] The Commissioner further finds that the ALJ erroneously interpreted *N.J.S.A.* 18A:6-14 to find that the petitioner is entitled to full back pay retroactive to the 121st day of her suspension until there is a second decision issued by Arbitrator Brent. Accordingly, that portion of the Initial Decision is rejected.

It is undisputed that under *N.J.S.A.* 18A:6-14, tenured employees are entitled to receive full salary and benefits starting with the 121st day of their suspension until a determination on the tenure charges is made by an arbitrator. *N.J.S.A.* 18A:6-14 also provides

[1] In the Initial Decision, the ALJ indicated that the 121st day was on or about January 14, 2013; however, the tenure charges were certified to the Commissioner on September 13, 2012. If the petitioner was suspended without pay upon certification of the charges to the Commissioner as permitted by *N.J.S.A.* 18A:6-14, then the 121st day would be January 12, 2013.

that, "[s]hould the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension." In this case, there was a determination by Arbitrator Brent on February 15, 2013 sustaining the charges of inefficiency at the original hearing. Those charges have not been dismissed on appeal thereby triggering the reinstatement of the petitioner with full pay as of the time of her suspension pursuant to *N.J.S.A.* 18A:6-14; rather, the matter was remanded as a part of the petitioner's appeal process.[2] A tenured employee who is appealing from sustained charges may not fall back on the 120-day provision during the appeal process; instead, if the employee is successful in getting charges dismissed the employee is entitled to be reinstated with full pay as of the date of suspension. Moreover, the Appellate Division's reversal and remand of these proceedings did not re-trigger the 120-day rule because there is no mechanism for such contained within *N.J.S.A.* 18A:6-14. Therefore, the remedy available to the petitioner at this juncture is reinstatement and back pay *if* she is ultimately successful in having the tenure charges dismissed.

The cases relied on by the ALJ to support her determination that the petitioner is entitled to full pay retroactive to the 121st day of her suspension were issued before TEACHNJ and are distinguishable. For example, in *In the Matter of the Tenure Hearing of William Thomas, Plainfield School District, Union County*, Commissioner Decision No. 242-08, decided May 23, 2008, the ALJ made a recommendation on the charges and the Commissioner

[2] As the Appellate Division pointed out, the concern in this unique matter was the procedures for teachers who have received tenure charges after the effective date of the TEACHNJ, alleging poor performance that occurred prior to the implementation of the statute's new standards. *Pugliese, supra*, 440 *N.J. Super* at 512. The motivation for the remand by the Appellate Division in this case will not occur in the future because all future tenure charges filed against tenured employees will be based on performance that occurred after the enactment of TEACHNJ. The Appellate Division did not state in the May 19, 2015 decision that the petitioner should receive full pay retroactive to the 121st day of her suspension until a decision on the tenure charges is issued.

remanded to the matter to the OAL for a factual hearing. Despite the fact that the Commissioner ultimately sustained the tenure charges, the tenured employee was entitled to full pay during the remand in accordance with the 120-day rule because there was not a final decision issued by the Commissioner at that stage of the proceedings. Importantly, prior to TEACHNJ, the tenure decisions of ALJs were simply recommendations to the Commissioner: they were not final decisions for purposes of the 120-day rule. Here, the decision of Arbitrator Brent on the original proceedings was a final decision, as opposed to a recommendation, and that February 15, 2013 decision ended the petitioner's entitlement to full pay under the 120-day provision.

Despite the petitioner's argument to the contrary, the Legislative history of *N.J.S.A.* 18A:6-14 does not dictate a different result. In her exceptions, the petitioner cites to *In the Matter of the Tenure Hearing of Grossman*, 127 *N.J. Super* 13 (App. Div. 1974), to stress the purpose and Legislative intent behind *N.J.S.A.* 18A:6-14:

> It seems clear that in enacting [*N.J.S.A.* 18A:6-14] the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary ... from the 121st day following the certificate of charges until the determination thereof by the Commissioner. [Id. at 35-36]

Since the enactment of TEACHNJ, the arbitrator has stepped into the shoes of the Commissioner in that the arbitrator's decision is now deemed to be a final decision. The Legislative intent behind the 120-day rule remains in effect to help prevent economic hardship to the employee until the arbitrator makes a determination. However, once there is a determination by an arbitrator sustaining the tenure charges on the original hearing, the tenured employee is no longer

entitled to full pay under the 120-day provision in *N.J.S.A.* 18A:6-14, which is consistent with the result of final Commissioner decisions and the Legislative intent prior to the enactment of TEACHNJ.

Accordingly, the Initial Decision is rejected in part. The District is directed to pay the petitioner back pay for the period beginning on the 121st day of her suspension through Arbitrator Brent's February 15, 2013 award.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/16

Date of Mailing: 4/12/16

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON CROSS MOTIONS FOR SUMMARY DECISION**

OAL DKT. NO. EDU 14409-15

AGENCY DKT. NO. 194-7/15

**FELICIA PUGLIESE,**

Petitioner,

v.

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

Respondent.

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**Richard A. Friedman**, Esq., for petitioner Felicia Pugliese (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

**Brenda C. Liss**, Esq., for respondent State-Operated School District of the City of Newark (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: January 8, 2016 Decided: January 13, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about July 24, 2015, Felicia Pugliese (petitioner) filed a Petition of Appeal to the Department of Education in which she asserted that a dispute had arisen between the respondent State-Operated School District of the City of Newark (Newark BOE) and herself over whether she was entitled to her full salary and benefits retroactive to the 121st day after she was suspended without pay, which date was September 12, 2012. Petitioner has been a tenured teacher with Newark BOE and asserts in this appeal that the unique procedural history of a collateral arbitration proceeding entitles her to the relief sought in her Petition. On or about September 14, 2015, following notices and an extension, Newark BOE filed its Answer to the Petition.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on September 16, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned on September 23, 2015. Accordingly, I convened a telephonic case management conference with counsel on October 1, 2015, to discuss the potential issues in the case and schedule the matter for hearings. It was agreed that counsel would consider drafting a joint stipulation of facts and presenting the case through dispositive motion practice. The scheduling of a plenary hearing date was deferred and a briefing schedule established. The matter is now ripe for decision.

## JOINT STIPULATION OF RELEVANT FACTS

1. Petitioner began her employment as a teacher with the Newark BOE in September of 2004.

2. Petitioner was employed by the Newark BOE as a teacher continuously thereafter, and acquired tenure in the district.

3. The Newark BOE filed tenure charges against petitioner on July 23, 2012.

4. In its tenure charges, the Newark BOE alleged that petitioner was inefficient in her performance of her duties. Petitioner denied the allegations in the charges and asserted that the charges were improper for other reasons also.

5. The Newark BOE certified tenure charges against petitioner to the Commissioner of Education on or about September 13, 2012.

6. As a result, petitioner was suspended without pay effective September 12, 2012, has been suspended without pay since then, and remains suspended without pay to date.

7. The Commissioner of Education transferred the charges to Arbitrator Daniel Brent ("Arbitrator") for disposition under the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 et seq.

8. The arbitration hearings were held on November 20, 2012, December 5, 2012, and January 3, 2013, and the Arbitrator rendered a decision on February 15, 2013[1], that upheld the tenure charges and terminated petitioner's tenured employment with the Newark BOE.

9. After the Arbitrator rendered his decision, petitioner filed a summary action in the Superior Court, Chancery Division, under N.J.S.A. 2A:24-7 to 10, seeking to vacate the Arbitrator's award. The Newark BOE filed a motion to dismiss the action and for confirmation of the arbitrator's award.

10. On September 16, 2013, the Chancery Division Judge, in an oral bench decision and an order, confirmed the Arbitrator's award, and dismissed petitioner's complaint.

11. Petitioner then filed a timely appeal of the Chancery Division's decision with the Superior Court, Appellate Division.

[1] Neither party has set forth when the 121st day should be deemed to have occurred, and no tolling periods were argued or stipulated. By my inartful calculation, that date would be on or about Monday, January 14, 2013. In other words, petitioner could have applied for her pay before the Arbitrator, the Commissioner, or the Superior Court.

12. The Superior Court, Appellate Division issued a decision on May 19, 2015

13. After receiving the Appellate Division's decision, on June 1, 2015, the Commissioner of Education re-assigned the matter to Arbitrator Brent for further proceedings.

14. On June 8, 2015, the Newark BOE filed a Notice of Petition for Certification with the New Jersey Supreme Court seeking to reverse the Appellate Division's decision, and in response, on June 17, 2015, petitioner filed a Notice of Cross-Petition for Certification. The Newark BOE subsequently filed a Petition for Certification and petitioner filed a Cross-Petition for Certification.

15. By letter dated June 9, 2015, petitioner also requested that the Commissioner reconsider his decision to remand the matter to the Arbitrator and reconsider the legal "guidance" he provided to the Arbitrator in light of its insufficiency pursuant to the parameters set forth in the Appellate Division's decision, and on that same day, the Newark BOE requested that the Arbitrator hold the matter in abeyance pending a decision on the Newark BOE's Petition for Certification.

16. In response to petitioner's letter, the Commissioner refused to reconsider his transmittal to the Arbitrator or the terms of the transmittal, stating that he no longer had jurisdiction after the matter was referred to the Arbitrator.

17. In response to the Newark BOE's request that the Arbitrator hold the matter that had been re-assigned to him in abeyance, the Arbitrator agreed to hold the matter in abeyance, pending a determination by the Supreme Court on the Petitions for Certification.

18. On July 13, 2015, petitioner filed a Notice of Appeal with the Appellate Division, challenging the Commissioner of Education's remand of the case to Arbitrator Brent. The Newark BOE also filed a Notice of Appeal with the Appellate Division on

July 14, 2015, challenging the Commissioner of Education's action referring the matter to arbitration. Those appeals are pending before the Appellate Division.[2]

## ARGUMENT ON THE MOTIONS

The petitioner argues that the long and still-incomplete appeal process from the original arbitration determination upholding the tenure charges against her has placed her back in the position of suspended without pay pending determination. As such, she argues that she is entitled to reinstatement to her salary as of the 121st day after she was suspended without pay, irrespective of the several years passage of time due to the appeals.

Respondent argues the petitioner cannot avail herself of the salary reinstatement provision of the tenure laws because she has not prevailed on appeal and the original arbitration determination precludes the relief she seeks herein.

## LEGAL DISCUSSION

The above-recitation of the undisputed facts together with a reading of the legal submissions of the parties makes it clear that the only issue pending determination on this summary disposition motion is the legal authority of the Newark BOE to not reinstate petitioner to her salary even though she is and has not been providing any teaching services to the District.

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is

[2] Counsel has advised that subsequent to the preparation of the Joint Stipulation, the New Jersey Supreme Court denied both the Petition and Cross-Petition, and the Newark BOE withdrew its appeal of the second referral to arbitration from the Appellate Division. Petitioner's appeal is still pending and the arbitrator has established a briefing schedule for written submissions.

so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-37]

On stipulation of the parties, I **CONCLUDE** in this matter that the issue of petitioner's tenure salary rights can be decided as a matter of law.

Pursuant to the Tenured Employees Hearing Act (Tenure Act), N.J.S.A. 18A:6-10 et seq., a tenured teacher may not be removed from her position or have her salary reduced unless a school board successfully establishes one or more of these causes by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982). According to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Tenure is a status in a particular position created by statute, not the agreement of the parties. Accordingly, it is a "'statutory right imposed upon a teacher's contractual employment' [that] may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962); citing Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect

employees "from dismissal 'for unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (quoting Zimmerman, supra, 38 N.J. at 71).

As part of the Tenure Act, N.J.S.A. 18A:6-14 provides the conditions under which a tenured teacher is protected from a prolonged suspension without pay pending adjudication of her other rights under tenure charges:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.
>
> [Id. (emphasis added)]

The purpose behind the 120-day requirement was commented upon by the Appellate Division when it said:

> It seems clear that in enacting it the Legislature must have had in mind the economic hardship endured by teachers and other board of education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We

> are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.
>
> [In re Grossman, 127 N.J. Super. 13 (App. Div. 1974) (emphasis added)]

Cases at the OAL have applied Grossman and found that the tenured teacher, even while serious tenure charges have been sustained, were entitled to and that the statute mandates reinstatement of pay pending appeals, remands and other procedural curve-balls. In re William Thomas, OAL Dkt. EDU 1763-08 Initial Decision (April 9, 2008); IMO Tenure Hearing of Brian Yatauro, OAL Dkt. EDU 0793-99, Initial Decision (June 12, 1999). <http://lawlibrary.rutgers.edu/oal/search.html>

In Thomas, the teacher had been arrested for a drug CDS offense on May 4, 2004. He completed PTI on March 16, 2007, and tenure charges were filed on May 16, 2007. In the first Initial Decision, the Honorable Howard Solomon, A.L.J., entered an order sustaining the tenure charges on stipulated facts and without a plenary hearing, having found that PTI constituted a disfavorable conclusion to the criminal charge. The Commissioner reversed that summary decision and remanded the matter for a factual hearing. On April 9, 2008, Judge Solomon held, after a plenary hearing, that the underlying facts had been established and respondent's possession of CDS constituted just cause for tenure charges. Nevertheless, Judge Solomon granted the application for back pay for the period between completion of PTI and the tenure charges being filed, and from the 121st day after tenure charges had been filed, notwithstanding that he also sustained those charges, quoting Yatauro: "This statute contains mandatory language which requires that a board commence payment of salary on the 121st day after certification. It does not authorize a board to withhold such money until some later date, such as the conclusion of a tenure proceeding."

In Yatauro, the Honorable Jeff Masin, A.L.J., reviewed two proffered bases for that teacher's application for salary reinstatement. Therein, the teacher had been initially suspended with pay on March 27, 1996, pending resolution of criminal allegations relating to inappropriate sexual relationships with a student. Approximately six months later, he was indicted and the suspension was modified to one without pay. In 1997, he was acquitted but his district filed tenure charges against him on September 18, 1997. After an Initial Decision on the merits sustained the tenure charges, the Commissioner remanded as a separate matter the teacher's application for reinstatement of salary for the post-acquittal/pre-tenure charge period, and for his salary as of the 121st day after the tenure charges. Judge Masin engaged in a careful analysis of the equitable considerations at issue in the salary issue following acquittal on criminal charges and concluded that the respondent was not entitled to pay when he was ultimately discharged for the same behavior for which he had been indicted but found not guilty. He also reviewed the Tenure Law provisions on reinstatement of pay after the 120th day with equal attention to legal interpretation and precedence and held:

> The only reason why the salary payments would not begin would be an intervening indictment, or the prompt disposition of the tenure charge prior to the 121st day. Unlike the situation which exists regarding payment of moneys withheld during a period of indictment, where the statute does not indicate when, if at all, such moneys are to be paid to the employee, here the Legislature left no doubt that the salary was to commence on the 121st day. The statute cannot be read to authorize a board to hold the money aside, to keep a running tab of salary owed to the employee. Instead, it directs that the full salary "shall be paid." Equity is not an issue here.
>
> It is admittedly troubling that an employee such as Yatauro, who conducted himself so improperly and in doing so risked not only his own professional and financial future but the interests of a young student as well, should receive any salary payments for periods when he did not work. If the statute were not mandatory, it would be fully in accord with the equitable analysis applied to the post-indictment period to similarly deny this claim. However, here the Legislature has spoken with clear voice and intent.
>
> * * *

> I **CONCLUDE** that the law as it currently exists does not permit a board of education to refuse to pay to an employee the employee's full pay once the 120-day initial period has concluded. Where a board fails to do so, it cannot invoke equitable considerations to support a refusal to pay the moneys owed to the now ex-employee following his or her removal on substantiated tenure charges.
>
> [Yatauro, supra.]

Thus, I must also **CONCLUDE** as a matter of law that there is no discretion expressed in the mandate of N.J.S.A. 18A:6-14. The only real question is whether the remand from the Appellate Division somehow makes that mandate inapplicable to these circumstances. Furthermore, it is clear from the analysis of the cases cited above that remands to the OAL from the Commissioner were often involved, creating a scenario where there were significant gaps of salary withheld even though the charges against the tenured teacher were ultimately sustained. Judges Solomon and Masin both entered orders of salary reimbursement for teachers accused of highly inappropriate conduct and whom had not worked for their respective districts for long periods of time after the tenure charges were sustained but before determination by the Commissioner.

A reading of the Appellate Division remand in this matter makes it clear that the substantiation of the original tenure charges have been wiped clean and that the tenure charges have to be tried "anew" under legal standards that had not yet been articulated as applicable under the TEACHNJ:

> We reverse and remand to the Commissioner to explicitly decide those legal defenses that the Commissioner does not expressly delegate to the statutorily-mandated arbitrator to decide. The Commissioner must also inform the arbitrator what legal standards to utilize, after which the arbitrators must review the facts anew within this legal framework.
>
> * * *
>
> Thus, we remand both matters to the Department of Education to determine the validity of those legal defenses raised by each teacher deemed appropriate by the agency for resolution by the agency, so that a uniform educational

> policy will be promulgated. The agency should determine the appropriate standards to be used by arbitrators when adjudicating tenure hearings, thus determining a consistent procedure for teachers in positions similar to Chavez and Pugliese, who have received tenure charges after the effective date of TEACHNJ, alleging poor performance that occurred prior to the implementation of the statute's new standards.
>
> [App. Div. Remand at 2]

Here, the 121st day came and went about one month before the arbitrator issued his determination. Certainly, petitioner could have filed this motion at that time and the result should have been the same as herein. Now, that determination which sustained the tenure charges has been appealed, sustained, appealed, and then reversed. If there had been no remand to the Commissioner, petitioner would be entitled to her job back. As it stands, the arbitration must begin "anew" and petitioner is entitled under N.J.S.A. 18A:6-14 to reinstatement to salary retroactive to the 121st day after her unpaid suspension commenced even though she is not entitled to reinstatement to her teaching post.

## ORDER

It is **ORDERED** that the motion of petitioner Felicia Pugliese for an Order on Reinstatement to Salary is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of the State-Operated School District of the City of Newark for an Order Denying Reinstatement to Salary is hereby **DENIED**. It is further **ORDERED** that the State-Operated School District of the City of Newark must reimburse petitioner Felicia Pugliese for her salary commencing on the one-hundred and twenty-first day after the filing of the tenure charges against her.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 13, 2016
DATE

Gail M. Cookson
**GAIL M. COOKSON**, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 14 2016

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

146-16

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|---|---|---|
| DANIEL ESTEVES, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner challenged his removal – pursuant to *N.J.S.A.* 18A:12-3 – from the Board of Education of the Town of Kearny as the result of the Board's finding that he had failed to attend three consecutive meetings of the Board without good cause. Petitioner contended that he had good cause to be absent from all but one of the meetings in question, as he was on duty as a Kearny police officer on those dates; further, petitioner asserted that he did not receive 72 hours of notice of the Board's proposed action, as required in the Board's bylaws.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:12-3 provides that any member who fails to attend three consecutive meetings of the board without good cause may be removed from board membership; the respondent Board adopted bylaw number 0145, which provides that if a board member misses three consecutive meetings without good cause, the Board may remove that member provided that 1) such removal was proposed at the immediately preceding board meeting, and 2) the member be provided at least 72 hours' notice of the removal meeting; in the instant matter, petitioner missed numerous board meetings during 2014 and 2015 following his appointment as a township police officer, including three consecutive meetings; petitioner's many unexplained absences were contrary to the Board's interests; petitioner received timely notice of the removal meeting via ordinary mail and email, and was in attendance at the meeting prior to the removal meeting, at which his removal was discussed – although he left prior to the adjournment of the meeting; petitioner attended the June 1, 2015 removal meeting, but made no statement opposing his removal and did not request additional time to prepare a response; rather, petitioner stated he had not received adequate notice of the meeting and questioned the Board about how it had noticed him; however, the burden of proof was on petitioner to demonstrate that the Board's determination that his absences were without "good cause" was arbitrary, without rational basis or induced by improper motives. The ALJ concluded that petitioner received timely notice of the removal meeting, and has not sustained his burden to prove that the board's actions were arbitrary, capricious or unreasonable. Accordingly, the petition was dismissed.

The Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter.

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

April 14, 2016

OAL DKT. NO. EDU 13424-15
AGENCY DKT. NO. 188-7/15

| | | |
|---|---|---|
| DANIEL ESTEVES, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner when it removed petitioner from the Board for failing to attend three consecutive Board meetings without good cause. *N.J.S.A.* 18A:12-3. Further, the Commissioner concurs with the ALJ's finding that petitioner had 72 hours notice of the Board's special meeting on June 1, 2015, in accordance with the Board's Bylaw 0145. The Commissioner notes that the Board provided petitioner with the requisite notice by ordinary mail – in addition to electronic mail – thereby affording petitioner with the necessary notice and a fair opportunity to be heard. Indeed, petitioner attended the Board's special meeting and did not make a statement or present any argument as to why he had good cause for his absences and should not be removed as a Board member.

[1] The Commissioner was not provided with a transcript of the November 23, 2015 hearing at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/16

Date of Mailing: 4/14/16

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

*STATE OF NEW JERSEY*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO.: EDU 13424-15

AGENCY DKT. NO.: 188-7/15

**DANIEL ESTEVES,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,**

Respondent

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**Daniel Esteves**, pro se

**Kenneth J. Lindenfelser**, Esq. for respondent

Record Closed: November 23, 2015 Decided: March 7, 2016

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

## STATEMENT OF THE CASE

Daniel Esteves was an elected member of the Board of Education of the Town of Kearny. On June 1, 2015, he was removed as a Board member as a result of the Board's contention that he failed to attend three consecutive meetings of the Board without good cause.

Esteves contends that he did not receive the seventy-two hour notice required by the Board's bylaw 0145.

## FACTS

Three witnesses testified in this matter. Two of them were Board members and the third was Daniel Esteves. From their testimony, I **FIND** the following **FACTS**, none of which are in serious dispute:

1. Since January 1, 2014, the petitioner was absent from the following Board meetings: (Answer, Ex. C.)

   a. Five special meetings held on March 24, 2014, August 12, 2014, October 9, 2014, November 13, 2014, and February 23, 2015;

   b. Two budget public hearing held on May 5, 2014, and April 30, 2015;

   c. Seven regular meetings held on April 22, 2014, June 16, 2014, September 15, 2014, December 15, 2014, including three consecutive meetings held on February 17, 2015, March 16, 2015, and April 20, 2015;

   d. One committee of the whole meeting held on January 13, 2015; and

   e. One student hearing held on April 22, 2015.

2. Since January 1, 2014, the petitioner attended the following Board meeting: (Answer, Ex. C.)

   a. Four special meetings held on March 6, 2014, May 13, 2014, May 27, 2014, October 9, 2014 (which he left at 6:40 p.m., prior to a vote); and

b. Six regular meetings held on January 23, 2014, February 18, 2014, May 19, 2014, July 29, 2014, November 27, 2014, and January 20, 2014.

3. In 2014, the petitioner was hired as a police officer for the Town of Kearny. (P-2.) He works the evening shift, between the hours of 12 p.m. and 10 p.m. and he was on-duty on the following dates in 2014 (March 24, April 22, May 5, June 16, August 12, September 15, October 9, October 20, November 13, December 15) and in 2015 (January 13, February 17, February 23, March 16, April 20, April 30). (P-6.) A review of his on-duty log indicates that except for the April 22, 2015, meeting, he was on-duty when the meetings were held.

4. Due to his numerous absences, the Board, through its counsel, sent him a letter dated May 8, 2014. The letter noted that "[o]ver the past few months, you have asked to be removed from all committees of the Board and you have missed many Board meetings...," and inquired whether he would "...be able to attend future meetings of the Board and to carry out the duties and responsibilities of a Board member in the future." (P-4.) In response to the Board's May 8, 2014, letter he wrote an undated letter objecting to the Board's characterization of his request to be removed from Board meetings, noting that his absences were work-related. He noted that he intended to "continue to carry out the duties and responsibilities" of a Board member. (P-4.)

5. The Board discussed his removal at its regular meeting on May 18, 2015. (R. Ex. D.) Although there is no indication why the petitioner attended this meeting, he was present for the public session portion of the meeting but left in between the time the Board went into a closed session to discuss the petitioner's removal and its return to a public session. He attended the closed session at which time his attendance was discussed.

6. The petitioner was removed at a special meeting held on Monday, June 1, 2015, at 5:30 p.m. He did not make any statement against his removal and did not request additional time to prepare. (R. Ex. D.) Instead, he stated that he did not receive adequate notice of the meeting and questioned the Board about how it noticed him. (R. Ex. D.) A Board member stated that the Board sent him notice via ordinary mail and certified mail and via email on May 26, 2015. (R. Ex. D.) The Board voted 8 votes in the

affirmative and 1 vote in the negative (the petitioner voting in the negative) to remove him from the Board. (R. Ex. D.)

7. The Board sent notice of the removal meeting via ordinary mail and certified mail and via email on May 26, 2015. Although it is unclear how the petitioner became aware of the meeting, by his own admission, he "...became aware of the actual time of the meeting on May 30, 2015" (time unknown). (P-2.) The notice via ordinary mail was sent on May 26, 2015, intra-town—from the Board's attorney's office address to the petitioner's address in Kearny. The envelope is stamp-dated May 27, 2015. (P-5.)

8. Notice via certified mail was sent on May 26, 2015, simultaneously with the ordinary mail but it is undisputed that the petitioner received the certified mail on June 2, 2015, at 12:13 p.m. (P-3.)

9. Notice via email and accompanying attachments were sent to the petitioner's school district email address at Desteves@kearnyschools.com on Tuesday, May 26, 2015, at 6:32 p.m. (Answer, Ex. A.) The petitioner claims that he "...did not receive the email notices." However, the District's review of his district email account revealed that as of July 9, 2015, he had not accessed his emails since December 15, 2014, at 12:31 p.m. (Answer, Ex. B.)

10. On June 5, 2015, after his removal, he sent a letter to the Board indicating that he did not receive the certified mail until June 2, 2015, that he only became aware of the June 1, 2015, scheduled meeting on May 30, 2015, and that he had good cause to miss three consecutive Board meetings due to his working evening shifts (P-2.)

11. On June 15, 2015, during a regular meeting, the Board appointed Bryan Granelli to fill the seat left vacant after the petitioner's removal. In November 2015, Mr. Granelli was elected as a Board member for a three year term.

## PROCEDURAL HISTORY

On July 2, 2015, the petitioner filed a Petition of Appeal with the Commissioner of Education, Department of Education, Bureau of Controversies and Disputes (Department), seeking consideration of a conflict between himself and the Board. The Board filed an Answer on August 31, 2015. The Department transmitted the present

matter to the Office of Administrative Law as a contested case on September 1, 2015. A prehearing telephone conference was held on October 15, 2015, and a hearing was held on November 23, 2015.

## PARTIES' ARGUMENTS

The petitioner argues that he had "good cause" to be absent from Board meetings and that he did not receive 72 hours' notice of the Board's proposed action to remove him as a Board member pursuant to Bylaw 0145. The Board argues that it is the Board that determines "good cause" and claims that it sent him notice of the June 1, 2015, special meeting via ordinary mail, certified mail, and via email on May 26, 2015, providing him with more than 72 hours' notice.

## DISCUSSION

N.J.S.A. 18A:12-3, provides that "...any member who fails to attend three consecutive meetings of the board without good cause may be removed by it." Local boards are creations of the State and, as such, may exercise only those powers granted to them by the Legislature — either expressly or by necessary or fair implication. See Wagner v. Mayor & Mun. Council of Newark, 24 N.J. 467, 474 (1957); Fair Lawn Ed. Assn. v Fair Lawn Bd. of Educ., 79 N.J. 574, 579 (1979). A local board is a "public body" as defined in N.J.S.A. 10:4-8(a), and such boards derive the authority to adopt Bylaws from N.J.S.A. 18A:11-1(c). New Jersey courts have required public bodies to adhere to their own Bylaws. Matawan Reginal Teachers' Ass'n. v. Matawan-Aberdeen Regional Sch. Dist. Bd. of Educ., 223 N.J. Super. 504, 509 (App. Div. 1988). Here, pursuant to N.J.S.A. 18A:12-3, the Board adopted Bylaw 0145 which provides that if a Board member misses three consecutive meetings, without good cause, the Board may remove that member provided that (1) his removal was proposed at the "immediately previous Board meeting," and (2) he is given "at least 72 hours' notice" of the removal meeting.

**I. The Board's determination that the petitioner did not have "good cause" to be absent from numerous Board meetings was not arbitrary, capricious, or induced by improper motives.**

In reference to N.J.S.A. 18A:12-3, "...it is the Board itself that determines what constitutes good cause." Shamong Twp. Bd. of Educ. v. Chwastek, 1985 S.L.D. (July 8). However, in Smith v. Bd. of Educ. of Twp. of Hazlet, EDU 53-99, Decision on Motion for Emergent Relief (February 8, 1999), remanded, Comm'r (March 8, 1999), http://njlaw.rutgers.edu/collections/oal, the Commissioner explained that Shamong is not dispositive when the issue is whether a "good cause" absence applies to the "three consecutive meetings" requirement, explaining that "there is no decisional law which specifically addresses and interprets the statutory intendment of the term 'three consecutive meetings' or resolves the question of whether 'good cause' is required for each individual board member absence or for the period of absence."

Since the Board's determination of what constitutes "good cause" is a discretionary decision, such decisions will only be vacated where it acts in an arbitrary, capricious and unreasonable manner. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). And, unless there is a clear showing of abuse, the Commissioner will not substitute his own judgment for that of a local Board in matters which lie within its discretionary authority. Ibid. at 296. Thus, the burden of proof is on the petitioner to demonstrate that the Board's determination that his absences were without "good cause" was arbitrary, without rational basis, or induced by improper motives.

In order to determine whether the Board's determination was improper, it is necessary to articulate what the phrase "good cause" means. Judge Pressler, in Golaine v. Cardinale, 142 N.J. Super. 385, 395-97 (Law Div. 1976); aff'd, 163 N.J. Super. 453 (App. Div. 1979); cert. denied, 79 N.J. 497 (1979), eloquently explained the concept of "good" or "sufficient cause."

> "Cause" in this context is a concept which, like all of the enduring principles of the common law, is certain as a matter of legal import while being at the same time extremely elastic

> as a matter of specific application. It means, essentially "such cause as is 'plainly' sufficient under the law and sound public policy'" and has "reference to a substantial cause touching qualifications appropriate to the office or employment or to its administration." (citations omitted). It also necessarily implies such degree of misconduct or culpability on the part of the office holder as clearly implicates the public interest in precluding his continuance in that particular office. It is, indeed, the element of fault which conceptually distinguishes removal from office from all other causes resulting in a vacancy in office.

In Golaine, supra, at 393, the issue before the court was whether the plaintiff's 11-month absence from his unpaid appointment for a 6 year term (1972-1977) as a member of the Planning Board constituted a neglect of duty under a statutory removal provision.[1] The plaintiff was a diligent and valuable member of the Board but had to take a leave of absence when his employer assigned him to an overseas project that lasted for 11-months. Ibid at 390. The Board removed the plaintiff and argued that he was not granted a proper leave of absence, that his 11-month absence was inimical to the Board's interest, and that he "failed to do the right thing" by not resigning. Ibid. at 392. The plaintiff argued that his leave of absence was de-jure. The court reasoned that removal for "good cause" is in part based on an act of "misfeasance or nonfeasance" and includes an "element of fault," noting that "[t]he *leitmotif* of removal cases involving nonattendance is whether the absence was either excused or excusable, either circumstance negating a finding of neglect of duty." Ibid. at 398-99. The court entered judgment for the plaintiff and ordered him restored to his office, concluding that his nonattendance was not an actionable neglect of duty. In its decision, the court noted that the plaintiff had one and a half years of his 6 year term remaining and that he was prepared to return to office. Ibid. at 400-01.

Here, the petitioner does not sustain his burden of proof that the Board's determination was improper. N.J.S.A. 18A:12-3 and Bylaw 0145 require that a Board member must fail to attend three consecutive meetings without good cause before he can be removed. The petitioner argues that he had "good cause" to be absent from the Board meetings because with the exception of the April 22, 2015, meeting, he was on-

[1] The provision, N.J.S.A. 40:55-1.4 is repealed.

duty when the Board meetings were held. In this regard, Golaine, supra, suggests that the "misfeasance or nonfeasance" of not attending the Board meetings cannot be based on behavior that he can be faulted with—he was on-duty when the meetings were held. But unlike in Golaine, supra, where the plaintiff had one and a half years of his six year term remaining and he was prepared to return to office, here, the petitioner's term was due to expire at the end of 2015, a replacement Board member was elected in November 2015, and it is not clear whether the petitioner will be able to return to office given his work schedule. Furthermore, it is undisputed that he failed to attend Board meetings on February 17, 2015, March 16, 2015, and April 20, 2015. In this regard, the Board could have concluded that his numerous absences were inimical to it interests. Thus, it cannot be said that the Board's determination was arbitrary, without rational basis, or induced by improper motives.

Moreover, any remedy granted by this tribunal will have no practical effect on the outcome of this matter because the petitioner's term was due to expire at the end of 2015, but given his removal, Mr. Granelli was appointed as an interim Board member to sit for the rest of what would have been the petitioner's term. Subsequent to his interim appointment, Mr. Granelli ran and was elected to the Board in November 2015 for a three year term. See Marjarum v. Twp. Of Hamilton, 336 N.J. Super. 85, 92 (App. Div. 2000) (defining mootness as the inability of a court to grant judicial relief because of attendant circumstances)). See also Greenfield v. N.J. Dep't of Corr., 383 N.J. Super. 254, 257-58 (interpreting mootness when the court's decision can have no practical effect on the existing controversy)). Due to the attendant circumstances, specifically, the fact that the petitioner's Board seat was replaced by an interim member who was then elected and currently holds the seat, no remedy can be afforded to him.

## II. The petitioner received timely notice via ordinary mail and email.

In New Jersey, in the absence of a statutory, regulatory, or a contractual provision identifying the type of notice required, when a mailing is correctly addressed, proper postage is affixed, the return address is correct, and the mailing is deposited into a mailing receptacle, a presumption arises that it was received by the party to whom it

was addressed. SSI Medical Servs. v. HHS, Div. of Medical Assistance & Health Servs., 146 N.J. 614, 621 (1996). N.J.A.C. 1:1-7.1 provides that:

> (a) Service shall be made in person; by certified mail, return receipt requested; by ordinary mail; or in any manner which is designed to provide actual notice to the party or person being served.
>
> (b) Service by mail shall be complete upon mailing.

When a party is being served notice by ordinary mail, R. 1:3-3 affords that party an additional three days from the date of service to receive the ordinary mail. In addition, R. 1:5-4 provides guidance on the issue of when service is complete if service is made via regular and certified mail;

> (b) ... If service is simultaneously made by ordinary mail and certified or registered mail, service shall be deemed complete ... on mailing of the ordinary mail.

The petitioner's June 5, 2015, letter states that he did not receive the e-mail notice, that he did not receive the certified mail notice until June 2, 2015, but does not address the status of the ordinary mail. An analysis of the following facts reveals that the petitioner received the required 72 hours' notice: (1) the notice via regular mail was sent on Tuesday, May 26, 2015, (the envelope is stamp-dated Wednesday, May 27, 2015, time unknown) to the petitioner's address; (2) notice via email and the accompanying attachments were emailed on Tuesday, May 26, 2015, at 6:32 p.m. to the petitioner's school district email address; (3) the petitioner became aware of the time of the removal meeting on May 30, 2015, and (4) the Board convened for the June 1, 2015, special meeting at 5:30 p.m.

**A. The petitioner received timely notice via ordinary mail.**

Pursuant to N.J.A.C. 1:1-7.1(c), service by mail shall be complete upon mailing. R. 1:5-4 provides that when service is made by both ordinary and certified mail, service is complete upon the mailing of the ordinary mail and R. 1:3-3 provides the party being served with ordinary mail an additional three days, from the date of mailing, to receive

the ordinary mail. Here, the petitioner received timely notice by ordinary mail. First, the ordinary mail is correctly addressed to the petitioner and mailed to his address, lists the correct postage ($0.48), and bears evidence of being processed through a postal facility. Therefore, it bears the presumption established in N.J.A.C. 1:1-7.1(c) and SSI Medical Servs. that it was received by the petitioner. Second, pursuant to R. 1:3-3, even if the notice was mailed at 5:30 p.m. on May 26, 2015, then he would have received it by 5:30 p.m. on May 29, 2015.[2] The difference in time between June 1, 2015, 5:30 p.m., and May 29, 2015, 5:30 p.m. is exactly 72 hours. Thus, he received timely notice.

**B. The petitioner received timely notice via email because a plain and ordinary interpretation of the Bylaw's notice requirement does not exclude notice by email.**

Pursuant to N.J.A.C. 1:1-7.1(a), service can be made "... in any manner which is designed to provide actual notice to the party or person being served." Email communication can serve to provide actual notice to a party. See Modan v. Modan, 327 N.J. Super. 44 (App. Div. 2000) (noting that email is a method that reasonably effectuates actual notice to a party and that the plaintiff failed his due diligence obligation to provide notice to the defendant when he knew the defendant's email address where she could be reached but did not send notice to it)). In Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474 (1952), the Court stated that members of a local board are public officers holding positions of public trust and:

> As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity.

[2] This tribunal uses 5:30 p.m. for calculating the difference because that is the time the Board convened for the removal hearing on June 1, 2015.

A logical extension of Driscoll would suggest that public officers who hold positions of public trust are required to be diligent and should display the intelligence and skill they are capable of. As corollary, public officers who have an email address issued to them by a public body for the purpose of transacting the public body's business, should at least check their emails to remain diligent and conscientious about the public body's matter. In other words, the use of and the periodic checking of a public official's email account issued by a public body is an implied condition of the public official's faithful execution of his obligations as a public official.

In the absence of specifically defined notice provisions, ambiguous or undefined notice provisions are interpreted in accordance with their plain and ordinary meaning. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997); State Troopers Fraternal Ass'n. v. N.J., 149 N.J. 38, 47 (1997). New Jersey courts have invalidated public body decisions where notice requirements defined by statute or bylaw were deficient. See Opderbeck v. Midland Park Bd. of Educ. 442 N.J. Super. 40 (App. Div. 2015) (addressing the sufficiency of "adequate notice to the public" under the New Jersey Open Public Meetings Act); DeVita v. Housing of Paterson, 31 N.J. Super. 394, 397 (App. Div. 1954) (differentiating between "published notice" and "written notice" and concluding that decision taken by Board was contrary to its bylaw which required 7 days "written notice").

Here, the petitioner received actual notice of the Board's June 1, 2015, special meeting on Tuesday, May 26, 2015, at 6:32 p.m. when the Board sent him an email with attachments to his school district email address. Neither N.J.S.A. 18A:12-3 nor Bylaw 0145 specifies the type of notice that is required, suggesting that any notice, including notice via email, is good notice. In his letter dated June 5, 2015, and addressed to the Board's counsel, petitioner states, "I did not receive the e-mails..." However, his excuse is unsatisfactory given his position as a public official who was issued a district email address. Moreover, as of July 9, 2015, his failure to check this email account since December 15, 2014, at 12:31 p.m. is not in accord with his intelligence, skills and his responsibility to be diligent and conscientious in keeping abreast of Board matters. Driscoll, supra, at 474. In short, he offers no justification for why he should not be responsible for periodically checking his district email address and why the Board's

email should not count as effective notice. In this regard, 143 hours passed between the time the email was sent on Tuesday, May 26, 2015, 6:32 p.m., and Monday, June 1, 2015, 5:32 p.m. Thus, the Board's email notice was sufficient to provide him with 72 hours' notice.

**III. Even if the petitioner did not receive the notice via ordinary mail and via email, the Board did not violate the Bylaw because his 72 hours' notice began at the conclusion of the May 18, 2015, meeting, and at the very least, he was aware of the removal meeting for 48 hours.**

Assuming arguendo, that the petitioner did not receive timely notice, via ordinary and via email, his 72 hours' notice began after the conclusion of the May 18, 2015, meeting. Presumably, the purpose of the Bylaw is to (1) provide notice to the affected member that the Board will be seeking his removal and (2) apprise him with the date, time and place of the removal meeting.[3] Under this interpretation, the first requirement is substantive and affords the affected member with time to craft a defense to his removal. The second requirement is logistical and serves to apprise the affected member with the date, time and place of the removal meeting. The Bylaw's substantive and logistical notice procedures prevent the Board from unfairly surprising and removing a Board member. In this regard, so long as the Board complies with these procedures, or there is evidence that the affected member had notice and knew the date, time and place of the removal meeting, the substantive and logistical provisions of the Bylaw will not be violated because the purpose to the provisions have been met.

Using this logic, the substantive prong of the Bylaw was not violated and the petitioner's 72 hours' notice began at the conclusion of the May 18, 2015, meeting. He left the May 18, 2015, meeting between the time the Board went into a closed session and the time it returned to a public session. The petitioner offers no explanation for his early and voluntary departure from the meeting. The Board's May 18, 2015, meeting

[3] While the Board may effectuate a member's removal by first discussing his removal at the "immediately previous Board meeting," and then subsequently scheduling a removal meeting, it may also comply with the Bylaw in one proceeding. The removal of the Board member may be discussed at the "immediately previous Board meeting" and at the same meeting, the date, time, and location, so long as it is scheduled more than three days from this meeting may be announced as well.

was the "immediately previous Board meeting" that should have placed the petitioner on notice that the Board would be seeking his removal. If he stayed for the entire meeting, he would have been aware that the Board would be seeking his removal at the next meeting or in the near future. He had all of the time between the conclusion of the May 18, 2015, meeting and the June 1, 2015, meeting to establish a defense.

The logistical prong of the Bylaw was not violated because the petitioner's act of leaving prior to the conclusion of the May 18, 2015, meeting is indicative that he knew that his removal was imminent. He knew or should have known as early as May 8, 2014, that the Board was concerned about his numerous absences. The fact pattern does not support a scenario where the Board attempted to unfairly surprise and remove him. In addition, he became aware of the date, time, and place of the June 1, 2015, meeting on May 30, 2015. In a letter dated June 5, 2015, and addressed to the Board's counsel, the petitioner acknowledges that he "became aware of the actual time of the meeting on May 30, 2015." Although he doesn't specify at what time he became aware of this information, using 5:30 p.m. (the start time of the removal meeting) and counting backwards to May 30, 2015, results in 48 hours. If he became aware of the meeting on Saturday, May 30, 2015 at 5:30 p.m., then he was aware of the meeting for 48 hours'. Consequently, the petitioner's argument becomes not that he was deprived of 72 hours' of notice but that he was deprived of an additional 24 hours' of notice. In this regard, he attended the June 1, 2015, meeting, was given an opportunity to address the Board but did not make any statement against his removal and did not request additional time to prepare. The act of attending the meeting acted as a forfeiture to the additional 24 hours' notice. Thus, the notice that he would have received had he remained for the entire May 18, 2015, meeting, and his actual knowledge of the date, time and place, of the June 1, 2015, meeting on May 30, 2015, leads to a conclusion that the provisions of Bylaw 0145 were not violated.

## CONCLUSION

For the foregoing reasons, the petitioner received timely notice via regular mail and email, and even if he did not, the provisions of Bylaw 0145 were not violated.

## ORDER

It is **ORDERED** that Esteves' petition is **DISMISSED**.

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

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

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

March 7, 2016

DATE

**JEFFREY A. GERSON**, ALJ

Date Received at Agency:

March 7, 2016

Date Mailed to Parties:

MAR 8 2016

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## APPENDIX

**WITNESSES**:

For Petitioner

Daniel Esteves

For Respondent

Samantha Paris

Barbara Cifelli Sherry

**EXHIBITS**

For Petitioner

P-1 0145 Board Member Resignation and Removal (Kearny Public Schools

P-2 Letter to Kenneth Lindenfelser, Jr., Board Counsel for Kearny Board of Education from Daniel Esteves dated June 5, 2015

P-3 USPS Tracking Invoice

P-5 Envelope with attached letter with postage date of May 26, 2015

P-6 Attendance record for 2014 and 2015 re: Daniel Esteves from Department of Police, Kearny, N.J.

For Respondent

R-A Letter from Kenneth J. Lindenfelser, Esq. to Daniel Esteves re: Kearny Board of Education dated May 8, 2014

R-C Minutes from closed session of the Kearny Board of Education dated May 18, 2015

R-D Copy of a CD containing Special Board Meeting minutes dated June 1, 2015

148-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges Against
Nancy Mastriana

---

**SCHOOL DISTRICT OF THE TOWNSHIP OF HILLSBOROUGH**

Petitioner

- and -

**NANCY MASTRIANA**

Respondent

---

Agency Dkt. No.
**233-8/15**

**Opinion and Award**

Before: Deborah M. Gaines, Arbitrator

APPEARANCES:

FOR THE PETITIONER:
VITTORIO S. LA PIRA, ESQ.
FOGARTY AND HARA

FOR THE RESPONDENT:
EDWARD A. CRIDGE, ESQ.
MELLK O'NEILL

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 ("TEACHNJ"), the tenure charges brought by the Township of Hillsborough ("the District" or "Petitioner") against Nancy Mastriana ("Mastriana" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and

Decision on October 20, 2015.[1] I conducted hearings at the District's Offices in Hillsborough, New Jersey on December 11, 21, 2015 and February 2 and 29, 2016.

At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The parties submitted written closing statements which were received on March 31, 2016, whereupon the record was closed.

## THE CHARGES

The Sworn Tenure Charges brought against Nancy Mastriana on August 26, 2015, are as follows:

> **Charge No. 1**
>
> Nancy Mastriana, a tenured teaching staff member in the employ of the Hillsborough Township Board of Education, *consistently demonstrated inefficiencies and ineffectiveness in her teaching skills* throughout the 2013-2014 and 2014-2015 school years and, as a result of the significant negative impact that her poor teaching performance has upon the quality of education of her students, *she must be dismissed from her position.*

1. Nancy Mastriana ("Mastriana") has been employed by the Hillsborough Township Board of Education (the "Board") to serve as a full-time teaching staff member in the Hillsborough Township Public School District (the "District") since September 1, 2003. The District provides educational programs and services to

[1] The case had originally been assigned to Arbitrator Licata. Respondent filed a Motion to Dismiss on September 23, 2015. The motion was denied on October 9, 2015.

students who reside in the Township of Hillsborough from kindergarten through grade twelve.

2. The Board has employed Mastriana as a Special Education/Resource Center teacher at Hillsborough Middle School ("Middle School") throughout the course of her employment with the Board. Mastriana received tenure on or around September 1, 2006.

3. For two consecutive school years, 2013-2014 and 2014-2015, Mastriana's performance was rated partially effective on her summative evaluations, thereby necessitating the filing of the within charge for inefficiency.

4. Joseph Trybulski ("Trybulski") is the Principal of the Middle School and one of Mastriana's supervisors. As such, Trybulski, along with other members of the school improvement panel, is responsible for observing and evaluating Mastriana in her position as the special education teacher.

5. During the 2013-2014 school year, the administrative staff observed and evaluated Mastriana on three separate occasions, specifically on October 29, 2013, January 29, 2014, and March 12, 2014. The first observation, performed by Trybulski, was announced and was a "long" observation (a full period). Leonore Johnston, the Director of Special Services at that time, performed Mastriana's second evaluation, which was also announced, while Trybulski performed her third evaluation (which was unannounced).

6. Near the end of the school year, the District prepared Mastriana's annual summative performance report. When her evaluation was scored, Mastriana received a score of 2.58, which falls within the "partially effective" category. (Exhibit 1). That score was among the lowest in the District.

7. A Teacher Summative Performance Report ("summative report") was discussed and agreed upon by Trybulski and Mastriana for the 2013-2014 school year. In the 2013-2014 summative report, Mastriana was rated as "partially effective" in following performance standards:

a. Professional Knowledge;

b. Instructional Delivery;

c. Assessment of and for Student Learning; and

d. Learning Environment.

Professionalism as it relates to parental communication was also noted as an area for improvement. (Exhibit 1).

8. In the area of professional knowledge, Mastriana inconsistently demonstrated her understanding of appropriate curriculum standards or a full understanding of the subject matter and skills necessary to promote student development. Despite Mastriana's participation in professional development activities, there was an evident lack of fluidity in her demonstration of such knowledge in practice. Mastriana periodically demonstrated lack of understanding of the social, emotional, and psychological needs of her students, thereby, hindering the student development. (Exhibit 1, p. 1).

9. Specifically, during a classroom observation on November 14, 2013, Mastriana failed to recognize elements of a *correct response* from a student's answer, which went beyond the textbook definition. Instead of building upon the student's answer, Mastriana repeatedly stated that the answer was incorrect and called upon another student who provided an exact textbook definition of "terminal velocity." (Exhibit 2). Mastriana did not demonstrate her ability to build her students' confidence and recognize how their reasoning is connected to the larger themes or terms being used in class.

10. For the 2013-2014 school year, Mastriana received a "partially effective" summative rating in her "instruction delivery." Although Mastriana demonstrated *some* evidence of her ability to effectively engage students, the effectiveness of her limited instructional methods and strategies was inconsistent across all students and failed to meet their individual learning needs. (Exhibit 1, p. 3-4). During her observation on November 14, 2013, Mastriana utilized Nearpod in efforts to implement the use of technology as part of a 1:1 pilot program, which was ineffective in a small-group setting and created distance between the students and the activity. (Exhibit 2). Trybulski noted in Mastriana's evaluation that she needed to develop "a better understanding of the cognitive and psycho/social needs of students as well as a deeper understanding of the content/skills associated with the curriculum and diversify her instructional strategies to better meet individual needs as well as enhance communications with student/parents that provide more specific, detail and solution-oriented guidance." (Exhibit 1, p. 4).

11. Likewise, Mastriana also demonstrated only partial effectiveness in her "assessment of and for student learning" for the 2013-2014 school year. The sample of assessments provided by

Mastriana demonstrated assessment methods of a content area teacher and failed to demonstrate how Mastriana used the data to plan or modify instruction or guide the students' learning and achievement beyond that provided by the content area teacher. (Exhibit 38). Trybulski recommended that Mastriana look for ways to monitor students' progress on specific skills and concepts and report that information to students, parents and content area teachers with specific strategies to assist in remediating or strengthening those skills and concepts over the course of the school year. (Exhibit 1, p. 6).

12. With respect to the "learning environment" in Mastriana's classroom for the 2013-2014 school year, she demonstrated only partial effectiveness due to inconsistency in the classroom dynamics, as well as a lack of appropriate level of enthusiasm, respect, and teamwork. (Exhibit 1, p. 6-7). Additionally, Mastriana demonstrated inconsistency in her ability to establish positive and trusting rapport with all students. Mastriana's failure to establish a positive teacher-student relationship was evidenced in meetings with the Administration, Child Study Team ("CST") and communication with parents and students. During her classroom observation on November 14, 2013, Mastriana was observed to persistently and audibly huff and sigh with each statement that conveyed a sense of boredom, irritation or lack of interest in the lesson. (Exhibit 2). Additionally, at least two parents of students with special needs in Mastriana's classes raised concerns about Mastriana's lack of sensitivity to their children's emotional needs, requiring administrative intervention to assist in re-establishing a trusting relationship between student-teacher and parent-teacher.

13. Although Mastriana managed to achieve an effective rating in the area of professionalism in the 2013-2014 school year, she continued to exhibit weakness in the area of communication with parents. (Exhibit 1, p.7-8). Mastriana demonstrated evident lack of sensitivity, solutions, guidance and accommodations to the problems being presented in her communication with S.F.'s parents. For example, on September 25, 2013, Mastriana e-mailed the following correspondence to S.F.'s parents, which did not lead with a positive as she had been instructed to do:

> We are beginning to see a pattern with [S.F.], and we are beginning to get very concerned. [S.F.] did not bring either of her novels to school today, and was unable to complete the classwork for the day. At this point [S.F.] is chronically forgetting material at home and it is going to negatively impact her progress across the board. I am hoping that you will be able to help her

organize her materials every night for the next school day.

[Exhibit 40].

Additionally, on October 9, 2013, Mastriana sent the following correspondence to S.F.'s parents, wherein she did not offer any suggestions or solutions to address S.F.'s issues:

> Yes, [S.F.] did not attempt to work on her assignment. It is also frustrating for us because we spend a lot of time with each student commenting on their work, modeling and providing assistance. We are able to see everything each student does on their documents by looking at their revision history… so when [S.F.] tried to tell us she worked on it, but did not finish because she didn't understand we were able to see that she was not being truthful. I am not sure that anything can be done to prevent her from failing her classes if she does not do the work.
>
> [Exhibit 39].

Notably, when T.J.M.'s mother reached out to Mastriana to obtain extra help for her son who was struggling in Science class, Mastriana responded with the following (providing no constructive suggestions):

> I am sorry that [T.J.M.] was upset yesterday after school. I spoke to Miss Pierfy yesterday and told her that [T.J.M.] rarely does homework, therefore he is not getting the practice and reinforcement that he needs in order to be successful. I spend a lot of time in support class on the science curriculum reinforcing what was taught in class. *Unfortunately I do not offer extra help before or after school.* Hopefully this will help.
>
> [Exhibit 41 (emphasis added)].

The examples were consistent with the long-standing issues the Administration had with Mastriana, and demonstrated that Mastriana continued to fail to provide constructive feedback to parents in her role as a support professional for the students. Improvement in the effectiveness of communication with parents was noted as an important area of development for Mastriana, and ultimately became a part of her corrective action plan ("CAP").

14. As a result of Mastriana's "partially effective" summative rating for the 2013-2014 school year, the District developed and implemented an individualized and comprehensive CAP to address the areas noted for improvement. (Exhibit 3). The CAP included multiple demonstrable goals intended to assist Mastriana and facilitate professional development. Specifically,

a. Facilitate understanding of social, emotional and psychological needs of her students with special needs;

b. Provide Mastriana with professional development opportunities to enhance student learning;

c. Conduct weekly monitoring of lesson plans to ensure implementation of differentiated strategies in support of students in content area classrooms;

d. Provide mentoring services to assist Mastriana with implementing various instructional strategies that engage students in meaningful activities and are specifically designed for individualized learning; and

e. Encourage Mastriana to systematically gather formative data on student learning and utilize such data to guide instruction, provide timely feedback to students and parents, and promote collaboration with colleagues to improve communication with students and parents.

15. At the conclusion of the 2014-2015 school year, Mastriana failed to successfully accomplish a single demonstrable goal set forth above. (Exhibit 4). In some cases, she inexplicably made *zero effort* to comply with the CAP requirements, notwithstanding the knowledge that her future employment could be in jeopardy.

16. In her 2014-2015 CAP, Mastriana was responsible to read "*Brainstorm: The Power and Purpose of the Teenage Brain*" by Dr. Daniel Siegal and provide a reflection on the text as it relates to her teaching practices or engaging students. (Exhibit 3, p. 3). During her interim CAP evaluation in January of 2015, Mastriana only completed one section of the text and provided a one and one-half page bullet point summary of the text for her summative CAP review. (Exhibits 5, 6 and 45). At the summative CAP review on April 28, 2015, Mastriana demonstrated that she read the text, but failed to provide a reflection on the text as to how it relates to her teaching practices as required by the CAP. (Exhibits 4 and 7).

17. At the time of Mastriana's interim CAP evaluation in January of 2015, she did not demonstrate participation in any professional development activities. (Exhibit 5). Although by the end of the school year, Mastriana provided evidence of her participation in professional development opportunities, she provided "limited to no evidence" of specific application of the professional development to her classroom learning strategies, enhancement of student participation, differentiation in instruction or increase in student performance. (Exhibits 4 and 8). Moreover, all of the professional development activities were in the District, and many were required for all teachers—nothing representing any initiative on her part. Although Trybulski recommended that she contact her statewide union for resources, it does not appear that she ever did so, nor did she ever ask Trybulski for either course recommendations or for his input on whether the courses she selected (if any) were appropriate. As such, Mastriana failed to meet her CAP goal of "enhancing student participation, differentiating instruction, or increasing student performance."

18. The 2014-2015 CAP identified "lesson planning" as one of the areas in need of improvement. The four classroom observations throughout the 2014-2015 school year demonstrated Mastriana's mixed attention to lesson planning with inconsistency in the detail and degree of completeness and availability prior to the scheduled lessons. (Exhibits 9, 10, 11 and 12). Mastriana's classroom observations on October 29, 2014, December 11, 2014, February 5, 2015, and April 17, 2015 provided limited and inconsistent evidence of the use of varied instructional strategies that engaged the students in meaningful activities based on individual student needs. (Exhibits 9, 10, 11 and 12). As such, Mastriana failed to successfully complete her assigned goal. Notably, during the interim CAP review, Trybulski emphasized the following recommendation to Mastriana:

> As your assignment this year involves only in-class support, it is particularly important for your lesson planning to indicate the specific actions or areas in which you are addressing student needs reflecting IEP goals and accommodations. *It is not clear what differentiates your actions in the classroom from that of a content-specific teacher.* Naturally your plans should mirror the content-teacher's objectives and student activities, however, once you have copied and pasted that information, you should then indicate your plans to accommodate and support individual student needs.
>
> [Exhibit 5 (emphasis added)].

Despite the above-stated recommendation, Mastriana failed to demonstrate significant efforts to differentiate herself from the content teacher and clearly define her role in the classroom.

19. As part of her 2014-2015 CAP, Mastriana was responsible to visit the classroom of her mentor, at a minimum, two to three times per marking period for the first three marking periods. (Exhibit 3). The Administration developed this requirement in efforts to facilitate development of strategies and ideas that would enhance meaningful student engagement. During her interim CAP review, Trybulski advised Mastriana of her failure to conduct *even a single classroom observation of her mentor.* (Exhibit 5). Further, he reminded Mastriana of her responsibility to complete the same. Nevertheless, by the end of the school year, Mastriana *still failed* to conduct a single classroom observation of her assigned mentor, thereby, completely disregarding her responsibility under the CAP (again with full knowledge that her future employment with the District depended in part on attainment of these goals). Mastriana never offered an excuse or rationale for her admitted failure to achieve this goal. (Exhibit 4).

20. Mastriana also completely failed to meet her 2014-2015 CAP goal of systematically gathering formative data on student learning and using the same to guide instruction and provide timely feedback to student and parents. (Exhibit 4, Exhibit 14). Mastriana did not provide Trybulski with *any examples* of formative assessment development or use. (Exhibit 4, Exhibit 13). The purpose of this goal was to "promote the use of formative assessments and specific/focused data collection on student behaviors and/or academic progress that could be shared with students to help develop self-monitoring skills, with parents to help inform their support at home, and with teachers/CST to help monitor and inform instruction and program decisions. This was not met." Again, Mastriana provided no justification for her admitted failure to achieve this goal. (Exhibit 4).

21. In accordance with the 2014-2015 CAP, Mastriana was required to collaborate with her mentor and colleagues in developing successful communication approaches, implementing such approaches and discussing their effectiveness with her mentor and supervisor. Special emphasis was placed on improving Mastriana's communication with parents. (Exhibit 3). However, the samples of e-mail communication with parents that Mastriana provided during her mid-year review did not demonstrate her implementation of effective communication strategies that Mastriana's mentor reviewed with her. Trybulski specifically advised Mastriana to start parent communication with "a positive opening regarding the child before addressing concerns" and framing the communication

"with positive solutions… so parents understand what we are doing at school to help." Nevertheless, Mastriana's e-mails "often launched bluntly into the problem, detail all of the issues, but fail to provide much in terms of positive behavioral or motivational strategies/solutions." Instead, Mastriana's e-mails demonstrated, for example, the following: "I will continue to give [student] lunch detention for his behaviors, but I am not sure how well he will be prepared for the (test) retake with no notes," or "I just wanted to make you aware of the issues." (Exhibit 3).

22. Mastriana acknowledged the accuracy of the 2014-2015 CAP summative review and did not file a rebuttal statement, despite her right to do same. (Exhibit 3).

23. A Teacher Summative Performance Report ("summative report"), dated June 6, 2015, was prepared for the 2014-2015 school year that evaluated Mastriana's job performance as a special education/resource center teacher for the District. (Exhibit 15). Mastriana's overall rating was determined to be "partially effective." The summative report set forth Mastriana's rating of "partially effective" in the following performance standards:

a. Professional Knowledge;

b. Instructional Planning;

c. Instructional Delivery;

d. Assessment of and for Learning; and

e. Professionalism.

24. The Administration delineated specific evaluative statements regarding Mastriana's inefficiencies for each of the five performance standards set forth in the 2014-2015 summative report. Despite her CAP and the comprehensive support the District provided and made available to Mastriana throughout the school year, her performance and overall summative rating declined for the 2014-2015 school year.

25. Under the individual performance standards of "Professional Knowledge," Mastriana demonstrated inconsistent understanding of the curriculum, content and student development and lacked fluidity in the use of her knowledge. During two of the three formal classroom observations in the 2014-2015 school year, the evaluators could not observe evidence of Mastriana's professional knowledge. (Exhibits 11 and 12). Specifically, Trybulski noted that during the April 17, 2015 observation,

professional knowledge was "[n]ot observed" as the "content teacher facilitated the presentation of material, student dialogue and class discussions throughout the period." (Exhibit 12). In other words, Trybulski did not see her actively engage with the students to address the specific and individual needs of the at-risk children she served.

26. With regard to the performance standards of "Instructional Planning," Trybulski noted that although Mastriana's lesson planning tended to improve toward the second half of the school year, she nevertheless demonstrated inconsistency in the "detail and degree to which those plans were complete and made available prior to the lessons." (Exhibit 15). Trybulski further noted that Mastriana demonstrated "limited evidence of best practices/effective strategies, significant modification [in] development of resources beyond those of the content teacher, or collection [and] application of formative data to inform or drive instructional decisions regarding individual needs for student growth on a consistent basis." (Exhibit 15).

a. During the October 29, 2014 formal classroom observation, Trybulski noted that it was not clear "what differentiates [Mastriana's] actions in the classroom from that of a content-specialist teacher." (Exhibit 9). Such observation was notable due to the Mastriana's assignment for the 2014-2015 school year solely as "in-class support." Due to Mastriana's limited assignment, it was particularly important for her to indicate specific actions or areas in which she was addressing student needs, reflecting IEP goals and accommodations, and not merely copy content teacher's objectives and student activities. Additionally, Mastriana's lesson plan document, as initially submitted, was "one long chart spanning over 100 pages" which made it "somewhat difficult to work with." (Exhibit 16).

b. At the completion of the December 11, 2014 formal classroom observation, the improvement panel member, Eloise Stewart ("Stewart"), encouraged Mastriana "to find a way to share [her] lesson plans so they are available for easier access." (Exhibit 10).

c. Mastriana apparently did not fully heed Stewart's advice, because two months later, during the February 11, 2015 formal classroom observation (which Mastriana was aware of in advance), the evaluator, Michael Volpe ("Volpe"), was unable to review the lesson plans for the week; they were not available, and had not been put into the shared Google Drive before the lesson, *even though they are required to*

*be consistently available*. Volpe also reiterated Trybulski's recommendation that Mastriana differentiates her lesson plans from the ones of a content teacher by finding ways to accommodate and support individual student needs. (Exhibit 11).

27. Mastriana's performance in the performance standards of "Instructional Delivery" declined from the previous school year. The classroom observations on October 29, 2014, December 11, 2014, February 11, 2015, and April 17, 2015 provided "limited" and "inconsistent" evidence of Mastriana's use of varied instructional strategies that would engage students in meaningful activities while simultaneously consider the students' individual needs and advance learning. (Exhibits 9, 10, 11 and 12).

a. During the formal classroom observation on February 11, 2015, Volpe observed and noted the following:

> Ms. Altomari, the classroom teacher, began today's class by giving an overview of the next unit through the end of March… When some students had some difficulty in following the directions to download the textbooks, Ms. Mastriana helped one student step by step to download the textbook. During this time, Ms. Mastriana went to the back of the class to assist a student who was taking a make-up quiz for a brief period. After the students all attempted the download, they were directed to come to the back of the class where they would be discussing eclipses. This was 22 minutes into the period. Ms. Mastriana went to continue to work with the student who was taking the quiz. After helping the student, Ms. Mastriana joined the group in the back of the class where Ms. Altomari was using globes and lights to create shadows on the wall. During this time, Ms. Mastriana watched Ms. Altomari's presentation. With two minutes left, students were told to go back to their seats as they would watch a video about eclipses. A YouTube video was played, but had to get through a commercial before starting. The video then started and was watched for approximately 1 minute and 20 seconds. At that time, the bell rang and students left the class.
>
> [Exhibit 11].

Mastriana thus did not demonstrate an effective and efficient use of her time in the classroom, notwithstanding the fact that she was fully aware of Volpe's presence and

her prior less than favorable observation reports. As Volpe suggested, the textbook could have been downloaded ahead of time, allowing the students to focus on instruction. Additionally, once Mastriana's immediate assistance was no longer required, she did not proactively engage in the lesson and instead sat in the back of the classroom, passively watching the presentation by the content teacher. Ultimately, Mastriana demonstrated a lack of planning and coordination with her co-leader, resulting in a less than effective lesson.

b. Mastriana's lack of effort to seek out opportunities to engage students using instructional strategies and resources to enhance lessons and overall academic development was evident *in all* of her formal observations, as expected of an instructional aide, not a certified special education teacher. (Exhibits 9, 10, 11, 12 and 15). According to the evaluator, Mastriana mostly circulated throughout the classroom, "periodically checking on student and quietly addressing questions as needed." (Exhibit 12).

28. In the individual performance standards of "Assessment of and for Student Learning," Mastriana's rating was "partially effective" due to her limited selection of assessment strategies, inconsistent linking of assessments to intended learning outcomes, and lack of use of assessments in planning and modifying instruction. (Exhibit 15).

a. Trybulski provided the following comments regarding Mastriana's performance in the area of assessments of and for student learning:

> [T]here is limited evidence of any systematic approach to gathering, analyzing, or maintaining data on a consistent bas[i]s regarding academic progress or behavioral interventions. A critical role of in-class resource support is to provide for the use of formative assessment and specific/focused data collection on student behaviors and/or academic progress that can in turn be shared with students to help develop self-monitoring skills, with parents to help inform their support at home, and with teachers/CST to help monitor and inform instructional methods and program decisions.
>
> [Exhibit 15].

b. Both the February 11, 2015 and April 17, 2015 formal classroom observations produced *no evidence* of "assessments of and/or for learning" on Mastriana's part. (Exhibits 11 and 12).

29. Mastriana's rating in the performance standards of "Professionalism" also declined from the prior school year. (Exhibits 1 and 15). Although she attended mandatory in-District professional development courses and activities, that all teachers attended, she did not avail herself of any other performance development activities as required by her CAP, there was limited evidence of specific application of *any* learned strategies to enhance student participation, differentiate instruction, increase student performance or, at the very minimum, demonstrate reflection of such efforts. (Exhibits 8 and 15). Despite the fact that the Administration specifically identified improvement in communication with parents as a focus in Mastriana's 2013-2014 summative performance review and CAP, the examples of communication with parents at the mid-year review reflected "a lack of sensitivity toward providing meaningful resources, strategies or follow-up to address concerns or developing issues." (Exhibits 1, 3 and 15).

a. For example, in October 23, 2014 e-mail correspondence to N.I.'s parents, Mastriana stated the following:

> We have had a couple incidents with [N.I.] today. When he first came to class he asked me to go to the bathroom. I did let him go when he didn't come back for a long time I went and waited for him to come out. While coming out of the bathroom he was putting his phone away. He was gone for 10 minutes. The same thing happened yesterday. We cannot have him out of class for that long so I am not going to allow him to go to the bathroom during period 8.
>
> When he came back to class he started playing with his empty water bottles creating a lot of noise and distracting the other kids in the class. Mrs. Kiel asked him to put his empty water bottles away. Instead he got up and was walking over to the sink. When I asked him what he was doing he said he was going to fill them up. I told him no and to sit down, and he proceeded to tell me to get out of his way several times. When I refused to move he walked around the table and went and filled his water bottled up.

I am not sure how to handle [N.I.] at this point. Every method I have tried does not seem to work.

[Exhibit 19]. This merely identified problems without providing solutions.

b. Mastriana clearly demonstrated lack of sensitivity and meaningful solutions in her correspondence with N.I.'s parents. Additional e-mails provided by Mastriana, *which she submitted* as samples of her successful communication with parents, included short confirmation responses regarding parents dropping off their children for extra help. (Exhibit 20). Notably, in Mastriana's final CAP documentation log, she confirmed at the very beginning of the school year, on September 29, 2014, that she discussed proper ways of writing e-mail correspondence to her student's parents with her mentor. Specifically, she documented, "[w]hen writing an email about what the child didn't do or for negative behavior always start the email off with positive opening… [f]rame the email with the problem and a possible solution. This lets the parent know what we are doing at school to help." (Exhibit 14). Notwithstanding the foregoing, Mastriana's correspondence with parents does not demonstrate her implementation of the proper parent communication procedures.

c. The final CAP documentation log created by Mastriana demonstrates that on October 13, 2014, she confirmed that she will be "[s]ending home 1-2 positive emails a week to parents." (Exhibit 14). However, Mastriana failed to provide *any evidence* of weekly positive communication with the parents.

d. Further, during two separate formal classroom observations, on February 11, 2015 and April 17, 2015, evaluators were unable to ascertain any evidence of professionalism on the part of Mastriana. (Exhibits 11 and 12).

30. Importantly, Mastriana's performance has been declining and in need of improvement as early as the beginning of the 2005-2006 school year and demonstrates a pattern of ineffectiveness and inefficiency. In Mastriana's annual performance report for teaching staff members for the 2005-2006 school year, Trybulski noted the need for improvement in the following three areas: employing instructional methods and materials that are most appropriate for meeting stated objectives, providing activities

and experiences to meet the needs, interests and abilities of students, and creating a classroom environment that is conductive to learning and appropriate to the maturity and interests of students. (Exhibit 22). During the January 17, 2006 observation, Mastriana demonstrated lack of preparedness for class by failing to have an actual lesson plan prepared for that day. (Exhibit 23). During the classroom observation, Mastriana also did not provide her students with sufficient time to respond to questions and instead quickly proceeded to call on other students. Mastriana's observer, William Lyons, the Director of Special Services at the time, also recommended for Mastriana to be "more animated," use her voice "to show enthusiasm and excitement," and to "[e]njoy the class." Importantly, he noted that if her "performance continues at this level, a recommendation for future employment in Hillsborough cannot be made." (Exhibit 23). Notably, Mastriana's lack of enthusiasm proceeded to be a concern years after it was first brought to her attention in the 2005-2006 school year.

31. Mastriana's 2006-2007 annual performance evaluation demonstrated the need to improve the area of "questioning," requesting that Mastriana "include questions which elicit the higher level of thinking skills, such as applying, synthesizing, analyzing, and evaluating." Mastriana was also provided with a defined professional improvement plan that would address such need. (Exhibit 24). Nevertheless, as evidenced in Mastriana's more recent 2013-2014 performance evaluation, she continued to have such deficiencies, as she still failed to consistently elicit higher level of thinking from her students, despite the support and guidance provided by the District. (Exhibit 24).

32. In the 2007-2008 annual performance review, Mastriana's supervisor noted the following:

> As demonstrated in your classroom observation this year, there is a definite need to work on better and current planning. Your plans were not reflective of the lesson your supervisor observed and did not show evidence of modifying curriculum and strategies to meet the need of your special education students… I do have some concerns about the role you play as the special education teacher on your team. In December of this school year, the district supervisor of special education issued you an evaluative memorandum reflecting the fact that you had not shared any information with your team about a student who was classified…. I am also very concerned to find that you had not followed through regarding our conversations about a plan to provide support for J.M.R.

[Exhibit 25].

Mastriana's lack of preparedness for class and lack of a defined role in the classroom have thus been outstanding concerns for years as well.

Further, Mastriana's 2007-2008 annual evaluation also demonstrated an issue regarding Mastriana's inability or unwillingness to form positive and collaborative relationships with teachers on her team. (Exhibit 25). During the 2007-2008 school year, Mastriana did not establish a "comfortable or positive" relationship with the teachers on her team and was transferred onto a different team to ensure that her relationships with colleagues do not interfere with the students' success. (Exhibit 25). That continued to be an issue, up to and including the 2014-2015 school year, as various teachers requested that Trybulski not pair them with Mastriana.

33. Mastriana's consistent lack of lesson planning and differentiation of instruction was also noted in her 2008-2009 annual performance evaluation. (Exhibit 26). Procedural timelines with specific improvement goals were implemented by the Administration to assist Mastriana in completing lessons plans, developing strategies in motivating disaffected and difficult students, developing an organized system of identifying the classified students on her team, gathering information regarding the students' progress, and achieving specific IEP goals and accommodations. (Exhibits 26 and 42). However, despite the support provided by the District, Mastriana continued to show lack of improvement in the areas specified above.

34. In fact, in the 2009-2010 school year, Mastriana's performance declined even further. (Exhibit 27). The persistent lack of improvement in lesson planning was noted *yet again* in the 2009-2010 annual performance evaluation. Mastriana failed to timely complete students' progress reports, transition statements, IEP goals and objectives, and present levels of academic achievement and functional performance ("PLAAFP") that are necessary for IEP reviews and parent meetings. (Exhibit 27). The CST issued at least four separate memoranda to Mastriana, addressing her failures to provide timely information. (Exhibits 27 and 28). Additional concerns were expressed regarding Mastriana's "inattentiveness in class, including sleeping, text-messaging and working on the computer during instructional class time" in January of 2010. (Exhibits 29, 30 and 43). Mastriana was once again provided with an improvement plan, developed by the Administration, in efforts to assist Mastriana with her declining performance. Notably, Mastriana's lack of preparedness for class

and timely completion of her duties as a special education teacher continued throughout the years and into the most recent 2013-2014 and 2014-2015 school years.

35. In the 2010-2011 school year, Mastriana continuously failed to demonstrate any improvement in her lesson planning, as evidenced in her annual performance evaluation. (Exhibit 31, Exhibit 44). Despite the administrative support and prior requests for improvement, Mastriana also continuously failed to prepare important records of student progress that are essential for monitoring students' response to intervention and for review of IEP and parent meetings.

36. Despite the Administration's repeated discussions with Mastriana regarding her lack of lesson planning, including by way of a meeting on March 27, 2012 and a follow up notice, Mastriana failed to respond to the notice or post lesson plans as requested. (Exhibits 32 and 33). The lack of lesson planning continued to be a major concern for the 2011-2012 school year. By the 2011-2012 school year, Mastriana "failed to comply with school policy regarding lesson planning… *for the past 5 years.*" (Exhibit 33) (emphasis added). Additionally, despite prior notices and requests, CST members were yet again forced to follow up with Mastriana throughout the school year in efforts to obtain required information for IEP review and development in advance of parental meeting and for proper monitoring and reporting of student progress. (Exhibit 34). In her annual evaluation, Mastriana was once again reminded that her limited attention to District standards for professional responsibilities "places the [D]istrict at risk for procedural violations, including failure to ensure student progress toward IEP objectives and [free and appropriate public education]." (Exhibit 33). The annual evaluation further expressed a concern regarding Mastriana's preparation and engagement in classrooms as well as "unexplained lateness to class or absence from significant portions of ICR classes." (Exhibit 33). Despite the administrative support in efforts to assist Mastriana in improving her performance, she continued to demonstrate an inability or unwillingness to meet the District's standards of professional responsibilities.

37. In her 2011-2012 annual performance evaluation the evaluator noted that, "[Mastriana] ha[d] indicated her participation in the special education PLC meetings, however, [Mastriana] ha[d] provided no evidence of efforts to complete lesson plans in accordance with school and department standards or to develop an organized system of identifying the classified students on team, their specific goals and accommodations, useful strategies for their success, and regularly conveying and

gathering information regarding the students' progress with the team. In addition, [Mastriana] made no attempts to meet with the principal as per her PDP for the past 2 years."[2] (Exhibit 33). Notably, in 2013-2014 and 2014-2015 school years, Mastriana also indicated participation in professional development, yet failed to demonstrate any evidence of incorporating the learned material into her teaching practice.

38. On June 20, 2011, based upon a recommendation of the Superintendent, the Board took action to withhold Mastriana's employment and adjustment increments for the 2011-2012 school year. (Exhibits 35 and 36). The Board's decision was guided by Mastriana's "overall performance" being "unsatisfactory" and "not reflecting the professional standards expected of the teachers in the [District]." (Exhibit 36). Importantly, Mastriana did not appear before the Board to persuade the Board not to withhold her increments, nor did she ever challenge or appeal the same. Thus, when Mastriana began the 2013-2014 school year, two years later, under the new rubric, she knew that her employment record and evaluations were a major concern—but was still unable or unwilling to change her teaching practices to obtain an evaluation within the effective range.

39. Indeed, although Mastriana's performance *temporarily improved* following the withholding of her increment, her annual performance evaluation for the 2012-2013 school year demonstrated "continued need of improvement in the level of support of students in the ICR setting, enhanced communication with parents/teachers, and even more significant academic engagement with students during ICR instructional time and during support." (Exhibit 37).

40. In sum, beginning with the 2005-2006 school year, Mastriana's teaching performance began to noticeably decline, as indicated by her annual observations and evaluations. As the District moved towards the adoption of the Common Core State Standards, and began to implement District-wide instructional initiatives, culminating with the full implementation of TEACHNJ and ACHIEVENJ, Mastriana's ineffective and inefficient teaching skills became increasingly evident. In the first full year of ACHIEVENJ implementation, Mastriana earned one of the *lowest ratings* within the District on the teacher evaluation rubric.

41. Throughout the 2013-2014 and 2014-2015 school years, Mastriana demonstrated *inefficiencies and ineffectiveness* in her

[2] She also made no attempt to meet with her supervisor, either.

teaching skills which deleteriously impacted the education of the students assigned to her.

42. Mastriana's evaluations for the 2013-2014 and 2014-2015 school years adhered substantially to the evaluation process.

43. Mastriana has never alleged any mistakes of fact in any of her observation reports or evaluation reports.

44. The instant tenure charges were brought consistent with *N.J.S.A.* 18A:6-17.3, which requires the Superintendent to file them in this circumstance, because of her partially effective ratings in two consecutive years and the absence of any exceptional circumstances warranting the deferral of such charges. In filing these charges, the Superintendent has not given any consideration to political affiliation, nepotism, or union activity, nor is he discriminating against Mastriana in violation of State or federal law, or engaging in other conduct prohibited by law.

45. The District's actions were, at all times, taken in good faith and in no way arbitrary or capricious.

46. Mastriana's continued ineffectiveness, and her unwillingness or inability to improve, constitute inefficiency that warrants her dismissal.

**BACKGROUND**

Respondent was hired by the Hillsborough Board of Education as a full time teacher in September 2003 after graduating with a B.A. from Temple University the same year. She is certified in teaching both Kindergarten through 12th grade Special Education and Kindergarten through Elementary Education. Since 2003, she has been assigned as an In-Class Support and Resource Room teacher for special education. For a majority of her classes, she co-teaches with another educator. Her main role is to support the special education students in a mainstream

classroom. She has worked at the Middle School for the relevant time period.

As part of its implementation of the TEACHNJ Law, the District has adopted the Stronge Teacher Effectiveness Performance Evaluation System (TEPES). The model uses seven performance standards; each comprised of numerous performance indicators to provide evidence of the standard. The seven standards are: 1) Professional Knowledge; 2) Instructional Planning; 3) Instructional Delivery; 4: Assessment of/for Learning; 5) Learning Environment; 6) Professionalism; and 7) Student Progress.

Classroom observations comprise one of the primary methods of data collection to assess teacher performance under the under the model. A minimum of three observations must be completed for each teacher, one of which must be a formal observation. The formal observations include a pre-observation conference in which the teacher has the opportunity to advise the administrator about the lesson to be delivered. In addition, a post observation conference is also conducted to ensure the teacher obtains feedback from the observation. These events are documented in the school's database platform, which is referred to as "OASYS".

The observations themselves are not specifically rated. Rather, they are used as "evidence" for the summative

evaluation, along with other sources of data, some of which may be supplied by the teacher.

The specifics of the model, including the scoring rubric, are included in a handbook, which was submitted into the record. The Stronge model was adopted by the District on a pilot basis in 2012-2014 school year and rolled out to the entire school for the 2013-2014 school year. Prior to the roll out, all teachers received an in-service training on the model. In addition, all evaluators receive annual calibration on the model to ensure they are applying the standards correctly.

2013-2014 School Year

Respondent received her first observation on October 29, 2013. The observation was conducted by Principal Trybulski. This was a long or 40 minute evaluation. Principal Trybulslki performed the pre-observation conference electronically on October 25, 2013. This included having the Respondent complete the pre-observation conference record where she provided her learning objectives and the materials she intended to use. Following the observation, Trybulski met with Respondent to have a post-observation conference.

Respondent's second evaluation was conducted by then Director of Special Services, Leonore Johnston on January 29, 2014. This was an announced short observation, which included a pre-observation conference. Respondent testified she recalled

speaking with Johnston following the observation and the comments were primarily positive.

Respondent received a third observation on March 12, 2014. This was a short unannounced observation which was conducted by Principal Trybulski. The observation contained mostly positive remarks. The results were posted on the database system. Respondent acknowledged the observation, but did not file any comments or responses to the observations.

At the end of the 2013-2014 school year, Dr. Trybulski completed Respondent's summative evaluation. This is the tool used under the model to rate the teacher for the year. All evidence, including the observations conducted during the year, as well as information contained in Respondent's documentation log went into the score. Respondent received a score of 2.58, which is considered Partially Effective Under the rubric. Of the seven indicators, Respondent receive partially effective in the following areas: 1) Professional Knowledge; 2) Instructional Delivery; 3) Learning Environment.

2014-2015 School Year

Based upon her 2013-2014 summative evaluation, Respondent received a Corrective Action Plan for the 2014-2015 school year. Under the TEACHNJ regulations, the plan is to be developed

between the principal and the teacher in order to provide a roadmap to improvement.

CAP requirements include having the teacher observed by at least two observers during the year and also an additional observation of at least 20 minutes. In addition, the teacher must be given a mid-year evaluation. The written CAP must include a description of the documented deficiencies, timelines for corrective action and a detailed list of responsibilities for both the teacher and the District.

Respondent's CAP was developed by Dr. Trybulski. He testified he shared the plan with Respondent prior to their meeting to provide her with the opportunity to give input into it, but she did not make any comments. Respondent explained that based upon her experience in the school she did not believe Trybulski welcomed any input. Respondent testified she understood the expectations that were set forth in the CAP.

Respondent received her first observation that school year on October 23, 2014. This was an announced observation. The school's records show the pre-observation documentation was submitted online. According to Dr. Trybulski, he offered to meet with Respondent beforehand, but she did not come to see him. Following the observation, Trybulski met with Respondent and then finalized his report.

Dr. Stewart conducted Respondent's second observation on December 2, 2014. As this was an unannounced observation, no pre-observation was conducted. Following the observation, Dr. Stewart conducted a post observation conference with Respondent. Respondent had access to the observation before the conference. According to Dr. Stewart, Respondent acknowledged and demonstrated she understood the concerns expressed in the observation report. Respondent did not file any objections to the observation.

According to Dr. Trybulski, he contacted Respondent on January 5, 2015 to meet with her regarding her mid-year evaluation. At that time, he requested Respondent provide him documentation regarding her progress with her CAP. Trybulski did not receive the type of material he expected and requested she provide additional documentation.

Trybulski reviewed the material and a document meant to summarize his assessment of her progress. He shared this plan with Respondent prior to their meeting. Specifically, Trybulski found Respondent failed to make any progress toward her participation in professional development to enhance student learning. He noted she failed to include specific strategies in her lesson plan, as required by her CAP, to show specific strategies to show improvement. She failed to to meet with her mentor teacher. She also did not show evidence of systematic

gathering of formative data to guide instruction and give feedback to parents.

The areas where Trybulski noted some progress included implementation of varied instructional strategies; 2) her book study project on the teenage brain; and 3) meeting with her mentor teacher to discuss enhancing communication skills with parents.

Respondent received her third observation on February 11, 2015. This was an unannounced observation conducted by Human Resources Director Volpe. Volpe testified that he stayed longer than the planned short observation because of the nature of her assignment. According to Volpe, he was surprised by Respondent's performance (she watched a presentation with the students) and offered Respondent the opportunity to have an additional observation if she believed this observation did not properly reflect her performance. Respondent did not object to this observation report either in writing or verbally when she met with Volpe.

Dr. Trybulski conducted a fourth observation of Respondent on April 7, 2015. This was an unannounced observation, and therefore, only a post observation conference was held. Respondent acknowledged the observation and did not file any written or verbal comments.

Dr. Trybulski also met with Respondent on April 28, 2015 to review her CAP. Trybulski testified that as of that date, she had not made any meaningful progress toward her CAP. She did not meet any of the four goals laid out under the plan. Trybulski testified Respondent had not attended any professional development in the areas they discussed, nor had she observed her mentor teacher. Respondent did not note any problems she had in achieving these goals.

Respondent's summative evaluation was prepared on June 3, 2015. At that time, she received a score of 2.54 on her summative evaluation, which is considered partially effective under the rubric. Respondent and her Union Representative Mr. Goodhue requested the opportunity for her to upload additional documentation to be considered. Dr. Trybulski testified he reviewed all of the documentation submitted, but it did not impact her evaluation score.

As a result, the District filed charges of inefficiency against Respondent in accordance with TEACHNJ.

**Positions of the Parties**

Position of the Board

The Board maintains it has complied with the statutory requirements to sustain charges of inefficiency under TEACHNJ. It notes the legislature specifically limits arbitrators' decision making authority to determine whether one of four

factors materially effected the outcome of the evaluation. In so doing, the arbitrator is prohibited from questioning the evaluator's determination of the quality of instruction; thus the arbitrator must determine the case based solely upon the factors noted. To that end, the Board maintains there is no evidence it did not substantially comply with the evaluation procedure, made a mistake of fact in the evaluation or was arbitrary or capricious.

According to the Board, it has demonstrated substantial adherence to the evaluation process during both the 2013-2014 and 2014-2015 school years. With respect to 2013-2014, it notes the District adopted the Stronge TEPES model, which was one of the evaluation rubrics specifically approved by the Department of Education as compliant with its regulations. According to the Board, the record evidence shows all evaluators were trained and calibrated under the model and all teachers were provided in-service training to ensure their understanding of the procedures.

With respect to the evaluation process, it maintains the record evidence shows Respondent was observed at least three times and at least once each semester in accordance with the regulations. It notes two of her observations were announced and preceded by an electronic pre-observation conference which is allowable under the regulations. Post observation

conferences followed the observations and the record evidence shows, the Board maintains, Respondent was provided feedback regarding the observation and the opportunity to dispute any of the findings.

With respect to the 2014-2015 school year, the Board argues the record evidence also demonstrates substantial adherence to the evaluation process. It notes that it developed a CAP for her as required by Section 6A:1-02.5(a)-(e); conducted at least four observations of her using multiple observers as required by statute; and ensured she received a mid-year evaluation.

The Board argues the Board timely met with Respondent to review her performance under the CAP in February 2015 at which time her deficiencies were explicitly stated. They included failure to demonstrate progress toward participating in professional development to enhance student learning; failed to include specific strategies in lesson plans; failed to visit the classroom of her mentor teacher; and failed to show evidence of gathering formative data to guide instruction. It notes Dr. Trybulski met with Respondent to discuss these issues and provided resources for her to meet these goals.

The Board cites Respondent's 2014-2015 summative evaluation and end of year failure to meet the standards of her CAP as the basis for her end of year partially effective rating. It notes Respondent was provided the opportunity to raise any issues

regarding her observations or provide any documentation to show her compliance with the CAP, which she never did. It notes Respondent's only explanation was, that it was pointless to dispute his assertions. The Board maintains that any minor deviations did not impact substantial compliance with the process. It argues that although the pre-observation conferences were electronic, Respondent was provided the opportunity to meet with Dr. Trybulski but declined.

The Board notes the goals set in her CAP were clear and Respondent acknowledged understanding them. According to the Board, the summative evaluation was made based upon the classroom observations that were conducted, as well as the documentary evidence provided by Respondent and gathered in preparation for the evaluation. It argues Respondent had the opportunity to achieve an effective rating, even if she failed to meet all the terms of the CAP.

The Board noted that recent arbitrator decisions support the conclusion that it adhered to the procedures and that Respondent failed to meet her burden to demonstrate that any such action or inaction materially affected the outcome of her evaluation.

The Board notes the only evidence of "mistakes of fact" in either her 2013-2014-2015 evaluations were not material. It argues during the hearing, Respondent raised only three things

she characterized as "mistakes of fact". First, was the comment in her observation that she huffed or sighed audibly because of frustration. It argues she did not dispute whether she sighed, but only that it was not out of frustration for the students. The Board notes the observation was that the sighing appeared this way to the reviewer. It notes that it was therefore not a mistake of fact, but even if it were considered to be one, there is no evidence it would have materially affected the outcome of her overall evaluation.

Second, it notes Respondent claimed that concerns about her lack of sensitivity to her students and failure to provide a safe and supported environment were never brought to her attention. The Board argues that she never took issue with these allegations until after charges were filed against her. The Board notes it has provided extensive documentation of her email communication with parents to support this conclusion.

As to the 2014-2015, Respondent raised only one mistake of fact, that her lesson plans were not readily available. The Board contends there was evidence to support this observation, but that even if it did constitute a mistake of fact, there is not evidence it materially affected the outcome of her evaluation.

The Board argues the evidence shows the Board adhered to the evaluation process by observing Respondent at least three times and at least once per semester. It argues two of the

Position of Respondent

Respondent argues the charges must be dismissed because the Board cannot meet its burden to demonstrate it has complied with the evaluation process as required by TEACHNJ. It maintains there is a paradox raised by Respondent's receiving a highly effective rating for student achievement for both years at issue while being rated partially effective for the year. It avers that Respondent's partially effective ratings, therefore, are based on serious flaws in the evaluation process which require the charges to be dismissed.

First, Respondent contends the Board failed to comply with the law and regulations applicable to the teacher evaluation process. Specifically it maintains, the record evidence shows: a) the Board of Education did not approve an evaluation rubric prior to the 2014-2015 school year; b) the Board could not confirm whether all teachers were notified of the evaluation procedures adopted by the Board of Education for both school years at issue; c) the Board could not confirm whether the District notified the Department of Education of the instruments that would be used in connection with the District's evaluation rubric or the 2014-2015 school year; and d) the Board could not

provide evidence it certified to the Department of Education that its observers met the necessary statutory requirements as required by law. Respondent maintains these were material deficiencies. It maintains that after four days of testimony, the Board failed to show what exactly the "Stronge Model" is. Given the Board's failure to follow the law, Respondent maintains it cannot ask the undersigned to presume its subjective assessments of Respondent's performance are correct.

Secondly, Respondent maintains the Board improperly evaluated Respondent as if she were a general education teacher. Respondent maintains her role as an in-class support teacher is distinct in that she plays a supporting role in a "one teach, one support" co-teaching model. As a result, it argues, even Principal Trybulski recognized that her unique role gave her limited opportunity to demonstrate her mastery of the TEPES. However, it argues, Trybulski admitted he did not expand his observation and he chose to evaluate Respondent when observing another teacher who was also on a CAP the same year. As such, Respondent did not have the opportunity to demonstrate her skills.

Third, Respondent argues the Board's 2013-2014 evaluation was premised on a mistake of fact, which materially impacted her score. It notes her evaluation was premised on the score Respondent received for "Learning Environment" which Principal

Trybulski wrote "students who did not feel safe, supported, understood or respected by Ms. Mastriana." However, Respondent argues there is no evidence for this claim. It notes no one mentioned this to her throughout the year. Trybulski justified this with mention of only one student and the allegations were vague. Respondent argues there is no competent evidence to support this allegation and therefore given how close Respondent came to receiving an effective rating, it is clear this materially impacted her score.

Fourth, Respondent argues the Board acted arbitrarily and capriciously when it evaluated Respondent poorly for failing to provide extra help. It cites Trybulski's testimony that Respondent's 2013-2014 summative evaluation was affected because she did not offer "before or after school help during the school year. It argues there was no contractual obligation to offer such help and, therefore, it cannot be a factor for scoring an evaluation. Moreover, it argues Respondent was never aware that this was an expectation. It maintains it was an unfair expectation to arbitrarily require, especially since she had child care issues to attend to before and after school.

Finally, Respondent argues the Board failed to follow the CAP provided to Respondent. Specifically, the CAP required Principal Trybulski to work with Respondent - yet he never met with her to discuss the content and ideas generated from the

book assignment given to her, never took any meaningful steps to identify appropriate professional development resources and gave her no feedback and failed to take the initiative to arrange coverage for her to observe her mentor teacher. Moreover, it argues, Trybulski never conducted additional observations as specified in the CAP.

Decision

After carefully considering the entire record before me, including my assessment of witness credibility and the probative value of evidence, I find the Board has met its burden under the statute to sustain the charges of inefficiency against Respondent. My reasons follow.

Charges of inefficiency are specifically governed by TEACHNJ, which not only provides specific requirements for the teacher evaluation process, but also the limits the decision-making authority of the arbitrator in the process. To that end, the statute provides that in rendering a decision, an arbitrator "shall only consider whether or not"

1 The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
2 There is a mistake of fact in the evaluation;
3 The charges would not have been brought but for the consideration of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
4 The district's actions were arbitrary or capricious.

The statute prohibits the arbitrator from reviewing the evaluator's qualitative determination of an employee's classroom performance. If the arbitrator finds that none of the above factors were either present or materially affected the outcome of the evaluation, "the arbitrator shall render a decision in favor of the Board and the employee shall be dismissed." N.J.S.A. C.18A:6-17.2 23.b

The credible record evidence shows Respondent received partially effective summative evaluation ratings in the 2013-2014 and 2014-2015 school years. The 2013-2014 summative evaluation resulted from a record of three observations, documentation from Respondent's documentation log and results from Respondent's students in meeting their School Growth objective. The 2014-2015 summative evaluation was based upon four observations performed with at least two different reviewers, documentation including a CAP, and the student achievement score, made up her Student Growth Objective.

Respondent's contentions that the Board failed to adhere to the regulations regarding the evaluation process is not supported by the credible record evidence. I credit Dr. Schiff's testimony the Board approved the evaluation policy submitted by the District, which specifically referenced the evaluation rubric used by the District. Of course, it was the

same rubric used the year before. Thus, I find no basis to find it was not properly approved.

Likewise, I find insufficient record support to find that teachers failed to be notified of the evaluation procedure as required under the statute. Both Dr. Trybulski and Dr. Schiff testified the entire staff received a one-day training session on the new evaluation procedures at the start of the 2013-2014 school year. The record evidence included a letter issued by Dr. Schiff advising the staff of the training and Respondent acknowledged receiving in-service training.

In addition, I find no merit to the claim that the Board failed to satisfy whether the District certified to the Department of Education that the District Observers met the necessary statutory requirements. I credit Dr. Trybulski and Dr. Stewart regarding the training they received, including ensuring they were properly calibrated. They both described receiving training in the each of the standards and scoring a mock evaluation in each standard.

Finally, I note the model adopted by the District is one of the four evaluation models specifically approved by the Department of Education. Thus, even if any particular element were not satisfied to the letter under the statute (i.e., a timeline failed to be met), it is clear that the model used complies with the statutory requirements for the evaluation

process and, I find no basis for determining any technical violation existed which materially affected Respondent's evaluation during the relevant time period.

I find no record support for Respondent's allegations the Board improperly evaluated her as a general education teacher rather than as an in-class support teacher. Respondent bases its contention upon a comment made in her October 23, 2014 evaluation by Dr. Trybulski. He noted the lesson he observed was driven mainly by the content teacher and because Respondent's assignment that year was as an in-class support teacher, additional short observations might be necessary in order to gather evidence on all seven indicators.

I do not Trybulski's comment to reflect a difference in the procedural standards applied to Respondent in the evaluation process. No such distinction exists in the statute or the Stronge evaluation model. In fact, Dr. Trybulski testified the same standards of evaluation are applied to all teachers. Susan Eckstein provided numerous examples of how Respondent, as a co-teacher in special education could meet all of the standards. She noted co-teaching requires planning and cooperation between the teachers. Such planning and cooperation would ensure Respondent being able to implement specific strategies such as using various assessment tools, such as exit tickets, which were indicated in her CAP.

While Dr. Trybulski acknowledged he did not increase the number of times Respondent was observed, Respondent was observed in accordance with the standards required under the statute. Moreover, the record evidence shows Respondent's 2014-2015 summative evaluation contained evidence of all seven indicators. As a result, I find no material deficiency in the evaluation process.

There is insufficient record support to substantiate Respondent's contention that her 2013-2014 summative evaluation was based on a mistake of fact, as alleged. Respondent argues her 2013-2014 summative evaluation rating of partially effective in the Learning Environment standard is mistakenly premised upon an allegation that students did not feel safe and supported by her. However, I credit Dr. Trybulski's testimony. He testified more than one parent expressed concerns to him regarding Respondent's insensitivity in class. He noted this was a specific concern in her CAP and assigned Respondent work with Ms. Eckstein on these issues. Ms. Eckstein testified she addressed these issues with Respondent directly. Given this evidence, I do not find there was a mistake of fact in Respondent's evaluation.

The record evidence also does not support Respondent's contention the District acted arbitrary and capricious by evaluating Respondent poorly for failing to provide extra help

2013-2014 school year. I note the issue was not cited in Respondent's summative evaluation. Rather, Respondent's CAP included a requirement to provide additional help to students outside of classroom hours. On cross-examination Dr. Trybulski testified that he considered it an element of professionalism and noted that there were many things teachers were required to do outside their school day.

I note Respondent fulfilled this aspect of her CAP and did not grieve it as being outside the scope of her duties. Moreover, while Trybulski testified that he considered this an aspect of professionalism, I did not find his testimony to indicate that it materially affected her 2013-2014 evaluation.

Finally, I do not find record evidence showing the District failed to follow its obligations under the CAP. While Dr. Trybulski did not meet with Respondent to discuss the book assignment given to Respondent, she met with Ms. Eckstein regarding this assignment.

As noted in prior arbitration decisions, the CAP is a two-way street with obligations falling to both parties. In this case, the evidence shows Respondent was specifically advised to seek out professional development opportunities to assist with enhancing student participation, and differentiated instruction. Dr. Trybulski testified he discussed with Respondent the various places where she could find such courses. Respondent never

identified such opportunities, nor did she advise her supervisor of any difficulties she had in finding these resources.

Likewise, I find no basis for Respondent's contention the District took no action in arranging substitute coverage for Respondent to observe her mentor teacher. The record evidence shows Dr. Trybulski specifically advised Respondent he would provide her such time. However, Respondent testified she never asked Dr. Trybulski. There is no evidence to suggest he would not have provided her such time, especially since it was a CAP requirement. Here, the evidence demonstrates Respondent failed to take responsibility and comply with its requirements.

Finally, I return to Respondent's most compelling argument - how close she came each year to being rated Effective in both of the relevant school years. The record evidence shows her students were succeeding and yet she failed to achieve an effective rating. However strange this may seem, the legislature determined the weight that student achievement should play in a teacher's rating and the type of review to which the evaluation process is subject. Having found none of the statutory factors present that would materially impact Respondent's evaluations in either 2013-2014 or 2014-2015 school years, the undersigned is required by statute to uphold her termination from service.

**AWARD**

The charges of inefficiency against Respondent Nancy Mastriana are substantiated.

Deborah Gaines

Dated: April 16, 2016

Deborah Gaines, Arbitrator

Affirmation
State of New York }
County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: April 16, 2016

Deborah Gaines

151-16

| | | |
|---|---|---|
| K.B., ON BEHALF OF MINOR CHILDREN, A.U., G.U., B.U., A.U., and T.U., | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, | : | |
| RESPONDENT, | : | COMMISSIONER OF EDUCATION |
| AND | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | |
| C.U., | : | |
| RESPONDENT. | : | |

## SYNOPSIS

In these consolidated matters, petitioner K.B. – on behalf of her five minor children – appealed the determination of the respondent Board that her children did not reside in Branchburg when they attended the Township of Branchburg Schools from November 2014 to June 2015, and therefore petitioner owed tuition for the period of ineligible attendance; the Board subsequently filed a petition, consolidated herein, seeking tuition reimbursement from K.B.'s ex-husband, C.U. – the father of the five children. C.U. never submitted an answer to the Board's petition.

The ALJ found, *inter alia,* that: In 2012, K.B. and C.U. entered into a joint legal and physical custody agreement which stipulated that K.B. would be the parent of primary residence for purposes of determining school districts; at the time of the custody agreement, both parents resided in Branchburg; in November 2014, C.U. relocated his domicile to Bridgewater Township; as of the beginning of the 2014-2015 school year, all five children remained enrolled in Branchburg schools, but – commencing no later than November 2014 – all of the children began residing continuously and exclusively with C.U. at his residence in Bridgewater; a court order dated February 4, 2013 sets forth a new custody arrangement, whereby legal custody is shared between the parents and physical custody continues with the father, C.U.; the children remained enrolled in Branchburg schools until the end of the school year in June 2015, when they were withdrawn; K.B.'s domicile changed in November 2014 when she relocated to a trailer in Long Valley; there is ample evidence that petitioner was not domiciled in Branchburg from November 2014 to June 2015; and the testimony of K.B. was lacking in credibility, as she was not forthcoming with information about her actual domicile as of November 2014. The ALJ concluded that petitioner has failed to prove by a preponderance of credible evidence that she was domiciled in the Branchburg Township School District from November 2014-2015; further, C.U. has failed to file an answer to the Board's petition despite numerous notices; accordingly, the Board's request for a default judgment was granted. The ALJ ordered K.B.'s petition dismissed and granted the Board's default order for tuition reimbursement.

The Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner directed K.B. and C.U. to reimburse the Board for tuition in the amount of $ 54,966.16.

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

Issued 4/21/16

OAL DKT. NOS. EDU 07023-15 AND EDU 13033-15 (CONSOLIDATED)
AGENCY DKT. NOS. 88-4/15 AND 110-5/15

| | | |
|---|---|---|
| K.B., ON BEHALF OF MINOR CHILDREN, A.U., G.U., B.U., A.U., and T.U., | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, | : | |
| RESPONDENT, | : | COMMISSIONER OF EDUCATION |
| AND | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, | : | |
| PETITIONER, | : | |
| V. | : | |
| C.U., | : | |
| RESPONDENT. | : | |

The record of these consolidated matters and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner K.B. filed exceptions and the Board filed a reply thereto.[1]

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that K.B. failed to sustain her burden of establishing that she was a domiciliary of Branchburg from November 2014 to June 2015. The Commissioner further agrees with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during this time.

[1] Petitioner K.B.'s exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4, so they were not considered by the Commissioner. As K.B.'s exceptions were not considered, the Board's reply was also not considered.

Additionally, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that respondent C.U. is in default due to his failure to file an answer or otherwise respond to the petition. The Commissioner notes that C.U. was directed to file an answer on numerous occasions – including May 14, June 9, and August 7, 2015 – and was informed that if he failed to do so, each count in the petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e).[2] C.U. did not file an answer, nor did he appear for any telephone conference or hearing at the OAL. As such, the Board's claim that C.U. should be assessed tuition for the period of his children's ineligible attendance in the District is deemed admitted.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against K.B. and C.U. for the time period during which the minor children were ineligible to attend school in Branchburg. Therefore, the Board is entitled to tuition reimbursement in the total amount of $54,966.16 ($78.59 per day for 139 days for A.U., G.U., B.U., and T.U. and $81.08 per day for 139 days for A.U.) for the time period from November 2014 to June 2015.

Accordingly, the Initial Decision of the OAL is adopted – for the reasons expressed therein – as the final decision in this matter. K.B. and C.U. are directed to reimburse the Board in the amount of $54,966.16 for tuition costs incurred during the time period that the minor children were ineligible to attend school in Branchburg.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/16

Date of Mailing: 4/21/16

[2] The Commissioner transmitted the case against C.U. (Agency Dkt. No. 110-5/15) to the OAL without an answer because it was directly related to Agency Docket Number 88-4/15, which was scheduled for a hearing.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
(CONSOLIDATED)

**K.B. ON BEHALF OF MINOR CHILDREN, A.U., E.U., B.U., A.U. and T.U.,**[1]
Petitioner,
v.
**TOWNSHIP OF BRANCHBURG BOARD OF EDUCATION, SOMERSET COUNTY,**
Respondent.

OAL DKT. NO. EDU 7023-15
AGENCY DKT. NO. 88-4/15

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and

**BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,**
Petitioner,
v.
**C.U.,**
Respondent.

OAL DKT. NO. EDU 13033-15
AGENCY DKT. NO. 110-5/15

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**K.B.**, petitioner, pro se

[1] The official caption incorrectly sets forth a child E.U. that should be G.U. There is no child E.U.

**David Rubin**, Esq., for respondent/petitioner Township of Branchburg Board of Education

No appearance by or on behalf of respondent **C.U.**

Record Closed: December 9, 2015 Decided: March 10, 2016

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

## STATEMENT OF THE CASE

Petitioner K.B. ("petitioner"), on behalf of her minor children A.U., G.U., B.U., A.U., and T.U., appeals the determination of respondent Township of Branchburg Board of Education ("Board" or "respondent") that the children did not reside in the Branchburg Township School District when they attended the District's schools from November 2014 to June 2015, and the Board's assessment of tuition for the period of the students' ineligible attendance in the schools of the District, pursuant to N.J.S.A. 18A:38-1. The Board filed a petition seeking tuition reimbursement from K.B.'s ex-husband, C.U., the father of the five children.

## PROCEDURAL HISTORY

On March 26, 2015, the Board conducted a hearing to determine the district of residence of petitioner's children A.U., G.U., B.U., A.U. and T.U. Both K.B. and her ex-husband C.U. attended. On March 30, 2015, the Board determined that the children were not eligible to attend school in Branchburg based on their alleged residency in Bridgewater since November 2014. Petitioner K.B. filed a petition of appeal with the Commissioner of Education challenging the Board's determination on April 23, 2015. The Commissioner transmitted the petition to the Office of Administrative Law (OAL), where it was filed on May 15, 2015 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The Board answered and filed a counterclaim for back tuition for the period of ineligible attendance. On August 27, 2015, the Board filed a motion for summary decision seeking dismissal of the petition

and back tuition. On September 17, 2015, petitioner filed opposition to the motion. On September 21, 2015, I received the Board's reply to petitioner's opposition. I denied the motion for summary decision by Order dated September 22, 2015.

The hearing was scheduled for September 30, 2015, to determine residency as well as tuition, if proven to be owed. However, that date was adjourned due to the Board's filing a petition against C.U. for back tuition owed. That petition was consolidated with that of K.B. C.U. never answered the petition and never participated in any of the telephone conferences that we had regarding the case. A new hearing date of December 9, 2015, was scheduled. Prior to the hearing, on October 19, 2015, K.B. filed a motion to dismiss under N.J.S.A. 18A:38-1.1, supplementing a previous statute she had sent without legal argument, explaining that she would have asserted the argument earlier had she known of the existence of the statute. I also received documents from the Department of Children and Families, Division of Child Protection and Permanency, released to me for my in camera review pursuant to N.J.S.A. 9:6-8.10(b). On November 13, 2015, I issued an Order denying petitioner's motion to dismiss. In the Order, I set forth the reasons that I would not find in her favor under the "family-crisis" exception set forth at N.J.S.A. 18A:38-1.1 and N.J.A.C. 6A:4-2(h)(1). The Order explains why I would not consider evidence regarding "family crises" at the hearing.

On December 9, 2015, I heard the case and closed the record, except that I gave Mr. Rubin two weeks to submit a formal request for default judgment against C.U., since C.U. never answered the Board's petition against him. I received the materials supplementing the oral request on December 11, 2015.

## STATEMENT OF FACTS

The following facts are undisputed, according to the pleadings submitted by the parties.

1. K.B. and C.U. are the mother and father of five children, A.U., T.U., G.U., B.U. and A.U.

2. K.B. and C.U. entered into a Separation and Property Settlement Agreement on June 5, 2012, providing for joint legal and physical custody of their children and shared living arrangements whereby the children would reside with each parent roughly half-time every week. The agreement provided that K.B. shall be the parent of primary residence for purposes of determining school districts. (Exhibit R-7.)

3. The Agreement provided, "The parties shall have joint legal and physical custody of the parties' minor children. The wife shall be the parent of primary residence for purposes of determining school districts as it is agreed that the parties' son [T.U.] has special needs." (Exhibit R-7 at 2.)

4. When the Agreement was entered into in 2012, both K.B. and C.U. resided in Branchburg, at different addresses, and all five children were enrolled in the Branchburg Township School District.

5. As of the commencement of the 2014–2015 school year, K.B. owned a residence at 451 B. Court in Branchburg.

6. In November 2014, C.U. relocated his domicile to Bridgewater Township in the Bridgewater–Raritan Regional School District.

7. As of the commencement of the 2014–2015 school year, all five children remained enrolled in Branchburg, including T.U., a special education student placed by Branchburg at an out-of-district special education school. Commencing no later than November 2014, all five children began residing continuously and exclusively with C.U. at his residence in Bridgewater.[2]

8. On March 3, 2015, the Board's counsel gave written notice to K.B. and C.U. of the District's preliminary determination that their children were not eligible to attend school in Branchburg because they no longer resided there, and that a

[2] Petitioner clarified at the hearing that the child A.U. actually lived with his paternal grandparents, not C.U., during this time. The grandparents were never the legal guardians of A.U.

hearing would be conducted before the Board on March 26, 2015, if either parent wished to contest that determination. (Exhibit A to respondent's motion for summary decision.)

9. In February 2015, storm-related damage forced K.B. to relocate to a residence outside of Branchburg temporarily so that repairs could be made. She had no water in the house during the damage repair.

10. An August 10, 2012, court order (Exhibit F to respondent's motion) continues legal and physical custody with C.U. K.B. is given weekly visitation with the children, supervised by the New Jersey Division of Child Protection and Permanency (DCPP).

11. The most recent court order, dated February 4, 2013, (Exhibit C to respondent's motion) sets forth that legal custody is shared between K.B. and C.U. and physical custody continues with C.U. K.B. has visitation with the children on a weekly basis under the supervision of the DCPP.

12. During the pendency of the appeal, all five children continued to reside continuously and exclusively with C.U. in Bridgewater until the end of the 2014–2015 school year in June 2015, when they were withdrawn from Branchburg.

## FACTUAL DISCUSSION

Petitioner testified that she and her ex-husband, C.U., separated in January 2011. On January 24, 2011, she sent an email to the Branchburg Township School District saying that C.U. was going to Afghanistan. In February 2011 she sent an email to then principal of Whiton Elementary School Rebecca Gensel, advising that her ex-husband was threatening her in connection with their breakup. Their relationship had been difficult, and she was letting Ms. Gensel know that it was hard on the children. On November 7, 2011, C.U. returned from Afghanistan and their relationship deteriorated.

Petitioner testified that, as of January 2013, she no longer received any documents from the Whiton School, and when she asked to see any work of her children the teachers ignored her requests. She did not have physical custody of the children in January 2013. They were living in Bridgewater and going to Branchburg schools. The Branchburg house was in foreclosure at the time. Petitioner and her family were not able to live in the house between February 9 and April 9, 2015, because pipes had frozen in the home and they were waiting for the contractor to agree with the insurance estimate. All of her mail still went to Branchburg, including her utility bills, life insurance and credit cards. Petitioner testified that the District knew that the children were living in Bridgewater and going to school in Branchburg. Her ex-husband has moved four times since returning from Afghanistan.

A.U. actually did not live with his father, but lived with his paternal grandparents. The other children never see him. The Order of foreclosure on the Branchburg house is pending execution. Petitioner testified that she still owns it. She has been fighting for three and a half years to get her children back.

On cross-examination, petitioner testified that she and her husband owned the Branchburg property and moved there in 2004. The deed was changed over to her, apparently due to divorce. C.U. stopped living in the house in January 2011, first living with his parents at their home in Branchburg and then being deployed. C.U. moved to his present address in Bridgewater in November 2014 with all five children. K.B. noted that in response to requests for admissions, she conceded that "At no time, from November 2014 through the conclusion of the 2014–2015 school year in June 2015 did any of [her] five children reside in Branchburg." (R-5; R-6.) Rather, they resided exclusively with C.U. at his residence in Bridgewater. Petitioner testified that she lived in Branchburg up until February 2015. After repairs were completed on her home, she went back and forth between Long Valley and Branchburg. She entered into a lease for property and a trailer in Long Valley in November 2014. This was the same month that the children moved in with their father. She was in the process of selling their house in Branchburg, and found a property that she could afford. By the date she entered the contract of sale on the Branchburg home, which was determined to be February 9, 2015, mortgage foreclosure proceedings had started. The short-sale contract of

February 9, 2015, was canceled. The final judgment of foreclosure was entered on March 18, 2015, and a Writ of Execution was issued on the same day. (R-12; R-13.) Petitioner reiterated that she lived in the house up until February 2015. In May 2015, she decided that it was time to move on and stopped living in the Branchburg home altogether. She did not report to the Board that her domicile became Long Valley in May 2015. The grandparents of A.U. were never declared his legal guardians.

Petitioner further testified on cross-examination that she believes that the Separation and Property Settlement Agreement dated June 7, 2012, is still in effect. (R-7.) When asked why the children are not enrolled in the Long Valley School District in accord with that agreement, she said that she has legal custody, but she cannot enroll them. She denied that there was a subsequent court order, but said that she cannot enroll them in Long Valley because C.U. does not abide by any court order. Paragraph three of the June 2012 agreement establishes that they share physical custody equally and that the wife shall be the parent of primary residence for purposes of determining school districts. In July 2012, they did not abide by the agreement. Petitioner's son almost drowned, and the court issued an order that the children would live exclusively with their father. However, she disagrees that the August 10, 2012, Court Order overrides the June 2012 agreement as to who is the parent of primary residence. (R-4.) The August 10, 2012, Court Order gives legal and physical custody to C.U. The Board had the August 2012 Court Order at the residency hearing on March 26, 2015, and the next day, K.B. emailed Mr. Rubin "a more recent court order" dated February 4, 2013, returning legal custody to both K.B. and C.U. but maintaining physical custody with C.U. (R-3.) She sent it because there was a mistake in the prior Order of August 2012 that said she did not have legal custody. She believes that the Property Settlement Agreement, paragraph three, is still in effect regardless of the Orders acquired by the DCPP. Despite that, once she moved out of Branchburg, she never filed an application to enforce the perceived requirement to have the children attend school in Long Valley. She testified that C.U. would fight her on that. She does not recall having a conversation with Ms. Suarez from the Branchburg Township School District in November 2014 following an IEP meeting regarding her son.

Carolyn Suarez testified that she is the secretary for Student Services in the Branchburg Board of Education. She worked under Carol Webb, director of Student Services. She testified that petitioner's son T.U. had an individualized education program (IEP) that placed him in an out-of-district school, the Midland School in North Branch. In November 2014 she received a call from the Midland School asking who would be attending the IEP meeting, and she told them that it would be Ms. Webb. Two weeks after that, she received a call from petitioner, who was very upset because she had not been notified of the meeting. Petitioner said that she had wanted to be there, but she had no knowledge of it. After the IEP meeting, Ms. Suarez sent a copy of the IEP to petitioner and C.U. at the Branchburg address on file. Petitioner said that she did not get a copy of the IEP. Ms. Suarez verified the Branchburg address and petitioner said, no, she was living in Long Valley. Ms. Suarez then made a copy of the IEP and mailed it to her at her Long Valley address. Petitioner never made a subsequent call to say that she was not living in Long Valley. She also recalled petitioner calling when C.U. had withdrawn the children from Branchburg to enroll them in Bridgewater. Petitioner was upset because she wanted them to stay in Branchburg.

James Butler testified that he is a residency investigator. He visited petitioner's Branchburg residence on March 17, 2015 (R-18), and in May 2015. Mr. Butler testified, referring to his certification, that when he went to the residence on March 17, 2015, two people were working and invited him in. They said that they were friends of petitioner, and were there making repairs to the water-damaged bathroom. There was no furniture in the home. He looked in the mailbox, which was full, and he surmised that the mail had not been picked up in a long time. He looked into the garage windows and the garage was also empty. In May 2015, he checked to see if anyone was living in the house. He looked in and saw nothing in the home. He rang the doorbell, but no one was living there. He returned in November 2015 to see if the house was occupied. It was not.

Carol Webb testified that she is the director of Student Services and the residency officer. She testified that she was present at the Board hearing, and the description of the parents' testimony in the hearing decision was accurate. (R-2.) At the hearing, petitioner would not explain why the children had not been residing with her

at all since November 2014, even before she was forced to vacate the Branchburg home in February 2015, saying the information was private. Ms. Webb testified that she first saw the Separation and Property Settlement Agreement after the residency hearing. Petitioner did not mention it during the Board hearing.

Ms. Webb testified that the certified per-pupil cost for tuition-adjustment purposes for the 2013-2014 school year was $14,147 for grades one to five, and $14,594 for grades six to eight. (R-16.) The 2014-2015 figures had not been certified at the time of the hearing, but Ms. Webb testified that they did not go down. She testified that petitioner's triplets were in fourth grade, T.U. was in fifth grade out of district, and A.U. was in seventh grade. The children were in school 139 days, from November 2014 to June 2015, during which they were not living in the Branchburg School District. The statute does not speak to how tuition is to be calculated when a student is placed out of the district. Ms. Webb testified that if a parent's property-settlement agreement were the basis of his or her claim to residency in the district, she would expect the parent to submit it.

## FINDINGS OF FACT

The determination of domicile requires that I make credibility determinations with regard to the critical facts. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

I found petitioner to be lacking in credibility due to the fact that her testimony did not "hang together" well with the other evidence in the hearing. Petitioner never mentioned that she bought another residence in November 2014 until pressed on cross-examination. Her testimony that it was just coincidence that she entered into a lease for

property and a trailer in Long Valley at the same time that C.U. took the children to live with him in Bridgewater is simply unbelievable. She no longer needed the big Branchburg house to live in all by herself. Further, Wells Fargo Bank had already initiated proceedings against C.U., giving further reason to leave the Branchburg property and not return. It bears mentioning that pipes often freeze when a home is uninhabited in cold weather. In contrast, I found Ms. Suarez completely credible. She has no motive to fabricate that she talked to petitioner about her son's IEP and that petitioner told her that she lived in Long Valley. Not only did she have the conversation, but she took action to change petitioner's address to Long Valley. Petitioner never changed it back to Branchburg, even before the pipes froze in February 2015, and not after the house was fixed in April 2015. Petitioner did not refute any of Ms. Suarez's testimony, saying only that she did not recall. Similarly, I found Mr. Butler credible. His testimony was also supported by the other evidence in the case, and was inconsistent only with the testimony of petitioner, who seeks to persuade that despite the house being empty in March 2015, she intended to return to live there. Similarly, Ms. Webb was credible in her testimony that petitioner did not bring up the property-settlement agreement at any time prior to the determination being made that her children did not reside in the Branchburg Township School District. Although petitioner claims that her lack of knowledge of the statute was the reason she waited to raise the issue of the property-settlement language, she was less than forthcoming with all of the information in this case.

Based on my credibility determinations, the testimony and other evidence in the record, I **FIND** the following **FACTS** in addition to the above enumerated undisputed facts. In the same month that petitioner's children moved in with their father in Bridgewater, November 2014, petitioner bought land and a trailer in Long Valley. Also in November 2014, petitioner told Ms. Suarez that she never received her son's IEP because she was living in Long Valley. In February 2015, petitioner's home in Branchburg sustained water damage when nine pipes froze and broke. Petitioner's home was uninhabitable from February 9, 2015, to approximately April 15, 2015. On March 17, 2015, Mr. Butler visited petitioner's Branchburg house as part of his investigation. The house was empty with no furniture, including the garage, and mail had not been removed from the mailbox for a long time. He saw the same thing when

he visited the house in May and November 2015. Petitioner moved to Long Valley in November 2014 and remained there.

Petitioner and C.U. divorced in 2012. K.B. and C.U. entered into a Separation and Property Settlement Agreement on June 5, 2012, providing for a shared living arrangement whereby the children would reside with each parent roughly half-time every week. (R-7.) The Agreement further provided that "parties shall have joint legal and physical custody of the parties' minor children. The wife shall be the parent of primary residence for purpose of determining school districts as it is agreed that the parties' son T.U has special needs." After the property-settlement agreement above, in July 2012 petitioner's son almost drowned. The Superior Court in Somerset County issued an Order on August 10, 2012, giving legal and physical custody of the children to C.U. The Court issued another Order on February 4, 2013, giving legal custody to both parents and physical custody to C.U. Both Orders gave petitioner weekly supervised visits. Wells Fargo Bank filed a foreclosure complaint against petitioner and C.U. on February 6, 2014. On March 18, 2015, the Superior Court, Chancery Division, in Somerset County issued a Final Judgment against petitioner and C.U. ordering sale of the mortgaged premises to satisfy the amount due. On April 23, 2015, petitioner appealed the Board's decision, which meant that her children would continue to go to school in Branchburg.

## ISSUE

The issue is whether the petitioner has established that she was domiciled within the Branchburg Township School District for the period of November 2014 to June 2015, thus entitling A.U., E.U., B.U., A.U. and T.U. to attend school in Branchburg free of charge, pursuant to the provisions of N.J.S.A. 18A:38-1.

## LEGAL ANALYSIS AND DISCUSSION

Attendance at public schools shall be free to any person who is domiciled within the school district and meets the age requirements. N.J.S.A. 18A:38-1(a). The domicile of a child is based upon the domicile of the parents or legal guardians with whom they

live. N.J.A.C. 6A:22-3.1(a)(1). According to N.J.A.C. 6A:22-3.1(a)(1)(i), where a student's parents are domiciled in different school districts, the student's domicile may be determined by a court order or written agreement between the parents designating the school district for school attendance.

A person's domicile is "the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has an intention of returning, and from which he has no intention of moving." Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944). A person may have multiple residences but only one domicile. State v. Benny, 20 N.J. 238, 251 (1955). Thus, residence may coincide with domicile, but does not, alone, determine it. Ibid. As set forth in Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971), where a person has more than one residence, the following factors are important in determining the person's domicile:

> the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return.

Additionally, establishment of a domicile is an act of volition. In re Unanue, 255 N.J. Super. 362, 375 (Law Div. 1991). "[A] choice of domicile by a person, irrespective of the motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." Id. at 376. Three elements that must be considered in regard to a change of domicile are: "(1) whether there has been an actual and physical taking up of an abode in a particular state; (2) whether the subject had an intention to make his home there permanently or [at] least indefinitely; and (3) whether the subject had an intention to abandon his old domicile." Ibid. Once established, a domicile continues until superseded by a new one. Id. at 377.

In the present case, when K.B. and C.U. entered into the Separation and Property Settlement Agreement in 2012, both K.B and C.U. resided in Branchburg, at

different addresses, and all five children were enrolled in Branchburg Township School District. As of November 2014, all five children began residing continuously and exclusively with C.U at his residence in Bridgewater. Pursuant to N.J.A.C. 6A:22-3.1(a)(1)(i), the student's domicile may be determined by a court order or written agreement between the parents designating the school district for school attendance. Here, the parents entered into such an agreement on June 5, 2012, where it was decided that the mother will be the parent of primary residence for purpose of determining school districts. Although the children did not physically live in Branchburg from November 2014 to June 2015, if the petitioner's domicile remained in Branchburg, and the written agreement was not superseded by subsequent court order, then the children were eligible to attend school in Branchburg.

Regarding whether petitioner's domicile remained in Branchburg, the Board argues that there is ample evidence that petitioner was not domiciled in Branchburg from November 2014 through June 2015 and, therefore, petitioner's children were not eligible to attend school in Branchburg. The Board contends that petitioner changed her domicile from Branchburg to Long Valley as of November 2014 when she bought a trailer in Long Valley, around the same time that the children began living with the father in Bridgewater. The evidence includes the call that Ms. Suarez received from petitioner in November 2014 requesting a copy of an IEP for one of her children. Petitioner was upset, and told Ms. Suarez that she did not receive the IEP sent to Branchburg because she lived in Long Valley. Added to that is evidence that the house in Branchburg was for sale and Wells Fargo had filed for foreclosure. This action ended with a final order of foreclosure in March 2015. Further, when Mr. Butler visited the residence on March 17, 2015, to determine whether petitioner actually resided there, the house was empty and there was no furniture. He also found that the mailbox was full and that the mail "clearly had not been picked up in a long time." This is consistent with petitioner having told Ms. Suarez that she did not get mail at the Branchburg residence.

Petitioner argues that Branchburg was her domicile until she moved to Long Valley in May 2015. Petitioner contends that it was a coincidence that she bought a trailer in November 2014, around the same time her ex-husband and the children moved out of Branchburg. She contends that the reason she was not living in

Branchburg was that she did not have any water in the Branchburg house and had to find temporary residence while the repairs took place. She also explained that Mr. Butler did not see any furniture in her Branchburg residence during his March 2015 visit because she was downsizing. She argues that her house had been for sale since her divorce in 2012, and that even though her house was foreclosed in March 2015, she could still physically occupy that residence if she wanted to do so.

As set forth above, establishment of a domicile is an act of volition. Unanue, supra, 255 N.J. Super. at 375. Thus, the question becomes whether petitioner wanted to or ever intended to return to the Branchburg residence. Further, was the Branchburg domicile superseded by a new one in Long Valley? The first element to consider regarding whether petitioner changed her domicile from Branchburg to Long Valley is whether there has been an actual and physical taking up of an abode in a particular state, or, in this case, another town. Here, there was an actual purchase of another property in November 2014 indicating intent to move. Also, by her own admission to Ms. Suarez, which she did not refute, she was living in Long Valley in November 2014. The second element is whether the subject had an intention to make her home there permanently, or at least indefinitely. Although petitioner testified that she intended to maintain her residence in Branchburg, the evidence shows intent to reside in Long Valley. The fact that the pipes froze in Branchburg indicates that petitioner was not living there before February 2015. In addition to her admission that she was living in Long Valley, the final judgment against her and C.U. in March 2015 makes it extremely unlikely that she would intend to remain in a house that a court has ordered and directed to be sold. The third element is whether the subject had an intention to abandon her old domicile. It is clear that the Branchburg residence was uninhabitable from February 2015 to mid-April 2015, but when petitioner was asked when she returned to Branchburg, she equivocated. She said that she went back and forth between Branchburg and Long Valley. She initially said she moved back to Branchburg once the damages were repaired. However, Mr. Butler did not see any signs of occupancy at the house or intent to return when he visited in March or May 2015. Finally, petitioner admitted on cross-examination that she did change her domicile to Long Valley as of May 2015. Just like the fact that she purchased another home in

November 2014, petitioner was not forthcoming with the information, but it had to be adduced on cross-examination.

The relevant statute is N.J.S.A. 18A:38-1 and it provides in part:

> The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Where a local board of education removes a student, the parent may appeal to the Commissioner of Education. In the proceeding before the Commissioner, the parent has the burden of proof by a preponderance of the evidence that the child meets eligibility requirements for a free education. The child shall not be removed while the matter is pending before the Commissioner. If the evidence does not support the parent's claim, the Commissioner shall assess the parent tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. N.J.S.A. 18A:38-1(b)(2).

In conclusion, although petitioner filed a petition seeking to provide that her children were residents of the Branchburg Township School District because she was domiciled in the Branchburg Township School District based on the June 2012 Separation and Property Settlement Agreement, petitioner has not produced evidence that she was domiciled in Branchburg as of November 2014. Rather, the preponderance of the evidence shows that she purchased and moved into a property in Long Valley. For the foregoing reasons, I **CONCLUDE** that petitioner has failed to prove by a preponderance of the credible evidence that she was domiciled in the Branchburg Township School District from November 2014 through June 2015, making her children eligible to attend school in Branchburg. Therefore, petitioner and respondent C.U. are liable for back tuition for the days their children attended the Branchburg Township School District from November 2014 to June 2015.

The Board's request for default judgment against C.U. is granted based on the numerous attempts that the Board made to have C.U. answer the petition against him. The Board filed the petition on May 13, 2015; the Bureau of Controversies and Disputes sent C.U. the petition on May 14, 2015, and followed up with a letter giving C.U. an additional ten days to answer on June 9, 2015. Mr. Rubin reached C.U. on July 21, 2015, by telephone and confirmed his address in Bridgewater. Mr. Rubin confirmed the conversation by email on July 21, 2015. Mr. Rubin also wrote to the Bureau of Controversies and Disputes on August 4, 2015, confirming that their response to C.U. not answering was to indicate that the matter was "under review." In August, Mr. Rubin learned from C.U. that he had once again moved to another address in Bridgewater. C.U. did not clarify his position on whether he intended to file papers contesting the petition. On August 7, 2015, the Bureau of Controversies and Disputes sent another letter to C.U. saying that he still had not answered, and if he failed to do so in ten days, each count in the petition would be deemed admitted and the Commissioner would decide the matter on summary decision. On August 24, 2015, Mr. Rubin received a notice from the Department of Education that C.U. had filed an Answer, but neither Mr. Rubin nor I received a copy of an answer from C.U. Mr. Rubin's attempt on August 27, 2015, to obtain a copy of C.U.'s answer from him failed. Despite Mr. Rubin's additional attempts to obtain an answer from C.U. in September and December 2015, he has never obtained a copy, if one was ever filed. For the foregoing reasons, I **CONCLUDE** that C.U. has failed to file an Answer to the Board's petition despite numerous notices and requests to do so; therefore, the Board's request for default judgment against respondent C.U. is hereby **GRANTED**.

## ORDER

Based on the foregoing, I **ORDER** that petitioner's appeal is hereby **DISMISSED**. I **ORDER** that respondent Board's petition against C.U. is **GRANTED** by default judgment. I further **ORDER** that petitioner and C.U. shall reimburse the Branchburg Township Board of Education for the tuition and costs for A.U., G.U., B.U. and T.U.'s attendance at the District's elementary school during the time between November 2014 and June 2015 (139 school days) at the amount of $14,147 per year prorated, pursuant to N.J.S.A. 18A:38-1(b). Petitioner and C.U. shall reimburse the Branchburg Township

Board of Education for the tuition and costs for A.U.'s attendance at the District's middle school during the time between November 2014 and June 2015 (139 days) at the amount of $14,594 per year prorated, pursuant to N.J.S.A. 18A:38-1(b). The tuition amount shall be calculated consistent with N.J.S.A. 18A:38-1(b) and paid by petitioner and C.U. within one month of the date of the Commissioner's Final Decision approving this Initial Decision.

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

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

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

March 10, 2016
DATE

Ann James-Beavers
**LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: March 10, 2016

Date Mailed to Parties: 3/11/16

cmo

## APPENDIX

## WITNESSES

**For Petitioner:**

K.B.

**For Respondent:**

Carolyn Suarez
James Butler
Carol Webb

## EXHIBITS

**For Petitioner:**

P-1 Email from K.B. to Rebecca Gensel dated February 22, 2011
P-2 Email from K.B. to Rebecca Gensel dated January 24, 2011
P-3 Email from K.B. to Rebecca Gensel dated January 30, 2013
P-4 Email from K.B. to Rebecca Gensel and other staff dated November 7, 2011

**For Respondent:**

R-1 Letter from D. Rubin, Esq., to C.U. and K.B., dated March 3, 2015
R-2 Letter from D. Rubin, Esq., to C.U. and K.B., dated March 30, 2015
R-3 Email from K.B. to D. Rubin, Esq,. dated March 27, 2015, attaching February 4, 2013, Abuse or Neglect Multipurpose Order
R-4 Abuse or Neglect Multipurpose Order, dated August 10, 2012
R-5 Letter from D. Rubin, Esq., to K.B., dated June 23, 2015, forwarding Requests for Admissions
R-6 Emails to/from D. Rubin, Esq., and K.B., dated July 21, 2015

R-7 Separation and Property Settlement Agreement, executed June 5, 2012

R-8 Letter from K.B. to K. Duncan, dated May 1, 2015

R-9 Letter from K.B. to Honorable Lisa James-Beavers, dated September 9, 2015

R-10 Notice of Lis Pendens in Wells Fargo Bank, N.A. v. Useche, dated February 12, 2014

R-11 Complaint in Wells Fargo Bank, N.A. v. Useche, dated February 6, 2014

R-12 Final Judgment in Wells Fargo Bank, N.A. v. Useche, dated March 18, 2015

R-13 Writ of Execution in Wells Fargo Bank, N.A. v. Useche, dated March 18, 2015

R-14 Email from D. Rubin, Esq., to K.B., dated November 18, 2015

R-15 IEP for T.U., dated November 21, 2014

R-16 Memorandum from New Jersey Department of Education re: Per Pupil Tuition Costs

R-17 Chart of tuition-cost calculations

R-18 Certification of James Butler, dated August 26, 2015

153-16L

153-16

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

April 22, 2016

[redacted], *pro se*
[redacted]
Merchantville, New Jersey 08109

R. Taylor Ruilova, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Re: *L.E.-S. v. Board of Education of the Lenape Regional High School District, Burlington County, Agency Docket No. 43-2/16.*

Dear Parties:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's answer to the petition. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

152-16

| | | |
|---|---|---|
| G.C., on behalf of minor child, C.C., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

The petitioner challenged the determination of the respondent Board that his son, C.C., engaged in behavior that fell under the school district's policy against harassment, intimidation and bullying (HIB). This case stems from an incident between two eleven-year-old sixth graders, which occurred in the cafeteria of the school district's Lower Middle School in October 2014. In accordance with the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 *et seq.* (the Act), an investigation was conducted by the school's anti-bullying specialist. The investigation concluded that C.C. had committed acts of HIB stemming from comments he made regarding his classmate's vegetarian lifestyle, including C.C.'s self-admitted statement that "vegetarians are idiots". The HIB investigation report concluded that C.C.'s conduct met the statutory definition of HIB, as set forth in *N.J.S.A.* 18A:37-14, as C.C. made verbal comments that were reasonably perceived as motivated by a distinguishing characteristic, and had the effect of insulting and demeaning a classmate who is vegetarian. C.C. was assigned five lunch-time detentions. A Board-level hearing took place in February 2015 at the request of C.C.'s parents, after which the Board affirmed the initial finding of HIB. Thereafter, G.C. filed the within petition. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the parties stipulated that there are no material facts in dispute and the matter is ripe for determination by summary decision depending on the resolution of the sole legal issue in dispute herein, namely whether the state of being a vegetarian can constitute "any other distinguishing characteristic" within the meaning of the Act; in this case, C.C. admitted making comments regarding his classmate's vegetarianism, including "it's not good to not eat meat" and a statement asserting that people who eat meat are "smarter and have bigger brains"; these comments are reasonably perceived to be motivated by the classmate's distinguishing characteristic of being a vegetarian; and the fact that C.C.'s classmate is a vegetarian is an identifiable motivation. The ALJ concluded that C.C.'s comments in October 2014 constituted a violation of HIB, and petitioner has not met the burden of proof that the Board acted in an arbitrary manner in concluding that C.C.'s conduct constituted HIB under the New Jersey Anti-Bullying Bill of Rights Act. Accordingly, the Board's motion for summary decision was granted, the petitioner's cross motion was denied, and the petition was dismissed.

Upon review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – concurred with the ALJ that the petitioner failed to sustain his burden to show that the Board's actions regarding C.C.'s conduct in October 2014 were arbitrary, capricious or unreasonable. Accordingly, the Assistant Commissioner adopted the Initial Decision as the final decision in this matter.

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

April 22, 2016

OAL DKT. NO. EDU 12103-15
AGENCY DKT. NO. 149-6/15

| | | |
|---|---|---|
| G.C., on behalf of minor child, C.C., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – concurs with the Administrative Law Judge (ALJ) that the Board's decision in connection with C.C. was not arbitrary, capricious or unreasonable. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/22/16

Date of Mailing: 4/22/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 12103-15
AGENCY DKT. NO. 149-6/15

**G.C. ON BEHALF OF C.C.,**
Petitioner,
v.
**BOARD OF EDUCATION OF**
**THE TOWNSHIP OF MONTGOMERY,**
**SOMERSET COUNTY,**
Respondent.

---

**Adam P. Wilson,** Esq., for petitioner (Hinkle, Fingles, Prior & Fischer, attorneys)

**Cameron R. Morgan,** Esq., for respondents (Parker McCay, attorneys)

Record Closed: January 22, 2016 Decided: March 7, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 30, 2015, the petitioner, G.C. on behalf of C.C., filed a Petition of Appeal to the Commissioner of Education, in which they dispute respondent's finding that C.C. committed an act of harassment, intimidation or bullying ("HIB") pursuant to N.J.S.A. 18A:37-13.2 et seq. and request that the Commissioner overturn such finding

on the grounds that C.C.'s act was not reasonably perceived as being motivated by a distinguishing characteristic. Respondent, Board of Education of the Township of Montgomery, has moved for summary decision asserting that the Board's finding that C.C. committed an act of HIB. Petitioner cross moved for summary decision that respondent school board's action was improper.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on August 13, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties filed several briefs in support of the motion and cross-motion and the record closed on January 22, 2016.

## FACTUAL DISCUSSION

The following facts are stipulated to by and between the Parties, G.C. on behalf of the minor child C.C., and the Board of Education of the Township of Montgomery, Somerset County ("the Board") (collectively, "the Parties") and I therefore **FIND** them as **FACT**:

1. On October 30, 2014, an incident occurred in the cafeteria of the Lower Middle School in the Montgomery Township School District ("the District") between two sixth- grade students, C.C. and K.S., both of whom were eleven years old at the time.

2. On October 30, 2014, K.S. reported the incident as a potential instance of harassment, intimidation or bullying "HIB", as defined by the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. (the "Act"), wherein he alleged that he was the victim of an act of HIB perpetrated against him by C.C.

3. On October 31, 2014, an investigation was begun by Ms. Lesley Hass, guidance counselor and school anti-bullying specialist, in accordance with the

provisions of the Act. The parents of both C.C. and K.S. were notified of the incident and the investigation by letters, dated November 3, 2014.

4. On or about November 12, 2014, Ms. Hass completed the HIB investigation and forwarded her report to the Superintendent, Nancy Gartenberg. The HIB investigation concluded that C.C. had committed acts of HIB against K.S., stemming from comments he made regarding K.S.'s vegetarianism.

5. The HIB investigation found that C.C. admitted making comments to K.S. regarding his decision not to eat meat. The report found that C.C. told K.S. that "it's not good to not eat meat" and that "he should eat meat because he'd be smarter and have bigger brains." C.C. himself wrote that he told K.S. that "vegetarians are idiots." The anti-bullying specialist found that C.C. stated that K.S.'s response to his comments was amusing to him.

6. The HIB investigation report concluded that C.C.'s conduct met the statutory definition of HIB, as set forth in N.J.S.A. 18A:37-14. The District concluded that C.C. made verbal communications that were reasonably perceived as being motivated by a distinguishing characteristic between the two boys, namely vegetarianism, which substantially interfered with the rights of K.S. and had the effect of insulting or demeaning him.

7. As a result, C.C. was assigned five (5) lunch-time detentions. During said detentions, he was given the opportunity to speak with staff about his actions, with an intention of preventing future instances of such conduct. No other disciplinary consequences were imposed.

8. The findings of the HIB investigation were reported to the Board at its next meeting on November 25, 2014. Notice of the finding and information on the outcome, pursuant to N.J.S.A. 18A:37-15b(6)(d), was sent home to the parents of C.C. and K.S. by letters, dated November 26, 2014.

9. Thereafter, the parents of C.C. requested a Board-level hearing in accordance with N.J.S.A. 18A:37-15b(6)(d), which request was granted.

10. The Board-level hearing took place on February 10, 2015, at which time the Board heard from the school anti-bullying specialist, Ms. Hass, the vice-principal, the parent, and the parent's attorney, who was permitted to question the anti-bullying specialist. Following the Board-level hearing, the Board affirmed the superintendent's initial finding of HIB. The parents were later notified of the Board's decision.

11. On June 30, 2015, the petitioner, G.C. on behalf of C.C., filed a Petition of Appeal to the Commissioner of Education, in which they dispute the finding of HIB and request that the Commissioner overturn such finding on the grounds that C.C.'s act was not reasonably perceived as being motivated by a distinguishing characteristic.

12. The parties to the within matter stipulate as to the conduct alleged as found in the HIB investigation report.

13. The parties stipulate that the timelines of the HIB statute are not at issue in this case.

14. The parties stipulate that the sole issue in dispute in the within matter is limited to whether the state of being a vegetarian can constitute "any other

distinguishing characteristic" so as to undergird a finding of HIB, within the meaning of the Act, as HIB is defined at N.J.S.A. 18A:37-14.

15. The parties stipulate that there are no material facts in dispute, and this matter is ripe for determination on cross-motions for summary decision, with one party or the other being entitled to decision, as a matter of law, depending on the resolution of the sole legal issue in dispute above.

## LEGAL ANALYSIS AND CONCLUSION

The parties stipulate that the sole issue in dispute in the within matter is limited to whether the state of being a vegetarian can constitute "any other distinguishing characteristic" so as to undergird a finding of HIB, within the meaning of the Act, as HIB is defined at N.J.S.A. 18A:37-14.

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id.

at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The parties stipulate that there are no material facts in dispute, and this matter is ripe for determination on cross-motions for summary decision, with one party or the other being entitled to decision, as a matter of law, depending on the resolution of the sole legal issue in dispute above.

New Jersey enacted the Anti-Bullying Bill of Rights Act to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

> (b) has the effect of insulting or demeaning any student or group of students; or
>
> (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The sole issue in dispute in the within matter is limited to whether the state of being a vegetarian can constitute "any other distinguishing characteristic" so as to support a finding of HIB, within the meaning of the Act, as HIB is defined at N.J.S.A. 18A:37-14. Petitioner asserts that the fact that the statute requires that the insult must have been motivated by a characteristic of the individuals who was insulted means that the word "characteristic" must be construed as a limiting factor in determining whether an insult constitutes HIB. In W.C.L. and A.L. o/b/o L.L. v. Board of Education of the Borough of Tenafly, EDU 3223-12, Initial Decision (November 26, 2012), aff'd Commissioner (January 10, 2013) a student's comments relating to head lice on another student was perceived as being motivated by a distinguishing characteristic. In R.G.B. v. Village of Ridgewood Bd. Of Ed., EDU 14213-12, 2013 N.J. AGEN LEXIS 130 (May 15, 2013) a student calling another student a "horse" and a "fat-ass" was found to constitute HIB and reasonably perceived as motivated by the distinguishing characteristic of appearance or body-type. In C.C. o/b/o/ S.C. v. Bd. of Ed. Of Twp. Of Jefferson, EDU 10872-14, 2015 N.J. AGEN LEXIS 251 (April 6, 2015) a student's comments that another student "sucks at basketball" was found to constitute HIB because the comments were reasonably perceived as motivated by the distinguishing characteristic of height, intelligence and sports proficiency.

In this case, C.C. admitted making comments to K.S. regarding his decision not to eat meat. The report found that C.C. told K.S. that "it's not good to not eat meat" and that "he should eat meat because he'd be smarter and have bigger brains." C.C. himself wrote that he told K.S. that "vegetarians are idiots." I **CONCLUDE** that those comments are reasonably perceived to be motivated by the distinguishing characteristic of K.S. being a vegetarian. In K.L. v. Evesham Twp. Bd. of Ed. 423 N.J.Super. 337 the Appellate Division stated that the definition of bullying does not include harmful or demeaning conduct motivated by other reason, for example a dispute about

relationships or personal belongings, or aggressive conduct without identifiable motivation. The fact that K.S. is a vegetarian is an identifiable motivation. Therefore, I **CONCLUDE** that C.C.'s comments constitute a violation of HIB.

Respondent urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that C.C.'s conduct did constitute HIB. Therefore, the Petition of Appeal should be dismissed. Petitioner asserts that if vegetarianism is not a distinguishing characteristic as a matter of law than the Board's decision was arbitrary, capricious, and unreasonable.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The administrative law judge (ALJ) found that the board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ

concluded that the petitioner failed to establish that the board's actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious or unreasonable.

I have carefully reviewed the record. Petitioner has presented no credible evidence that the Board acted in an arbitrary manner. As I have previously concluded that C.C.'s comments are reasonably perceived to be motivated by the distinguishing characteristic of K.S. being a vegetarian, I **CONCLUDE** that petitioner has not met the burden of proof that the Board acted in an arbitrary manner in concluding that C.C.'s conduct did not constitute harassment, intimidation or bullying under the New Jersey Anti-Bullying Bill of Rights Act.

## ORDER

Based on the foregoing, it is **ORDERED** that:

1. Respondents' motion for summary decision is **GRANTED;**

2. Petitioner's cross-motion is **DENIED;** and

3. The petition in this matter is **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

March 7, 2016
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency: 3/7/16

Date Mailed to Parties: 3/7/16

JSK/vj

158-16

ADAMS GUTIERREZ & LATTIBOUDERE
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Petitioner, Trenton Board of Education

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF MELISSA BROWN<br><br>and<br><br>TRENTON BOARD OF EDUCATION | AGENCY REF. NO. 332-10/15<br><br><br><br>STIPULATION OF SETTLEMENT |

The Trenton Board of Education (the "District"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey 08609, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Melissa Brown, residing at 12 Roberts Place, Willingboro, New Jersey, 08046 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured secretarial staff member employed by the District as a secretary; and

**WHEREAS** the District certified tenure charges of Unbecoming Conduct and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Melissa Brown, Trenton Board of Education* ("Tenure Charges"), and such charges were assigned Docket No. 332-10/15; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to

warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator David Gregory, Esq. ("Arbitrator") for a hearing; and

**WHEREAS**, Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, the District with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent agrees to serve a one hundred and twenty (120) day suspension without pay, with reinstatement to an Administrative I Secretary position, upon the formal approval of this stipulation of settlement by the Trenton Board of Education; and

**WHEREAS**, Respondent agrees to accept an assignment to an Administrative I Secretary position at any school or department within the District that the District finds to be appropriate and in the best interest of the District;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Respondent shall serve a suspension without pay from October 27, 2015 through February 26, 2016. This one hundred and twenty (120) day unpaid period shall serve as the entire discipline for Respondent with respect to these tenure charges. Respondent agrees not to, and waives any right to, challenge or otherwise contest

this suspension. Respondent shall be restored to the payroll at her correct salary effective as of February 27, 2016, and shall receive back pay / benefits for any time between that date and the day when she is restored to the payroll.

2. Upon resumption of her duties, Respondent agrees to accept an assignment to an Administrative I Secretary position at any school or department within the District that the District finds to be appropriate and in the best interest of the District;
3. Respondent also agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Respondent. Should Respondent fail to submit letters of withdrawals for any such pending claims or suits, this Stipulation of Settlement will serve as Respondent's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.
4. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for the period October 26, 2015 through February 26, 2016. Respondent releases and waives any claim which she may have to any pay from the District from October 26, 2015 through February 26, 2016.
5. The District agrees to dismiss the instant tenure charges with prejudice, subject to the approval required in Paragraph 18.
6. In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges as against the School District any and all claims or causes of action, known or unknown, suspected or unsuspected, arising through the date of her execution of this Agreement,

including, without limitation, any claim for attorneys' fees, costs or other monetary relief; discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent

also agrees to withdraw any and all pending complaints or actions that have been or may have been filed against the School District or any of its employees or representatives. Notwithstanding this release of claims / causes of action, Respondent retains all of the rights and protections of a tenured staff member of the District.

7. Notwithstanding Paragraphs 3 and 6 of this Stipulation of Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims, Respondent agrees not to seek or accept any resulting relief whatsoever.
8. The District hereby represents and agrees that this Agreement represents full and final discipline for any act or omission of Respondent alleged in the tenure charges.
9. The parties acknowledge and agree that entry into this Agreement does not constitute an acknowledgement or admission by either party as to the truth, accuracy, merit, or demonstrability of the allegations set forth in Tenure Charge Number Two and Tenure Charge Number Three. The allegations set forth in Tenure Charge Number Two and Tenure Charge Number Three shall not be considered or relied upon for purposes of progressive discipline in any future proceeding.
10. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of

Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

11. This agreement shall not constitute a precedent in any matters involving other District employees.
12. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.
13. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.
14. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

15. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

16. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

17. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

18. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

19. This Stipulation of Settlement is also subject to formal Board of Education approval.

20. Upon formal approval of this stipulation of settlement by the District and the Arbitrator, a copy of same will be placed in Respondent's personnel file.

Dated: 3/17/16

Melissa Brown
MELISSA BROWN

TRENTON BOARD OF EDUCATION

Dated: 4/4/16

By: JASON REDD
Board President

## CERTIFICATION

I, Melissa Brown, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 8/17/16

Melissa Brown
MELISSA BROWN

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 4/11/16

D. Gutierrez
Derlys Maria Gutierrez, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Trenton Board of Education

**APPROVED:**

Dated: April 20, 2016

David G. Gregory
David Gregory, Esq., Arbitrator

154-16

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|---|---|---|
| LORAINE GAMMARO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, JOHN DOES 3-10 AND JAN DOES 11-20, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

Petitioner – formerly employed by the respondent's school district as a non-tenured building principal – alleged that she received insufficient and untimely notice of the non-renewal of her employment at the end of the 2013-2014 school year and that, accordingly, her employment contract as a principal was automatically renewed pursuant to *N.J.S.A.* 18A:27-11. Petitioner asserted, *inter alia*, that after she received a May 15, 2014 non-renewal letter – which was signed by the district superintendent – she spoke directly with the superintendent, who purportedly advised her that the non-renewal letter had been sent to petitioner in error, and that she should disregard it. The Board contended that petitioner's appeal was untimely filed, and submitted a motion to dismiss; the Board further claimed that the non-renewal notice received by petitioner on May 15, 2014 fully satisfied the requirements of *N.J.S.A.* 18A:27-10. The ALJ denied the motion to dismiss prior to the hearing, based upon petitioner's claims that she was misled by information from the superintendent, and that she did not fully understand that she had been non-renewed until sometime in July 2014.

The ALJ found, *inter alia*, that: petitioner received a letter of nonrenewal for her position as a principal on May 15, 2014; petitioner was non-renewed because of a fiscal crisis in the school district; at the time of her nonrenewal, the school district was under the financial oversight of a State monitor pursuant to *N.J.S.A.* 18A:7A-55; the nonrenewal letter was signed by the district superintendent; the State monitor made the recommendation to non-renew all non-tenured staff members by May 15, 2014, which district staff then implemented; in addition to the nonrenewal letter, petitioner received a "Rice Notice" on June 20, 2014 which advised her that her employment status would be discussed at the June 23, 2014 school board meeting; despite petitioner's confusion about her employment status resulting from the superintendent's alleged statement that petitioner's nonrenewal letter was sent in error, the nonrenewal of petitioner's employment was valid as it was never rescinded in writing; petitioner's contention that she failed to receive proper notice under *N.J.S.A.* 18A:27-11 was based solely upon verbal exchanges in which the superintendent purportedly advised petitioner that her nonrenewal letter was sent in error and should be disregarded. The ALJ concluded that rescission of the written notice of nonrenewal could have only occurred in one legally valid manner: via another written document. Accordingly, the ALJ denied petitioner's appeal and ordered that the petition be dismissed.

Upon review, the Commissioner concurred with the ALJ that petitioner failed to meet her burden to show that the Board acted in an arbitrary, capricious or unreasonable manner in non-renewing her employment. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

ISSUED 4/25/16

OAL DKT. NO. EDU 77-15
AGENCY DKT. NO. 353-12/14

| | | |
|---|---|---|
| LORAINE GAMMARO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, JOHN DOES 3-10 AND JAN DOES 11-20, | : | DECISION |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the Board's decision to non-renew the petitioner as a non-tenured principal for the 2014-2015 school year was not arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/16
Date of Mailing: 4/25/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 00077-15
AGENCY DKT. NO. 353-12/14

**LORAINE GAMMARO,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, JOHN DOES 3-10 AND JANE DOES 11-20,**
Respondents.

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**Brian Aloia**, Esq., for petitioner (Aloia Law Firm, attorneys)

**Eric Harrison**, Esq., and **Jennifer Herrmann**, Esq., for respondents (Methfessel and Werbel, attorneys)

Record Closed: February 22, 2016 Decided: March 15, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Loraine Gammaro, who was formerly employed by the Belleville Board of Education (the Board) as a building principal, alleges that she received insufficient and untimely notice of the nonrenewal of her employment at the end of the 2013-2014

school year; and that accordingly, her contract of employment as a principal was automatically renewed, per N.J.S.A. 18A:27-11.

This dispute comes to the Office of Administrative Law (OAL) after being first filed on August 27, 2014, in the Superior Court, Essex County, via Verified Complaint in Lieu of Prerogative Writs. On or about September 19, 2014, respondent, the Belleville Board of Education (the Board), filed a Notice of Removal to the United States District Court. Thereafter, a motion to dismiss the second count of the complaint was resolved via a November 17, 2014, consent order transferring the second count to the Commissioner of Education (the Commissioner). A petition of appeal renewing the allegations in that count was filed with the Commissioner on December 4, 2014. The Board filed a motion to dismiss in lieu of an answer on December 15, 2014, asserting that the petition was untimely. The contested case was transmitted to the Office of Administrative Law (OAL) on December 30, 2014.

The Board's motion to dismiss was denied via order dated April 1, 2015. A motion for reconsideration was denied on June 2, 2015.[1] A hearing was conducted on July 21, 2015. Based on the testimony received, I directed that the record be amplified to clarify the role of a State monitor in Gammaro's nonrenewal. Via letter dated August 21, 2015, counsel for the Board explained the State monitor's appointment, and attached his professional services contract. Thereafter, counsel for Gammaro requested leave to take the State monitor's testimony. The Board objected on relevancy grounds; via order dated August 27, 2015, I granted counsel leave to call the State monitor as a witness.

The hearing continued on January 6, 2016. Post-hearing submissions were filed on February 8 and 22, 2016, at which time the record closed.

[1] The Board renewed its timeliness arguments in its post-hearing submission. As set forth more fully in my earlier order, in light of the claims made by Gammaro that Feldman's conduct mislead her, and that she did not fully understand that she had been non-renewed until sometime in July 2014, I deemed it appropriate to allow Gammaro to proceed to a plenary hearing. At this juncture, I **CONCLUDE** that the parties will be best served by the issuance of a decision on the merits. Accordingly, the Board's arguments that the matter be dismissed as untimely under N.J.A.C. 6A:3-1.3(i) are again rejected.

## ISSUE PRESENTED

Gammaro's claim that she did not receive sufficient or timely notice of the nonrenewal of her employment as a nontenured principal raises the following limited issue for determination:

Can a notice of nonrenewal issued in writing by the Superintendent of Schools pursuant to N.J.S.A. 18A:27-10 be rescinded verbally? If so, does the employment of the affected employee then automatically renew, pursuant to N.J.S.A. 18A:27-11?

## FACTUAL DISCUSSION AND FINDINGS OF FACT

Gammaro began her employment with the Board in 2005, as a Teacher of Comprehensive Business. During the second half of the 2012-2013 year, she became Supervisor/Principal of the Belleville Universal Campus School, an alternative program designed to remediate and motivate academic skills for at-risk students. She ran the program in the evening and continued to perform her teaching duties during the day. Gammaro was appointed as full-time principal of Elementary School Number 9 effective July 22, 2013. Her employment contract expired on June 30, 2014.

In 2014, Belleville was a school district in financial disarray. Via a memorandum dated March 20, 2014, Superintendent of Schools Helene Feldman was advised by then Acting Business Administrator Raymond Jacobus that he could not certify that there were sufficient funds to meet the district's financial obligations. Feldman so advised the Essex County Superintendent of Schools, via letter dated March 25, 2014. In response, on May 13, 2014, the Acting Commissioner of Education appointed Thomas Egan as a State monitor, pursuant to N.J.S.A. 18A:7A-55. Egan's duties and responsibilities were as defined by law and as set forth in his contract. He had the clear authority to oversee the hiring and firing of staff. Egan moreover had the authority to "override a chief school administrator's action and vote by the board of education on any matters related to the fiscal and personnel management of the district . . . ." Upon entering the district in May 2014, Egan confirmed that there were insufficient funds to meet the district's payroll. He conferred with Feldman who, according to Egan, understood his concerns, and readily

accepted his recommendation that all non-tenured staff members be non-renewed prior to the May 15 deadline for such action set forth at N.J.S.A. 18A:27-10.

Since Gammaro did not hold her position of employment as principal under tenure, she too was non-renewed, and she received a letter dated May 15, 2014, signed by Feldman advising her as follows:

> It is with regret that I inform you that you are not being offered a contract for the 2014-2015 school year. Your employment will terminate June 30, 2015.

The letter went on to advise Gammaro that, pursuant to N.J.S.A. 18A:27-3.2, she was entitled to a written statement of reasons and an informal appearance before the Board. The record does not reflect that she availed herself of these procedural rights, however.

Instead, on May 18, 2014, Gammaro questioned Feldman, who advised her that the letter was sent in error, and to disregard it. According to Gammaro, the Assistant Superintendent, Paula Cummis, was also in the room. At a subsequent meeting the issue of the May 15, 2014, notice was raised again, and Cummis reiterated that the notice should not have been sent to Gammaro. Gammaro testified that this "made total sense to [her]" because as a tenured employee she did not understand how her employment could be summarily terminated. Concededly, the letter did not address any recall or reassignment rights Gammaro might have in light of her tenured status as a teacher, which could have contributed to her confusion.

On June 20, 2014, Gammaro was summoned to the Board office, and was given a "Rice Notice," alerting her that her employment status would be discussed at the June 23, 2014, Board meeting.[2] Still feeling unclear about her employment status, Gammaro discussed matters at lunch with Cummis and Feldman that day. According to Gammaro, she was again reassured that the notice of nonrenewal had been sent to her in error. Feldman advised that she did not know what was to be discussed at the June

[2] This is notice that that a staff member's employment status may be discussed by the Board, so that she may avail herself of the right, under the Open Public Meetings Act, to request that any such discussion be conducted in public. See N.J.S.A. 10:4-12(b)(8); Rice v. Union City Reg'l High Sch. Dist., 155 N.J. Super. 64 (App. Div. 1977).

23, 2014, meeting, as she had yet to receive an agenda for the meeting, and thus could not explain why Gammaro had received a Rice Notice. Since the notice went out under Feldman's signature, I asked Gammaro directly whether Feldman's apparent ignorance of why it was sent was confusing to her. It surely confused me. But I did not get a clear response. In any event, apparently her administrators' conduct confused Gammaro enough to prompt her to surreptitiously record their lunchtime conversation.[3]

The tape of the conversation is difficult to understand; the transcription references "unidentified speakers," and portions of the conversation are noted to be "indiscernible." But Cummis and Feldman are clearly disgruntled. In often salty language, they grouse about affairs in the school district, which at that point are under the direction of Egan as monitor. Both Cummis and Feldman appear primarily concerned about their own job security, stating that they both are going to be dismissed. They complain about the evisceration of their authority to direct school affairs. Gammaro tries valiantly, and repeatedly, to turn the conversation to her own employment situation, but with only limited success. Feldman does confirm that "[e]verybody who got a letter is gone until you get a letter that says you're not gone . . . ." Gammaro urges that while she got such a letter, it was sent in error, and Feldman replies "[w]ell, you got ripped by accident. They didn't ask us. You see, they didn't ask us." Thus, the lunchtime conversation actually confirms that while Feldman may not have liked doing it, she had indeed non-renewed Gammaro's employment.

Feldman contacted Gammaro again later that evening. This time Feldman affirmatively advised Gammaro that she would not be on the Board agenda that night. Gammaro testified that she remained unconcerned about her continued service as principal, notwithstanding the fact that her contract was to expire within days, because she had been told that contracts might not be renewed until mid-July. The minutes of the June 23, 2014, meeting confirm that discussion of Gammaro's employment status was not on the agenda.

[3] Both the recording and a transcript were admitted into evidence.

The lunchtime conversation with Feldman, Cummis, and Gammaro suggests that what transpired in May and June 2014 in Belleville was fraught with confusion and intrigue; but Egan's testimony readily revealed that the events those months were actually pretty straightforward. A Rice Notice was sent to Gammaro for the June 20, 2014, meeting, because, according to Egan, a layoff of over 100 employees, Gammaro included, was going to be discussed by the Board, and it was possible that any one of these staff members could have been discussed individually. Moreover, ultimately, Gammaro could no longer claim a lack of clarity about her employment status because, per Egan's testimony, she called him directly on at least two occasions, and he twice confirmed that she had been RIFed as a principal due to the fiscal crisis in the district.

Gammaro heard nothing further until she received a copy of a July 14, 2014, Board resolution transferring her from her position as principal to a position as a high school teacher. A July 16, 2015, letter enclosed her employment contract and indicated that she had been reappointed for the 2014-2015 school year as a teacher. According to Gammaro, between May 15, 2014, and June 30, 2014, she continued to perform the duties of her principalship. But at no time after receiving the May 15, 2014, letter and before receiving the letters in July 2014, appointing her to a teaching position, did Gammaro indicate that she was accepting appointment as a principal, nor did she at any time receive a contract appointing her to this position for the 2014-2015 school year.

In summary, while Egan urged that the layoffs were completed with full cooperation by Feldman, the tape of Gammaro's' lunchtime meeting suggests that both Feldman and Cummis may have perceived otherwise. This difference in perception notwithstanding, I **FIND** that Gammaro received a letter of nonrenewal as a principal on May 15, 2014; that she was non-renewed due to a fiscal crisis; and that her nonrenewal was never rescinded in writing. In light of this finding, and as will be more fully discussed below, Gammaro's confusion, or lack thereof, regarding her employment status becomes irrelevant to a determination as to the validity of the May 2014 notice of non-renewal issued by Feldman.

## CONCLUSIONS OF LAW

Although "[i]t is by now axiomatic that a board has virtually unlimited discretion in hiring or renewing non-tenured teaching staff members," Adams v. Trenton Board of Education, EDU 8237-07, Comm'r (August 13, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>; Dore v. Bedminster Board of Education, 185 N.J. Super. 447 (App. Div. 1982), Gammaro's claims spring from her contention that she failed to receive proper notice of her nonrenewal per N.J.S.A. 18A:27-10, which requires that

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increase in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.

See also Skidmore v. Washington Twp. Bd. of Educ., EDU 5688-03, Final Decision (December 1, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

N.J.S.A. 18A:27-11 affords a potential remedy should an employee fail to receive proper notice, providing that "then [the] board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." In the event notice is not timely issued, however, the teaching staff member must comply with the requirements of N.J.S.A. 18A:27-12, which provides as follows:

> If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein . . . .

Compliance with N.J.S.A. 18A:27-12 is critical to any claim to continued employment due to lack of proper notice, as the statute concludes by providing that, "[i]n the absence of such notice of acceptance the provisions of this article shall no longer be applicable." Ibid.

Gammaro, then serving as a nontenured building principal, received the requisite written notice from her superintendent of schools on May 15, 2014. She testified that the notice was worded in a manner that caused her to question its veracity, and that when she questioned Feldman, the superintendent verbally advised her more than once that it was sent in error and to disregard it. These verbal exchanges, and these exchanges alone, form the basis of Gammaro's contention that she failed to receive proper notice under N.J.S.A. 18:27-11. Her arguments are unpersuasive.

I **CONCLUDE** that a rescission of Feldman's written notice could have come in only one legally valid manner; that is, via another written document. Insofar as public moneys are at stake, as well as the livelihood of a public employee, the statute demands that the nonrenewal be unequivocal. Concomitantly, a rescission of the nonrenewal must be equally unequivocal. To hold otherwise would open a floodgate of claims that written nonrenewal notices have no import or meaning. For this reason, our courts have held that "[p]arol evidence is not admissible to contradict, alter, or vary a writing either appointed by law or by the compact of the parties . . . ." See Perrine v. Cheeseman, 11 N.J.L. 174 (1829).

Moreover, Gammaro's arguments ignore the reality of the administrative structure and climate in Belleville at the time of her nonrenewal. The role of the State monitor and his involvement in Gammaro's nonrenewal suggest why Feldman may have disavowed the notice sent under her signature; and equally so, why her disavowals cannot bind the Board. N.J.S.A. 18A:7A-55(b)(4) confirms that Egan had the authority to "oversee all district staffing, including the ability to hire, promote and terminate employees." See Rankins v Bd. of Educ. of the City of Pleasantville, A-1662-10T4 (App. Div. October 22, 2012), http://njlaw.rutgers.edu/collections/courts/. He thus had the clear authority to direct Feldman to non-renew Gammaro for fiscal reasons, or

for any non-proscribed reason whatsoever, and Feldman's protestations that her letter had no binding effect were at best an expression of her frustration at the emasculation of her authority.

Nor does the fact that Gammaro claims to have continued to perform the duties of a principal until June 30, 2014, alter the fact that Feldman's notice of nonrenewal was valid and binding; indeed, her contract did not expire until then. Likewise, although the transfer back to the classroom that was Gammaro's entitlement under the tenure and seniority laws was not formalized until the Board acted on July 14, 2014, this did not render Feldman's non-renewal letter untimely or ineffective. See N.J.S.A. 18A:28-12.

Finally, the Board urges that even if the notice issued by Feldman was somehow inadequate, Gammaro's claim to continued employment as a principal must nonetheless be rejected in light of her failure to comply with the express requirements of N.J.S.A. 18A:27-12. In light of my determination above, it is unnecessary to address this argument.

## ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

March 15, 2016

DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: March 15, 2016

Date Mailed to Parties: MAR 17 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## APPENDIX

### Witnesses

For Petitioner:

Loraine Gammaro
Thomas Egan

For Respondent:

None

### Exhibits

Joint Exhibits:

J-1 Letter dated May 15, 2014
J-2 Receipt
J-3 Audio tape of June 20, 2014, conversation
J-4 Letter dated June 20, 2014
J-5 Letter dated July 15, 2015
J-6 Letter dated July 31, 2014

For Petitioner:

P-1 Provisional Certificate
P-2 Certificates
P-3 Certificate
P-4 Agenda, Belleville Board meeting, June 23, 2014
P-5 Minutes, Belleville Board meeting, June 23, 2014
P-6 Letter dated July 16, 2014
P-7 Transcript of recorded conversation

For Respondent:

R-1 Admitted as J-1

R-2 Admitted as J-2

R-3 Admitted as J-3

R-4 Admitted as J-4

R-5 Admitted as J-5

R-6 Not admitted

R-7 Not admitted

R-8 Admitted as J-6

R-9 Agenda, Belleville Board meeting, July 14, 2014

R-10 Minutes, Belleville Board meeting, July 14, 2014

R-11 Not admitted

R-12 Letter from counsel dated August 21, 2015, with attachments:

- R-12(a) Memorandum dated March 20, 2014
- R-12(b) Letter dated March 25, 2014
- R-12(c) Letter dated May 13, 2014, and accompanying contract

155-16

OAL DKT. NO. EDU 11734-14
AGENCY DKT. NO. 204-8/14

| | | |
|---|---|---|
| DAMIAN DeBENEDETTO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/16

Date of Mailing: 4/25/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 11734-14
AGENCY DKT. NO. 204-8/14

**DAMIAN DE BENEDETTO,**
Petitioner,

v.

**CITY OF HOBOKEN BOARD OF EDUCATION,**
**HUDSON COUNTY**
Respondent.

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**Gregory T, Syrek,** Esq., for petitioner (Bucceri and Pincus, attorneys)

**Sandra N. Varano,** Esq., for respondent (Nirenberg and Varano, attorneys)

Record Closed: March 22, 2016 Decided: March 22, 2016

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

This matter was transmitted to the Office of Administrative Law on September 12, 2014 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves both disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

March 22, 2016
DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: 3-24-16

Mailed to Parties: MAR 24 2016

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BUCCERI & PINCUS, ESQS.
300 Broadacres Drive, Suite 210
Bloomfield, NJ 07003-3153
(973) 771-0700
Counsel for Petitioner

| | | |
|---|---|---|
| DAMIAN DeBENEDETTO, | : | BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF |
| Petitioner, | : | ADMINISTRATIVE LAW |
| v. | : | AGENCY REF. NO. 204-8/14<br>OAL DKT. NO. EDU 11734-2014N |
| HOBOKEN BOARD OF EDUCATION, HUDSON COUNTY, | : | |
| | : | **SETTLEMENT AGREEMENT** |
| Respondent. | | **AND RELEASE** |

This Agreement and General Release (the "Agreement") is made this _____ day of February, 2016, by and between the Hoboken Board of Education (the "Board") and Damian DeBenedetto ("DeBenedetto") (collectively, the "Parties").

**WHEREAS**, DeBenedetto was employed by the Board as a tenured teaching staff member, teaching Social Studies; and

**WHEREAS**, on or about May 13, 2014, the Board determined that it would not reappoint DeBenedetto to a Social Studies teaching position for the 2014-2015 school year as part of a reduction in force; and

**WHEREAS**, DeBenedetto filed a Petition of Appeal on or about August 5, 2014 challenging his reduction in force; and

**WHEREAS**, the parties to this Agreement wish to resolve this matter amicably;

**NOW THEREFORE**, in consideration of the mutual covenants contained herein and for good and other valuable consideration, the sufficiency of which is hereby acknowledged and agreed to by all parties hereto, DeBenedetto and the Board do agree as follows:

1. Reappointment

DeBenedetto shall be appointed to the position of Social Studies teacher for the 2016-2017 school year with an effective appointment of September 1, 2016.

2. Placement on Guide

DeBenedetto will be placed on the salary guide applicable for the 2016-2017 school year. His guide placement shall be as if he had continued in the Board's employment during the 2014-2015 and 2015-2016 school year.

3. DeBenedetto shall receive two years of seniority service credit in the Secondary Social Studies category. His seniority shall be calculated as if he had been employed by the Board for the 2014-2015 and 2015-2016 school years.

4. DeBenedetto agrees to waive any claim he may have for back pay or any other damages for the 2014-2015 and 2015-2016 school years.

5. Upon the full execution of this Settlement Agreement and Release as well as the approval of same by the Hoboken Board of Education, Administrative Law Judge and Commissioner of Education, the above referenced Petition of Appeal will be dismissed with prejudice.

6. Nothing contained in this Agreement shall constitute an admission of wrongdoing by any party. Instead, this Agreement is reached to resolve the pending dispute.

7. DeBenedetto agrees not to initiate or process any further grievances, charges, petitions and/or litigation against the Board, its members, agents or employees, with regard to any disputes relating to the above referenced Petition of Appeal, up to the date of the execution of this Agreement.

8. In exchange for the above consideration, DeBenedetto specifically waives and releases any and all claims and rights he may have against the Board, its members, agents and employees up to the date of the execution of this Agreement. This releases all claims, demands, damages, causes of action or suits which have been or could have been brought, including those of which DeBenedetto is not aware and those not mentioned in this Settlement Agreement and Release. This releases all claims resulting from anything which has happened up to now, including, but not limited to all claims which

were or could have been brought in the above referenced Petition of Appeal. This includes but is not limited to all claims under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 et seq.; the Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. Section 621 et seq.; the Americans With Disabilities Act; Title VII of the Civil Rights Act of 1964; Section 1981 of the Civil Rights Act of 1866; the Conscientious Employee Protection Act, *N.J.S.A.* 34:11 B-1 et seq.; 42 U.S.C. 1983; *N.J.S.A.* 10:6-2; Negligence; the U.S. Constitution; the New Jersey Constitution; tort law or contract law; any similar statute, regulation, rule or order; any provision of any other law, common or statutory, of the United States, New Jersey or any other state, county, city or locality; and/or any claims for costs, fees, or other expenses, including attorney's fees.

9. This Agreement constitutes the entire agreement between these parties and constitutes full and final settlement as identified herein. The terms of this Agreement shall be interpreted in accordance with the laws of the State of New Jersey.

10. The parties each affirm and represent that they had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and they are entering into this Agreement and Release voluntarily and with full understanding of its meaning.

11. This Agreement is subject to the approval by the Hoboken Board of Education. This Agreement will be submitted to the Board of Education for consideration of approval at the Board's regular monthly meeting.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this Settlement Agreement and Release as of the dates indicated.

**FOR THE PETITIONER, DAMIAN DE BENEDETTO:**

Damian DeBenedetto — Dated: 3/5/2016

~~Witness:~~

Gregory T. Sycek — Dated: 3/7/16

**FOR THE HOBOKEN BOARD OF EDUCATION:**

Board President — Dated: 03/10/16

*ATTEST:*

Bd. Sec./Bus. Admin. — Dated: 03/10/16

CERTIFIED RESOLUTION

## Agenda Item Details

| | |
|---|---|
| Meeting | Mar 08, 2016 - AGENDA |
| Category | 9. ACTION - GOVERNANCE AND PERSONNEL |
| Subject | 9.21 Approval of Settlement Agreement betwen the Hoboken Board of Education and former Employee |
| Type | Action |
| Recommended Action | BE IT RESOLVED, that the Board of Education and former employee hereby agrees to settlement agreement Agency Reference No. 204-8/14 OAL Docket No. EDU 11734-2014N. |

## Motion & Voting

IT RESOLVED, that the Board of Education and former employee hereby agrees to settlement agreement Agency Reference No. 204-8/14 OAL Docket No. EDU 11734-2014N.

Motion by Leon Gold, second by Jennifer Evans.
Final Resolution: Motion Carries
Yes: Sharyn Angley, Peter Biancamano, Jennifer Evans, Leon Gold, John Madigan, Britney Montgomery, Irene Sobolov, Monica Stromwall, Thomas Kluepfel

The above resolution was approved by the Hoboken Board of Education at its Public Meeting held on 08 MARCH 2016.

(signature)
William P. Moffitt
Business Administrator / Board Secretary

156-16

OAL DKT. NO. EDU 14406-15
AGENCY DKT. NO. 267-9/15

IN THE MATTER OF TRUDI DAWES, :
HOPE COMMUNITY CHARTER :
SCHOOL, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner observes that the Executive Director of the Hope Community Charter School signed the agreement on behalf of the Board of Trustees. The file does not contain a copy of the Board's resolution approving the settlement and designating the Executive Director to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Executive Director to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/16

Date of Mailing: 4/25/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 14406-15
AGENCY DKT. NO. 267-9/15

**IN THE MATTER OF TRUDI DAWES,**
**HOPE COMMUNITY CHARTER**
**SCHOOL, CAMDEN COUNTY.**

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**Lauren E. Tedesco**, Esq., for petitioner (Capehart & Scatchard, attorneys)

**Zachary R. Wall**, Esq., for respondent (Wall & London, LLC, attorneys)

Record Closed: March 21, 2016 Decided: March 24, 2016

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 16, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 24, 2016
DATE

Susan Scarola
**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: March 24, 2016

Date Mailed to Parties: March 24, 2016

/cb

OAL DKT. NO. EDU 4822-16
AGENCY DKT. NO. 95-3/16

| | | |
|---|---|---|
| S.A. and J.A., on behalf of minor child, P.A., | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE HANOVER PARK REGIONAL HIGH, SCHOOL DISTRICT, MORRIS COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/16
Date of Mailing: 4/25/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 04822-16
AGENCY DKT.NO. 95-3/16

**S.A. & J.A. ON BEHALF ON MINOR CHILD, P.A.,**
Petitioners,
v.
**HANOVER PARK REGIONAL HIGH SCHOOL BOARD OF EDUCATION, MORRIS COUNTY,**
Respondent.

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**Arla D. Cahill**, Esq., for petitioners (Mandelbaum Salsburg, P.C., attorneys)

**Dennis McKeever**, Esq., for respondent (Sciarillo Cornell Merlino McKeever & Osbourne, LLC, attorneys)

Record Closed: April 5, 2016 Decided: April 6, 2016

BEFORE **LELAND S. McGEE,** ALJ:

Petitioner brings this emergency relief action seeking an order allowing their child to participate in the April 19, 2016, National Honor Society induction ceremony. On March 30, 2016, the Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL).

## STATEMENT OF FACTS

P.A. is a 17-year-old high school senior at Whippany Park High School ("WPHS"). On Thursday, February 18, 2016, P.A. and eleven other students from Respondent school district attended the Future Business Leaders ("FBLA") conference in Atlantic City, New Jersey along with hundreds of students from other school districts. At or about 4:15 p.m., after the day's activities concluded, P.A. and three male students went to their hotel room. One of the students was P.A.'s roommate, S.R., said that he brought vodka with him on the trip. P.A. did not actually see S.R. with any vodka-labeled bottles.

After dinner that evening at a local pizzeria, P.A. returned to his hotel room at which time S.R., gave him a plastic sparkling water bottle containing a clear liquid and told P.A. that it contained vodka. P.A. took some sips from the bottle and later emptied its contents in the sink. He never removed the bottle from his hotel room.

Later that same evening, P.A. attended a dance at which S.R. displayed impaired behavior and was disruptive. P.A. and at least one other student helped S.R. back to the hotel room. On the way to the hotel room they saw Ms. Andrea Ritacco, a teacher from WPHS, and explained what occurred. She followed the students up to the hotel room and P.A. observed another student apparently intoxicated, and went to her aide in addition to S.R.

Respondent ultimately contacted P.A.'s parents ("Petitioners"), and the mother traveled to Atlantic City and caused P.A. to have a blood and urine test for drugs and alcohol at the request of WPHS administrators. The tests were negative.

After returning home on February 19, 2016, Petitioners and P.A. met with WPHS administrators to discuss the events of the prior evening. They required the Petitioners return to Atlantic City, to have the hospital physicians recertify the results of the blood and urine tests on their form. They also required that Petitioners sign a "Possible Alcohol or Drug Violation Letter to Parent/Guardian," presumably to acknowledge

receipt of the letter. During that meeting, Christopher Kelly, Principal at WPHS, imposed the following discipline on P.A.:

1. A 4-day Out-of-school suspension commencing on Monday February 22, 2016.
2. Removal from the National Honor Society ("NHS").
3. Retraction of the principal's letter of recommendation required for an NHS scholarship.
4. Removal from participation in the Senior Service Project (later rescinded)
5. Placement on probation with respect to attending Senior Prom.

## DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the instant matter, the presumed potential for irreparable harm lies in the fact that P.A.'s reputation will be damaged because his admission to several colleges and universities **might** be revoked; he will be "branded" as one who abuses alcohol; he failed an exam in one of his Advanced Placement courses because of the 4-day suspension; and his opportunity to apply for a NHS scholarship was "undermined".

The undersigned is not persuaded that P.A. will be irreparably harmed. He was suspended in his junior year for an infraction of district policy which resulted in him not being inducted in the NHS. It is clear that this did not prevent many prestigious colleges and universities from admitting him to their institutions. Further, there is nothing more than speculation that the offers of admissions will be revoked once P.A. discloses information about the incident. All of P.A.'s purported conduct surrounding the incident reflects a compassionate, aware young man who exercised sufficient discretion not to get intoxicated himself. It appears that, just as he may be able to provide Admissions Officers with a reasonable explanation for the prior suspension, P.A. may likewise

satisfactorily explain the current incident. Further, P.A. returned to school in February and there is no evidence that since February, his reputation has been tarnished as a result of the incident.

Petitioner argues that there is a likelihood that they will prevail on the merits of the case. They argue that the due process notice that they received regarding the regulatory provision that formed the basis for the suspension, did not afford Respondent jurisdiction to impose a penalty; the conditions precedent were not established. Respondent argues that, without conceding Petitioner's position, notwithstanding that provision, P.A. violated a specific Handbook policy; he violated the policy that prohibits the "use" of alcohol at school activities. It is undisputed that P.A. admitted that he drank what he believed to be vodka. The undersigned is persuaded that P.A. acted conscientiously when he candidly and honestly recounted the events of the evening and implicated himself. The undersigned is persuaded that his conduct during the course of the incident and following the incident might have risen to the level of a mitigating factor. Nonetheless, I cannot ignore his admission when determining the likelihood of success on the merits.

## CONCLUSION

After hearing the arguments of petitioner and respondent and considering documents submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by petitioner or the likelihood of prevailing on the merits.

## ORDER

For the foregoing reasons, it is hereby **ORDERED** that Petitioner's request for emergent relief is **DENIED**.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6. Hearing dates will be scheduled shortly.

April 6, 2016
DATE

**LELAND S. McGEE,** ALJ

lr

160-16

OAL DKT. NO. EDU 5199-16
AGENCY DKT. NO. 104-4/16

| | | |
|---|---|---|
| S.A., on behalf of minor child, H.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is appealing the decision of the West Orange Board of Education (Board) to suspend H.S. from school for the remainder of the 2015-2016 school year for unauthorized occupancy of a school building. The ALJ denied the petitioner's request for emergent relief.[1]

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the

[1] The recommended Order states that the petitioner has not established the necessary elements to grant emergent relief under *N.J.A.C.* 6A:3-1.6; however it did not specifically state why one or more of the *Crowe* prongs was not established.

movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In this case, the petitioner has failed to show that H.S. will suffer irreparable harm if he is not immediately permitted to return to the general education setting. It is undisputed that the Board is providing H.S. with home instruction and that the Board has provided an alternate education program for H.S. at the Essex Junior Academy. Moreover, H.S. is going to advance to 9th grade after the completion of the 2015-2016 school year, and the Board is allowing him to participate in the 8th grade graduation ceremony. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

Although the petitioner is not entitled to emergent relief, the Commissioner emphasizes that the governing statutory and regulatory provisions prevent the Board from implementing a long-term suspension that extends to the remainder of the 2015-2016 school year without reviewing the case at subsequent Board meetings. Under *N.J.A.C.* 6A:16-7.3(c), the "[s]uspension of a general education student shall not be continued beyond the district board of education's second regularly scheduled meeting following the suspension, unless the district board of education so determines pursuant to *N.J.S.A.* 18A:37-5." In accordance with *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

i. The nature and severity of the offense;
ii. The district board of education removal decision;
iii. The results of any relevant testing, assessments or evaluations of the student; and
iv. The recommendation of the chief school administrator, after considering input from the principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

Therefore, at the May 9, 2016 Board meeting, the Board is directed to determine whether H.S. should return to the general education program or whether H.S.'s long-term suspension should continue.[2] If it is determined that H.S.'s long-term suspension should be continued, the Board must maintain H.S.'s placement in an appropriate alternative education program pursuant to *N.J.A.C.* 6A:16-9. Additionally, the Board is reminded that it must also continue to follow the applicable regulatory provisions concerning the process for determining whether the suspension should continue and/or when H.S. should return to the general education program, i.e., *N.J.A.C.* 6A:16-7.3(d)-(f).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted as modified. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/25/16
Date of Mailing: 4/26/16

[2] It appears from the calendar posted on the Board's website that there were regularly scheduled Board meetings held on March 28, 2016 and April 25, 2016.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 05199-16
AGENCY DKT.NO. 104-4/16

**S.A. o/b/o minor child, H.S.,**

Petitioner,

v.

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

Respondent.

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**Ronald J. Ricci**, Esq., for petitioner (Ricci, Fava & Bagley LLC, attorneys)

**Matthew J. Giacobbe,** Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs LLC, attorneys)

Record Closed: April 13, 2016 Decided: April 13, 2016

BEFORE **IMRE KARASZEGI, JR.,** ALJ:

Petitioner brings this action seeking emergent relief under N.J.A.C. 6A:3-1 et seq. regarding the Board of Education of the Township of West Orange, Essex County, decision to suspend H.S., a minor child, from Liberty Middle School in West Orange, New Jersey. On April 6, 2016, the Commissioner of Education received petitioner's application for emergent relief. On April 6, 2016, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) where it was filed as a contested case under Docket No. EDU 05199-16. On April 13, 2016, oral argument was presented at the OAL.

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b) and Crowe v. DeGioia, 90 N.J. 126 (1982). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In the instant case, after hearing the arguments of petitioner and respondent and considering any other documentation submitted, I **FIND** that petitioner is not entitled to emergent relief because the proofs submitted have not established the necessary elements to grant emergent relief under N.J.A.C. 6A:3-1.6(b). H.S. will be provided an alternative education setting, specifically at the Essex Junior Academy Campus through the end of the 2015-2016 school year, in order that H.S.'s continuing educational needs are addressed.

After hearing arguments of petitioner and respondent, and considering all the affidavits, certifications and documents submitted, I enter this **ORDER** in favor of respondent. Petitioner's motion for emergent relief is therefore **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this Order. If the Commissioner of the Department of Education does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 13, 2016

DATE

**IMRE KARASZEGI, JR., ALJ**

id

161-16

AGENCY DKT. NO. 119-5/15

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | ORDER |
| RESPONDENT. | : | |

On January 28, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found B.P. liable for tuition in the amount of Nine Thousand Two Hundred Thirty Dollars and Thirty Eight Cents ($9,230.38), representing tuition for a period of ineligible attendance by his child, N.P., in the Board's school district between February 2, 2015 and June 18, 2015. The Board subsequently notified the Commissioner that B.P. failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. B.P. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Brandon Perrone is now subject to entry of a judgment by the court in the amount of $9,230.38, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/26/16

Date of Mailing: 4/26/16

OAL DKT. NO. EDU 05106-16
AGENCY DKT. NO. 102-4/16

| | | |
|---|---|---|
| KEVIN KARP, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed before Arbitrator Gerber with such proceedings as the parties and the Arbitrator deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/27/16

Date of Mailing: 4/27/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 05106-16
AGENCY DKT. NO. 102-4/16

**KEVIN KARP,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,**
Respondent.

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**Stephen B. Hunter,** Esq., for petitioner (Detzy, Hunter, and DeFillippo, LLC, attorneys)

**Jerry J. Dasti,** Esq., for respondent (Dasti, Murphy, McGuckin, Ulaky, Koutsouris and Connors, attorneys)

BEFORE **PATRICIA M. KERINS**, ALJ:

The issue presented in this request for emergent relief is whether petitioner Kevin Karp (Karp) is entitled to dismissal of tenure charges against him on the grounds respondent Barnegat Township Board of Education (Barnegat) did not comply with the Open Public Meeting Act (OPMA). This matter was transmitted to the Office of Administrative Law (OAL) for consideration of the emergent relief request on April 5, 2016 and scheduled for oral argument on April 18, 2016. The argument was held on that date at the OAL in Mercerville, New Jersey.

## FACTUAL DISCUSSION

This matter arises out of a dispute over whether Barnegat should have provided Karp notice of its consideration of tenure charges in accordance with the OPMA, N.J.S.A. 10:4-6. Karp is a tenured teacher employed by Barnegat. In January 2016, a student alleged Karp committed an act of "harassment, intimidation, or bullying" while handing out paperwork during a Computer Application class that he taught at a middle school in Barnegat Township. Barnegat's staff conducted an investigation of the allegations and issued a report on January 10, 2016, concluding that evidence did not show Karp committed the alleged acts. On January 20, 2016, Karp was advised that other students had made several similar allegations against him. Karp was not notified formally by Rice notice that his employment status was to be discussed by Barnegat in an executive session at a regularly scheduled board meeting on February 23, 2016. Barnegat voted at that meeting to serve Karp with tenure charges.

After considering the potential tenure charges on February 23, 2016 Karp was served by letter February 25, 2016, with the Board "Statement of Formal Charges" and "Statement of Evidence". The Board then voted to certify those charges on March 22, 2016. Karp was charged with (1) repeatedly brushing up to and against the breasts of a twelve-year-old female student; (2) making "cat calls" to a female student; (3) engaging in various incidents that made a female student "uncomfortable," such as touching her exposed bra strap and making "creepy comments;" and (4) making inappropriate comments to students. Petitioner's Petition of Appeal, Exhibit B, and Statement of Initial Charges. Karp will not receive his salary for 120 days while the charges against him are pending.

## LEGAL DISCUSSION

Karp asserts that Barnegat violated the OPMA by failing to notify him of his right to request a public discussion at the meeting on February 23, 2016, regarding his continued employment status. On those grounds Karp seeks emergent relief dismissing the tenure charges filed against him. In response the Board cites the provisions of New Jersey's teacher tenure statue which provide a Board's consideration

and actions on tenure charges shall not take place at a public meeting. N.J.S.A. 18A:6-11.

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [Id; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).]

Petitioners must meet all four criteria to prevail on this motion. See Crowe v. DeGioia, 90 N.J. 126 (1982). Further the moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

The first standard to be addressed is whether the petitioner will suffer irreparable harm. Crowe, supra, 90 N.J. at 132-332. Harm is irreparable when it cannot be addressed with monetary damages. Id. This standard also contemplates that the harm be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, supra, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Id.

In this matter, Karp claims he will suffer irreparable harm if the tenure charges are not dismissed because the loss of his salary would have an "impact on his ability to even pay for his roof expenses." Petitioner's Brief, 9. Karp also claims that the pendency of the charges subjects him to ridicule in his municipality. Id.

The loss of salary is purely monetary and, should he prevail on the tenure charges he will be made whole. Further, there is no evidence that Karp will suffer irreparable harm as a result of being "subject to ridicule" in his municipality as the very procedure he is challenging is to keep discussion of the charges out of a public hearing. Therefore, Karp has not "clearly and convincingly" shown that he will suffer immediate or irreparable harm if the tenure charges are not dismissed.

The next standards Karp must meet are whether the legal right underlying his claim is settled and whether he is likely to prevail on that claim. Karp claims that his legal right in this matter arises under the OPMA, specifically N.J.S.A. 10:4-12(b)(8). He asserts he was entitled to (1) notice that his employment status would be discussed at an executive meeting on February 23, 2016 and (2) an opportunity to request that the matter be discussed publicly at that meeting. Barnegat counters that the "Tenure Employees Hearing Law," N.J.S.A. 18A:6-11, ("the tenure statute") prohibits a Board's consideration of tenure charges from taking place at a public meeting.

The conflict between the OPMA and the tenure statute was settled initially in Cirangle v. Maywood Bd. of Educ., 164 N.J. Super. 595 (1979). Under Cirangle the tenure statue prevailed over the OPMA. In this matter, however, petitioner argues that before a Board can consider tenure charges in closed session it must first serve the employee with a Rice notice and allow him or her to choose to have the matter discussed in public. Only then he argues can the Board choose to move onto consideration of tenure charges in private as contemplated by the tenure statue.

The OPMA protects "a strong tradition both in this State and in the nation favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (N.J. 1977). In the OPMA, the Legislature declared "that the right of the public to be present at all meetings of public bodies . . . is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, . . . " N.J.S.A. 10:4-7. It also declared

> it to be the public policy of this state to insure the right of its citizens to have adequate advance notice of and the right to

> attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> [Id.]

One exception that allows the public to be excluded from a meeting is when a public body discusses any:

> matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any . . . current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting . . .
>
> [N.J.S.A. 10:4-12(b)(8). ("the personnel exception")]

The personnel exception identifies a concern for "personal privacy or guaranteed rights of individuals which would be clearly in danger of unwarranted invasion" if these matters were to be discussed in public. Rice v. Union County Regional High School Bd. of Education, 155 N.J. Super. 64, 72 (App.Div. 1977). However, to not require specific notice of the matter to be discussed at the meeting would "render useless and inoperative the statutory right granted an employee to have a public discussion of his or her personnel matter." Id. This section of the OPMA "provides a method by which the individual may forego [his] personal privacy and have a public discussion on the matter." Id. "We must presume that the Legislature knew what it was doing and did not intend to establish a useless procedure." Id; Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969). "Strict adherence to the letter of the law is required in considering whether a violation of the [OPMA] has occurred.'" Rice v. Union County Regional High School Bd. of Education, 155 N.J. Super. 64, 70 (App.Div. 1977); quoting Polillo, supra, at 578.

"[T]he right to request a public discussion of a personnel matter presupposes notice to an employee who may be adversely affected . . . ." Oliveri v. Carlstadt-East

Rutherford Regional Board of Education, 160 N.J. Super. 131, 133-134 (App.Div. 1978). The personnel exception to the OPMA implies that if an employee decides to request a public hearing, "[he] can only exercise that statutory right . . . if [he has] reasonable advance notice so as to enable [him] to (1) make a decision on whether [he] desire[s] a public discussion and (2) prepare and present an appropriate request in writing." Rice, supra, 155 N.J. Super. at 73.

While the OPMA basically provides that meetings of public bodies . . . must be open to the public at all times, the tenure statue provided otherwise Cirangle v. Maywood Board of Education, 164 N.J. Super. 595, 598 (1979). The statute "details the procedure involved when charges are made against a tenured board of education employee." Id. at 599. When charges are made against a tenured board of education employee, "the Board's role is limited to making findings as to whether there is probable cause to credit the evidence in support of the charges." Id. If probable cause exists, the Board "merely forwards such written charges to the Commissioner of Education for further determination on the merits." Id. "It is at this stage of the proceedings where public hearings must be held and the charged employee is granted the full panoply of his rights to due process." Id. "Unlike the [OPMA], [the tenure statute] does not contain a provision which gives the employee the right to request that charges against him be heard in public." Id. Instead, the tenure statute provides that:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the Board in writing and a written statement of evidence under oath to support such charge shall be presented to the Board . . . After consideration of the charge, statement of position and statements of evidence presented to it, the Board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary . . . **The consideration and actions of the Board as to any charge shall not take place at a public meeting**.
>
> [Id. at 599-00; N.J.S.A. 18A:6-11; emphasis supplied]

In Cirangle, a tenured superintendent of schools was confronted with charges and demanded that the charges be discussed in public. Id. at 597. The Board refused to comply with his request and evaluated the charges against him in closed meetings. Id. at 597-98. Then, the Board forwarded charges over to the Commissioner of Education for determination on the merits. Id. The court acknowledged that the provisions of the OPMA and the tenure statute were in direct conflict regarding the right to a public meeting on the charges. Id. at 598. The court found that the tenure statute was a narrower statute that became effective within nineteen days of the OPMA. Id. at 601-02 and that one purpose of the tenure statute was to remove the discussion of bringing tenure charges from the publicity of the local hearing which "tears the community apart" and "disrupts the orderly conduct of local school affairs." Id. at 601; quoting In re Fulcomer, 93 N.J. Super. 404, 414 (App. Div. 1967). The court then concluded,

> ["[b]earing in mind the legislative intent to remove hearings of this nature from local school boards because of the disruptive effect upon the community, it becomes apparent that the failure to specifically afford accused employees the right to demand a public hearing cannot be chalked up to legislative oversight." Id. at 602. Therefore, "the Legislature has manifested its intention to exclude the public even in the face of a demand for an open meeting by the affected tenured employee." Id. at 602.]

Here, Karp claims that Cirangle is distinguishable from his case because on February 23, 2016, Barnegat was not certifying tenure charges to the Commissioner, but instead was merely considering the allegations and its potential response. Therefore, Karp claims he was entitled to notice of the meeting. The gravamen of petitioner's argument is that irrespective of the tenure statue he was entitled to a Rice notice of the Board's consideration of possible tenure charges at its February 23, 2016 meeting.

Karp's claim is unlikely to be unsuccessful as this matter falls within the orbit of tenure statute, which has prevailed in the courts over the OPMA. The tenure statute evinces intent to exclude the public from board meetings regarding tenure charges. As a result, once a Board considered the possibility of tenure charges Karp was not entitled to a public hearing discussing those charges. In this matter there is no

evidence that the Board considered any other action against Karp at its February 23, 2016 meeting. As its consideration went to tenure charges, it appears Karp had no right to notice and the concomitant ability to respond in public. Instead, under the tenure statue he had notice of the Board's proposed charges and the ability to respond to them prior to the Board's vote on certification. As such Karp has not met the second and third prong of the test for emergent relief.

The final prong of the test for emergent relief assumes a balancing of the equities and interests between the parties. Karp claims that he will suffer a greater harm if emergent relief is not granted because he will be without pay for a period. Petitioner's Brief, 8. Karp contends that if relief is granted the only harm Barnegat will suffer is that it will be required to restart the procedures for bringing tenure charges. However, if emergent relief is granted, the tenure charges will be dismissed and Karp will be reinstated to his position as a teacher. Therefore, Barnegat also has an interest in preventing Karp from teaching while it believes there are grounds for tenure charges.

In this matter the more substantial interest for Barnegat is likely preventing Karp from teaching during the pendency of his tenure charges. These charges allege inappropriate conduct by a teacher towards underage female students and Barnegat has an interest in preventing this conduct in school. This interest must be balanced with the harm that Karp will suffer suspension for a period without pay while the tenure charges proceeds. Because of the severity of the charges, Barnegat and its students will suffer a greater harm if emergent relief is granted. Therefore, the fourth standard for emergent relief has not been met.

## ORDER

Petitioner's request for emergent relief is **DENIED**, no other issues remain.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 19, 2016
DATE

**PATRICIA M. KERINS**, ALJ

/mel

163-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

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|---|---|---|
| IN THE MATTER OF THE TENURE CHARGE AGAINST MICHAEL LEFKOWITZ, Respondent | ) | |
| | ) | OPINION |
| BY THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY, NEW JERSEY, Petitioner | ) | AND DECISION |
| AGENCY DOCKET NO. 329-10/15 | ) | |

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Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

## APPEARANCES

FOR THE SCHOOL DISTRICT

Therese M. Taraschi, Esq., Brown & Connery, LLP
Tara L. Humma, Esq., Brown & Connery, LLP

FOR THE RESPONDENT

Cosmas P. Diamantis, Esq., Zeller & Wieliczko, LLP

STATEMENT OF THE CASE

This case arises under the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ Act" or the "Act"), N.J.S.A. 18A:6-117, et seq., which became effective on September 1, 2012. Pursuant to the Act, TEACHNJ establishes uniform requirements for the evaluation of teachers, including a process for filing inefficiency charges against teachers whose summative ratings for two (2) consecutive school years were "ineffective" or "partially effective."

PROCEDURAL HISTORY

Lefkowitz is a tenured Music Education Teacher within the District. After several years of service, on May 11, 2015, Lefkowitz received a reduction-in-force notice, effective June 30, 2015. On August 31, 2015, Lefkowitz received a recall notice back to the District advising him that he must either accept or reject the position "no later than October 31, 2015." On the same date, August 31, 2015, Lefkowitz was placed on administrative leave "due to issues including, but not limited to, evaluation scores."

Pursuant to the Act, on September 2, 2015, the State-Operated School District of the City of Camden (hereinafter the "District"), specifically N.J.S.A. 18A:6-17.3, filed a tenure charge of inefficiency against Michael Lefkowitz (hereinafter the "Respondent" or "Lefkowitz") alleging that he had received "partially effective" ratings for two (2) consecutive years of "2.56" and "2.36" and, as a result, these summative ratings warranted his dismissal from the District.

Thereafter, the District filed Amended Tenure Charges of Inefficiency on October 1, 2015.

The amended charges and a supporting statement of evidence which the District asserts "was caused by mathematical errors committed by Lefkowitz when he calculated his SY 14-15 Student Growth Objective ("SGO") scores, which altered his summative score and were discovered only after the original charges were served. Based upon this correction, the District revised Lefkowitz's summative evaluation rating" for SY 14-15 from the "2.26" that was noted in the original charges to "2.36."

The Respondent submitted a Position Statement to those amended charges on October 9, 2015. The District certified the charges to the Commissioner of Education on October 27, 2015. Effective October 28, 2015, Lefkowitz was suspended without pay in accordance with N.J.S.A. 18A:6-14.

The Respondent filed a Motion for Summary Decision with the Commissioner of Education, David C. Hespe ("Commissioner") on November 6, 2015. The Commissioner appointed the undersigned to arbitrate this matter on November 13, 2015. The District filed its Opposition to the Motion for Summary Decision on December 4, 2015. The Respondent submitted his Reply on December 18, 2015. The Arbitrator issued his Opinion and Decision, denying the Motion on January 9, 2016.

The parties exchanged discovery. After discovery was complete, the District filed a Motion for Summary Decision on February 1, 2016. The Respondent submitted his Opposition to the Motion for Summary Decision on

February 5, 2016. During a conference call with the parties on February 9, 2016, the Arbitrator issued a bench decision denying the District's Motion on timeliness grounds.

The arbitration hearing in the instant case was held on February 11, 2016, February 16, 2016, February 22, 2016 and February 25, 2016. The parties submitted post-hearing briefs dated March 23, 2016 and reply briefs dated March 28, 2016.

## CONTENTIONS OF THE PARTIES

### District Position

The District, which has the "ultimate burden of proving the tenure charges" against Lefkowitz, pursuant to N.J.S.A. 18A:6-17.3, maintains that it evaluated Lefkowitz in compliance with the evaluation requirements of TEACHNJ. With respect to the District's evaluation procedure, "the District observed Mr. Lefkowitz three (3) times during the 2013-2014 school year in accordance with the law. Based on his poor performance, he received a 'partially effective' summative evaluation rating, necessitating his placement on a corrective action plan ("CAP"). Accordingly, the District placed Mr. Lefkowitz on a CAP for the 2014-2015 school year and provided him with ample support and opportunity to improve. In accordance with the law, the District observed Mr. Lefkowitz four (4) times during the 2014-2015 school year. He received post-observation conferences following every observation and had a mid-year CAP review. Nevertheless, Mr. Lefkowitz failed to improve. He again merely received a 'partially effective' summative evaluation rating and thus, the District was

required to bring tenure charges of inefficiency against him in accordance with the law."

According to the District, it "adhered or, at minimum, substantially adhered to the evaluation process with Mr. Lefkowitz." Since he failed to receive an effective rating for two (2) consecutive years, the District contends that "the tenure charges must be sustained and Mr. Lefkowitz permanently dismissed from employment with the District."

## I. TEACHER PRACTICE EVALUATION INSTRUMENT – DANIELSON AND TEACHSCAPE

### A. Charlotte Danielson Framework for Teaching

Pursuant to TEACHNJ, the District adopted the Charlotte Danielson Framework for Teaching ("Danielson") – a pre-approved evaluation instrument. Under Danielson, teachers are scored on a scale of 1 to 4: 1-1.84 – ineffective; 1.85-2.64 – partially effective; 2.65-3.49 – effective; 3.5-4 – highly effective. The Teacher Practice score, which is based almost entirely upon classroom observations,[1] is one part of the two-part evaluation process under TEACHNJ. As discussed below, Student Growth Objectives (SGOs) comprise the second part of the evaluation process under TEACHNJ.

"Danielson encompasses four (4) domains: 1) Planning and Preparation; 2) Classroom Environment; 3) Instruction; and 4) Professional Responsibilities. (See Am. Tenure Charges ¶ 6; 3T 536:1-10; P-9.) Each domain contains a

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[1] The evaluators/observers who testified at the hearing set forth a basic description of the Danielson Framework and the training they received individually on the Danielson Framework for Teaching.

number of 'components' or 'subdomains,'[2] which are scored by the observer following the observation on a scale of 1 to 4 – 1 – ineffective; 2 – partially effective; 3 – effective; and 4 – highly effective. The component/subdomain scores within a particular domain are then averaged, yielding the score for that domain for the observation. The domain scores for each observation are averaged to obtain a total domain score for the school year and then assigned their percentage/weight of the Teacher Practice score." (See Am. Tenure Charges ¶ 6; 2T 230:22-231:22).

Teachers in the District received Danielson training prior to and during the 2013-2014 academic year and during the 2014-2015 academic year. (Dist. brief @ 5).

B. Teachscape

"The District also implemented Teachscape, a web-based software program utilized by 170 New Jersey School Districts to facilitate and implement Danielson, its evaluation rubric. Information regarding the evaluation process, included, but was not limited to, observation reports, student growth objectives ('SGOs'), and summative ratings that are recorded and stored electronically in Teachscape. Scheduling of observations, pre- and post-conferences, summative conferences, and other meetings may occur through Teachscape as

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[2] For example, Domain 1 (Planning and Preparation) contains components 1a through 1f – 1a: Demonstrating Knowledge and Content of Pedagogy; 1b: Demonstrating Knowledge of Students; 1c: Setting Instructional Outcomes; 1d: Demonstrating Knowledge of Resources; 1e; Designing Coherent Instruction; 1f: Designing Student Assessments. (See e.g. Exhibit P-9).

well. Further, as discussed at length in Section IV, Teachscape calculates the summative ratings for the school year." (Id.).

"Prior to and during the 2013-14 school year and during the 2014-15 school year, each District employee responsible for observing teachers received Teachscape training. Teachers also received Teachscape training and support from the District when necessary." (Id.)

C. Classroom Observations in Teachscape

The Teacher Practice Component of the two-part evaluation process measures the teacher's instructional skill through classroom observation. Teachscape facilitates the completion and scoring of classroom observations under the Danielson framework.

Referring to the testimony of the District's evaluators/observers, the District notes that generally they conducted their observations using a laptop computer after logging onto Teachscape. They collected "evidence" by typing what they see and hear as the teacher provides instruction. As they "script" the lesson, the evidence is automatically time-stamped. "After the observation, the observer aligns the time-stamped evidence to the appropriate component(s)/subdomain(s) within the domain."

"After aligning the evidence to the appropriate component(s)/ subdomain(s), the observer assigns them a score between 1 and 4, as discussed above. Teachscape also affords observers the option of assigning insufficient evidence when there is no evidence to justify a score for a particular

component(s)/subdomain(s). Observers also have the option of assigning critical attributes to each component/subdomain to provide further context for their scores. Once the scores are entered, Teachscape generates an observation report containing all of the scores, evidence, and critical attributes assigned to the components/subdomains within the domains, which is available for the teacher's review prior to the post observation conference." (id.)

There was a difference of opinion among the evaluators regarding whether evidence and/or critical attributes are required before a component/subdomain score can be assigned. The District relies on the testimony of Mr. Pillsbury, Implementation Manager, in the Office of Evaluation, who indicated that neither is required to assign a score under TEACHNJ and District policy.

D. Pre and Post Observation Conferences

TEACHNJ requires a pre-observation conference be completed prior to every announced observation, and post-observation conferences are completed following every observation. Both conferences are usually scheduled through Teachscape.

"Prior to the pre-observation conference, the teacher completes and uploads a Pre-Observation Conference Form in Teachscape. This form contains a series of questions regarding the lesson to be presented at the upcoming observation. During the pre-observation conference, the teacher and the observer discuss the design and goals of the lesson within the context of the Danielson domains and their corresponding components/subdomains. It is also

an opportunity for the teacher to voice any concerns he may have regarding the lesson and/or students in the class (e.g. problematic student behavior)." (Dist. brief @7).

"After the component/subdomain scores for each domain are submitted, Teachscape generates an automatic email to the teacher advising that his scores are available for review. Once the scores become available, the teacher completes and uploads a Post-Observation Conference Form in Teachscape. (P. Ex. #55). This form contains a series of questions designed to have the teacher reflect on the successfulness of the lesson, including the strengths and weaknesses of the instruction delivered. During the post-observation conference, the teacher and the observer review this form as well as the scores and evidence assigned to the different components/subdomains on the observation report. The observer provides feedback on the areas in need of improvement and strategies to improve performance in these areas." (See id.)

"Following the completion of the post-observation conference, during which the scores are discussed, Teachscape generates an automatic email to the teacher advising that his scores have been finalized and cannot be changed. (See P. Ex. #56). At that point, the observation is complete." (Id.)

II. Student Growth Objectives ("SGO")

"SGOs represent the totality of student growth from the beginning of the school year to the end of the school year. Student growth is measured by taking baseline or diagnostic data on students in the beginning of the year and then setting growth marks or goals for the students to achieve before the end of the

school year. The goals are set by the teacher with input from the administrator(s) and ultimately, finalized by the teacher and the administrator(s). At the end of the school year, the teacher is assigned two SGO scores based upon the percentage of students who meet the designated goals. Prior to and during the 2013-2014 school year and during the 2014-2015 school year, teachers received SGO training and support." (Dist. brief @ 8).

> "In addition to his teacher practice score, Mr. Lefkowitz received an SGO score of "3.45" for the 2013-2014 school year. (See id.) His SGO and Teacher Practice were assigned their respective weights/ percentages (15% and 85% respectively) and added together to produce a summative rating, which corresponds to one of the four (4) rating categories." (id.)

## III. Evaluation Scoring in Teachscape

A teacher's summative rating is the combination of his/her Teacher Practice score and, in part, his SGO score. During the 2013-14 school year, the Teacher Practice Score comprised 85% and the SGOs comprised 15% of the teacher's summative rating. During the 2014-15 school year, the Teacher Practice score comprised 80% and the SGOs comprise 20% of each teacher's summative ratings.

### A. Calculation of Summative Score

After the observation, SGO and Domain 4 Scores are finalized. Teachscape calculates, based on a pre-loaded formula, the teacher's overall summative rating for the school year. "Notably, this pre-loaded formula, which consists entirely of averaging at the domain level, is consistent with the language in the District evaluation overview." The numerical component/subdomain scores within each domain are averaged to obtain the domain scores for that

particular observation. The domain scores for each observation are then averaged to obtain the total domain scores for the school year. The total domain scores are assigned their specific percentage/weight of the Teacher Practice Score and added together to obtain the Teacher Practice score for the school year.

B. Summative Evaluation

At the end of the school year, Teachscape generates a Summative Form containing the teacher's summative ratings, Teacher Practice and SGO scores. The teacher and the administrator participate in a summative conference, during which the scores on this form are reviewed. If a teacher received an ineffective or partially effective score, the teacher would be placed on a Corrective Action Plan ("CAP") for the upcoming school year, and the potential for tenure charges for inefficiency would ensue following a second consecutive ineffective or partially effective score.

C. Corrective Action Plan ("CAP")

TEACHNJ requires that a teacher who has received a partially effective or ineffective summative rating for a school year be placed on a CAP during the next school year. The CAP is drafted by the administrator with input from the teacher in terms of the specific areas in need of improvement, goals, and support services that will be provided to assist the teacher in meeting these goals.

"As required by TEACHNJ, the District ensures that teachers placed on a CAP receive a mid-year CAP review with an administrator during which the teacher's progress is discussed."

## IV. 2013-2014 Academic Year

During the 2013-14 school year, Lefkowitz worked at Davis Elementary School as a music teacher. He received three (3) formal observations that year.

### A. Observation One: 1/10/13 – Leon Mashore (Announced)

Mr. Leon Mashore ("Mashore") has been employed by the District for twenty-four years. He has been a Vice Principal for the past nineteen (19) years. He holds a standard principal and supervisory certificate issued by the New Jersey Department of Education ("NJDOE").

Mr. Mashore testified that he was trained on the Danielson Framework during the spring 2012-13 and Teachscape. He testified that he had to complete a Danielson/Teachscape test before September of the next school year (2013-2014). He explained that the test focused on bias avoidance and was based upon practice videos of observations. The test was scored, and if the observer was proficient in the Danielson Framework, s(he) received a certificate of proficiency. (P. Ex. #34).

Prior to conducting the Respondent's first observation during the 2013-14 school year, a pre-observation occurred on January 13, 2014. Lefkowitz submitted his pre-observation conference form on January 14, 2014, after the pre-conference had taken place. (P. Exs. #36, #37).

The observation occurred on January 21, 2014. (P. Exs. #35, #64). Mashore testified that the announced observation would have been at least twenty (20) minutes long. He completed the observation in Teachscape that same day at 1:40 p.m. Contemporaneously, Mr. Lefkowitz received an email from Teachscape indicating that "his scores were available for review." Mashore confirmed this observation in Teachscape on January 27, 2014 at 8:37 a.m. meaning "it is completed and the scores are finalized and cannot be changed." (P. Ex. #66).

The post-observation conference was held on or about January 23, 2014 or January 24, 2014, but definitely prior to January 27, 2014 when he "confirmed the observation in Teachscape." In Mashore's recollection, he would have first discussed Lefkowitz's areas of strength and then went into his areas in need of improvement. He recalled that Lefkowitz had some trouble in the areas of "questioning, answering and discussion and the other area was assessment." (Tr. @ 487-488). "Mashore did not receive any rebuttal to his observation from Lefkowitz."

Mashore further testified that teachers were provided with extensive training in the 2013-14 school year, including professional development sessions on Mondays and Thursdays focused on Danielson and the domains and components of the rubric. Teachers were also provided with the "Teach Like a Champion" book. Additionally, he testified that he did not receive any training in music and, although there had been a music curriculum, with a music supervisor whose position was eliminated in the prior year. "For music, we may have asked

them to work in conjunction with a math teacher since music had beats and rhythm and time things..." (Tr. @ 496-497).

B. Observation Two: 3/4/14 – John Ketterer (Unannounced)

Mr. John Ketterer ("Ketterer") was employed as a teacher-trainer during the 2013-14 school year. His duties included training teachers in the Danielson Framework. He has held a standard supervisor certificate since 2001.

Ketterer observed Lefkowitz on March 4, 2014. (P. Ex. #31). He testified that the unannounced observation would have been around thirty (30) minutes long. He completed the observation in Teachscape on March 9, 2014 at 3:35 p.m. Lefkowitz concurrently received an email from Teachscape indicating that his scores were available for review. (P. Ex. #70). Ketterer confirmed his observation in Teachscape on March 21, 2014 at 10:33 a.m.

Among the concerns Ketterer had with Lefkowitz's performance was that students were getting out of their seats, there were too many chairs in the room, and students were ripping pages out of books.

The post-observation conference was held on March 21, 2014. Ketterer testified that he did most of the talking during his post-observation conference with Lefkowitz and was not sure whether Lefkowitz was "hearing him." Lefkowitz submitted his post-observation conference form. He neither mentioned any problems he had with his observation at the post-observation conference nor submitted a rebuttal. (P. Ex. #39).

Ketterer responded to questions about IEPs. He described how teachers may accommodate students with IEPs, with the teacher having the responsibility

of obtaining the IEPs and implementing it for particular students. Ketterer testified that knowledge of the students' IEPs would be important to a music teacher. (Tr. @ 306).

C. Observation Three: 3/13/14 – Tracey Reed Thompson (Unannounced)

Ms. Thompson has been a principal with the District for approximately five years. During the 2013-14 school year, she was the Principal of Davis Family School. She held a provisional principal certificate during the 2013-14 school year and a standard supervisor's certificate during that year. Thompson completed the Danielson proficiency test and received training in Danielson and Teachscape before and during the 2013-14 school year.

She observed Lefkowitz for approximately twenty (20) minutes on March 12, 2014. The post-observation conference occurred on March 13, 2014. As noted in his post-conference form, Lefkowitz had problems with classroom procedures and assessment of the lesson. Although teachers were made aware that they could submit rebuttals if they disagreed with any part of the evaluation process, Lefkowitz did not submit a rebuttal to his observation.

She testified that teachers at Davis before and during the 2013-14 school year received training and coaching on the Danielson rubric, Teachscape and SGOs.

With respect to IEPs, Thompson testified that they were accessible to teachers, upon request, from the teacher's homeroom teacher or from the guidance counselor. (Tr. @ 440).

Thompson further testified that occasionally observations would overlap within the three "cycles" set for a particular school year; however, these cycles were not required under the Act.

D. SGOs for 2013-14 School Year

Thompson testified that both she and Lefkowitz signed off on his SGOs on June 12, 2014. (P. Ex. #45). She explained that she calculated the scores and entered them into Teachscape based on the results in his reports. (Tr. @ 381-282). She did not have knowledge that those SGO scores were ever changed. Pillsbury testified that Thompson entered a 4 and a 2.9 at the end of the school year. Lefkowitz, to her knowledge, never submitted a rebuttal to his SGO scores.

E. Summative/Domain 4

Thompson testified that she scored the Respondent's Domain 4 for the 2013-14 school year. She explained that teachers are able to submit artifacts for Domain 4. Lefkowitz submitted the following items in support of his Domain 4 score:

- A list of Profession Development hours
- A professional learning community agenda
- Student quick reference chart
- Faculty meeting agenda
- Professional development log
- Log of contributions made to teachers
- Student discipline log
- Parent-teacher communication log
- Log showing contributions to staff

- Log showing support provided to students
- Student work

Principal Thompson met with Lefkowitz to go over Domain 4 at the Summative Conference and entered his Domain 4 scores into Teachscape. After discussing his Teacher Practice and SGO scores, Thompson and Lefkowitz signed off on the short summative evaluation form. In addition, Lefkowitz submitted a summative conference form wherein he identified "significant areas for growth." Thompson submitted a similar form. (P. Exs. #49, #50). She completed Lefkowitz's summative conference for the 2013-2014 School Year on June 12, 2014. (Tr. @ 390) (P. Ex. #48).

Thompson further testified that all teachers at Davis received various training and coaching throughout the year. Coaching was done by the administration, by teacher-leaders in the building, and by outside district individuals that were supervisors. She also testified that there were walk-throughs completed and that she specifically recalled doing walk-throughs of Mr. Lefkowitz's classes. She recalled that his issues, which she would have discussed with him, related to his classroom management and assessment throughout the lessons.

## V. 2014-2015 Academic Year

During the 2014-15 academic year, Lefkowitz worked at the Riletta Twyne Cream Family School ("Cream") as a music teacher. He received four (4) formal observations that year.

### A. Corrective Action Plan ("CAP")

During the 2014-15 school year, Ms. Natalie Goode ("Goode") was the Lead Educator at the Cream School. The Lead Educator position was a supervisory position and she was required to hold a supervisor certificate. Unfortunately, Ms. Goode passed away during the 2014-15 school year. Ms. Goode received the requisite training and certification on Danielson and Teachscape.

Lefkowitz was placed on a CAP at the beginning of the 2014-15 school year due to his 2.36 partially effective score for the 2013-14 school year. Ms. Hye-Won Gehring ("Gehring"), Principal at the Cream School during 2014-15, assisted Goode in developing Lefkowitz's CAP. Ms. Goode emailed Gehring a draft of the CAP prior to her meeting with Lefkowitz where it was received and executed. Gehring testified that Lefkowitz participated in the creation of the CAP and signed it, indicating that he received a copy and contributed to its contents.

B. Mid-Year CAP Review

Gehring testified that Lefkowitz received weekly coaching from Goode during the 2014-15 school year and coaching with herself from December 2014-February 2015 on Danielson and the areas specified in the CAP. Grade level meetings and weekly professional development sessions after school were also provided. With respect to the after school sessions, Gehring noted that Lefkowitz opted to stay for the contractually mandated 45 minutes rather than the full 90 minute session. He also observed an experienced teacher and received feedback from Gehring following informal observations and walk-throughs.

A mid-year CAP meeting was conducted on February 11, 2015 during which Lefkowitz's progress toward the goals specified within the CAP was discussed.

C. Observation One: 9/11/14 - Natalie Goode (Unannounced)

Goode observed Lefkowitz on September 11, 2014. (P. Exs. #22, 55, 77). Based on the time-stamped evidence, the observation was at least 17 minutes long. Pillsbury testified that "the time-stamped evidence is not a precise indicator of the exact duration of the lesson as it merely captures the exact time the first and last piece of evidence was typed, which is not synonymous with the exact time the observer entered or exited the classroom." (Tr. @ 583-584). Lefkowitz admitted that he had no reason to dispute that the observation lasted the requisite 20 minutes. (Tr.@ 901-902).

Goode completed the observation in Teachscape on September 17, 2014 at 11:41 a.m. Concurrently, Lefkowitz received an email from Teachscape indicating that the scores from his observation were available to review. The post-observation conference was held on September 17, 2014 at 1:35 p.m. Prior to the post-observation conference, Lefkowitz submitted a post-observation form. Lefkowitz did not submit a rebuttal to his observation.

D. Observation Two: 10/16/14 - Hye-Won Gehring (Unannounced)

Gehring observed Lefkowitz on October 16, 2014. It was unannounced and consumed a minimum of twenty (20) minutes. Gehring completed her observation in Teachscape, with Lefkowitz receiving an email from Teachscape on October 21, 2014 at 2:29 p.m. On October 22, 2014, Lefkowitz received an

email from Teachscape indicating that his scores were finalized and could not be changed. (P. Ex. #58).

Among the concerns identified by Gehring were "the content of the lesson was not age appropriate, numerous students were misbehaving during the lesson and Lefkowitz struggled in Domains 2 and 3 with regard to managing student behavior and engaging students in learning." (P. Ex. #9).

Gehring testified that the post-observation conference would have been held within ten (10) days of the October 16, 2014 observation. She recalled that Lefkowitz did not submit his post-conference reflection form prior to the post-observation conference but submitted it on Sunday, October 26, 2014 after the post-observation conference had taken place. (P. Ex. #9). From his submission, Gehring was able to determine that the post-observation conference took place prior to October 26, 2014. "As a result, she assigned him a score of insufficient evidence on Domain 4a, Reflecting on Teaching."

Gehring testified that during the post-observation conference, she discussed with Lefkowitz "engaging students in learning and managing student behavior and provided strategies for improving his performance in these areas." (Tr. @ 61-62). The Respondent did not submit a rebuttal to the observation.

E. Observation Three: 11/21/14 – Gehring (Unannounced)

Gehring also observed Lefkowitz on November 21, 2014. It was unannounced and at least twenty (20) minutes long. Gehring completed the observation in Teachscape and Lefkowitz received an email on 11/24/14. On

December 19, 2014, Lefkowitz received an email from Teachscape indicating that his scores were finalized and could not be changed.

Among the concerns Gehring had with the lesson was its purpose. Although Lefkowitz was "teaching a Kindergarten class, he had the students complete several different tasks throughout the lesson (e.g. watching a video of Mozart, coloring a picture of Mozart, and learning the different parts of the piano)," which Gehring thought was too much for them to learn at one time. She also had "continuing concerns about his ability to manage student behavior and noted that the atmosphere in the classroom was chaotic, as an inordinate amount of time was spent passing out crayon, with the students fighting amongst themselves over some."

While Gehring could not recall the precise date of the post-observation conference, she testified that it would have been within ten (10) days of the November 21, 2014 observation. Lefkowitz deviated from standard practice by submitting his post-conference reflection form on November 24, 2014. As a result, she assigned him insufficient evidence on Domain 4a. During the post-observation conference, Gehring addressed the areas where Respondent needed growth, including a protocol for handing out crayons. Lefkowitz did not express any concerns regarding his scores and did not submit a rebuttal.

F. Observation Four: 3/10/15 – Gehring (Announced)

Gehring observed Lefkowitz for the final time on March 10, 2015. Her observation was announced and was for a minimum of twenty (20) minutes. Lefkowitz submitted a pre-observation conference form prior to the observation

and received as score of "3" on Domain 4a, Reflecting on Teaching. (P. Exs. #11, #14). Lefkowitz received an email from Teachscape on March 16, 2015 at 9:50 a.m. indicating that his scores were available for review.

Gehring testified that this was Lefkowitz's best observation for three reasons: "First, she 'gave him the benefit of the doubt,' because he was in a different building due to the flood[3] and had to utilize another teacher's classroom. Second, Ms. Blair, the teacher whose classroom Mr. Lefkowitz was utilizing, chose to remain in the room during this observation and her presence assisted with classroom management, an area in which he greatly struggled during his prior observations. In fact, Ms. Gehring testified that Ms. Blair decided to remain in her classroom because if she did not, her classroom would be destroyed and her students would get into fights. Third, Mr. Lefkowitz had begun incorporating the feedback and coaching he had received throughout the school year, which resulted in better scores. However, the lesson continued to lack any type of assessment tools to determine whether the students comprehended the lesson."

Gehring testified that the post-observation conference would have been within ten (10) days of the March 10, 2015 observation. Lefkowitz did not submit a rebuttal.

G. Student Growth Objectives ("SGOs")

Gehring testified that either she or Goode approved Lefkowitz's SGOs for the 2014-15 school year. Gehring further testified that both she and Lefkowitz

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[3] During February 2015, there was a flood at the Cream School. For the remainder of the year, the students and teachers were relocated to different schools within the District. (See 1T 37:17-20.)

signed off on his SGOs on May 11, 2015. (P. Exs. #16, 17). Gehring entered Lefkowitz's SGO scores into Teachscape, and Teachscape factored them into his summative rating.

While Gehring did not notice any issues with Lefkowitz's SCO scores during their May 11, 2015 meeting, she later noticed that he made an error when calculating the scores. "Specifically, Mr. Lefkowitz assigned himself an 'O' for his 'high group' which is not possible, as '1' is the lowest score a teacher may receive." Ms. Gehring testified that she corrected the error in Teachscape, which resulted in Mr. Lefkowitz's SGO scores increasing from '1.85' and '2.67' to '2.19' and '3.38' respectively. (See id.) As a result, his summative rating for the 2014-2015 school year was increased from the '2.26,' initially reported to a '2.36. Despite the increase, Mr. Lefkowitz remained 'partially effective' for the 2014-2015 school." (See id.)

Mr. Lefkowitz never submitted a rebuttal to his SGO scores. (Tr. @ 107).

H. Summative/Domain 4

In scoring the Respondent's Domain 4 for the 2014-15 school year, Gehring took account of the fact that many classrooms were destroyed in the flood preventing many teachers from submitting artifacts that they otherwise would have submitted for Domain 4 scoring. "However, Mr. Lefkowitz did not submit any evidence for his Domain 4 scores beyond his professional development hours, which were contained in Teachscape."

"Ms. Gehring testified that she considered the following when assigning Mr. Lefkowitz's Domain 4 scores: multiple teachers requested not to have music

on their designated days due to his poor classroom management, resulting in student misbehavior; multiple students were injured during his class without him having any knowledge of what happened; he was observed working on his laptop rather than paying attention to the students; he repeatedly failed to timely submit post-conference reflection forms; no formal school concerts were held, and he failed to engage with the parents and community." (See P. Exs.#19, #20, #23); (Tr. @100-103). (Dist. brief @26).

Gehring met with Lefkowitz to review his Domain 4 at the summative conference and enter his Domain 4 scores into Teachscape. This summative conference was completed on May 26, 2015. (P. Ex. #21). Gehring recalled that the conference was "very brief and a mere formality" since the Respondent's position had been subjected to a reduction in force, and therefore, he would not be employed with the District for the 2015-16 school year.

I. Other Testimony of Ms. Gehring

Principal Gehring testified that student IEPs were available in the main office during the 2014-15 school year. According to Gehring, Lefkowitz could have retrieved the IEPs for his students at any time.

She further testified that Lefkowitz was not a "good fit" for the students in the Cream School, largely because of his poor classroom management. She described his classes as often "very chaotic, bordering on dangerous, with students throwing things." (Tr. @ 128-130; 192-194). She personally observed the students in a 3rd grade boys class "screaming and throwing pencils," necessitating that she intervene in order to calm them down. Moreover, several

teachers requested that Lefkowitz not come into their classes for music. "In short, student safety was an ongoing concern with Mr. Lefkowitz because students were having fist fights in his class and getting hurt."

In terms of her formal observations, Ms. Gehring testified that Mr. Lefkowitz was either teaching content that was inappropriate for the grade level of the students or very boring."

## VI. Admissions By Mr. Lefkowitz

The District has delineated several "admissions" purportedly made by the Respondent that it submits in support of its decision to file the tenure charge as follows:

### A. Admissions Regarding the Evaluation Process.

> Mr. Lefkowitz admitted during his testimony that his first observation during the 2013-2014 school year was completed by Mr. Mashore. (Tr. @898-899). He admitted that he had no reason to dispute that:
>
> - It was preceded by a pre-conference;
> - It occurred on January 21, 2014;
> - It was 20 minutes long; and
> - He had a post-conference within 15 days of the observation.
>
> With regard to Mr. Ketterer's observation, Mr. Lefkowitz admitted that he had no reason to dispute that:
>
> - It occurred on March 4, 2014;
> - It was 20 minutes long; and
> - He had a post-conference within 15 days of the observation.
>
> (See 4T 899:14-900:5.) With regard to Ms. Thompson's observation, Mr. Lefkowitz admitted that he had no reason to dispute that:
>
> - It occurred on March 13, 2014;
> - It was 20 minutes long; and
> - He had a post-conference within 15 days of the observation.

(Tr. @900). Mr. Lefkowitz testified that he had no reason to dispute that he had a summative conference with Ms. Thompson on June 12, 2014. (Tr. @ 905).

Mr. Lefkowitz also testified that he had a CAP meeting on September 12, 2014. (Tr. @900-901). He admitted to signing the CAP on that date as well. He also testified that he had a mid-year CAP review meeting on February 11, 2015 and that he signed off on the CAP on that date.

With regard to the 2014-2015 school year, Mr. Lefkowitz admitted during his testimony that his first observation was completed by Ms. Natalie Goode. (Tr. @ 901-902). He admitted that he had no reason to dispute that:

- It occurred on September 11, 2014;
- It was 20 minutes long; and
- He had a post-conference within 15 days of the observation.

Mr. Lefkowitz admitted that he had a second observation with Ms. Gehring on October 16, 2014. (Tr. @902-903). He admitted that he had no reason to dispute that:

- It occurred on October 16, 2014;
- It was 20 minutes long; and
- He had a post-conference within 15 days of the observation.

Mr. Lefkowitz's third observation was with Ms. Gehring. He had no reason to dispute that:

- It occurred on November 21, 2014;
- It was 20 minutes long; and
- He had a post-conference within 15 days of the observation.

(Tr.@903) Finally, Mr. Lefkowitz had a fourth observation with Ms. Gehring. He testified that he had no reason to dispute that:

- It occurred on March 10, 2015;
- It was 20 minutes long;
- He had a post-conference within 15 days of the observation; and
- He had a pre-conference prior to the March 10, 2015 observation.

(Tr.@903-904). Finally, Mr. Lefkowitz testified that he had no reason to dispute that he had a summative conference with Ms. Gehring on May 26, 2015. (See 4T 905:11-17.) Mr. Lefkowitz also admitted that he never submitted a rebuttal to

any observations in either the 2013-2014 school year or the 2014-2015 school year. (Tr.@855).

B. Admissions Regarding Training and Supports Received

Mr. Lefkowitz admits that he "was given professional development on Danielson." (Tr.@761). He does not dispute that he attended all of the training sessions listed in his records of professional development hours for 2013-2014 or 2014-2015. ( P. Exs. #20, #46). He also admitted that he received the "Teach Like a Champion" book described by Mr. Mashore as a resource teachers could use for instruction under Danielson. (Tr. @775-776).

During the 2014-2015 school year, Mr. Lefkowitz admitted that he received coaching from Ms. Goode once per week until she passed away sometime in December or January (over holiday break.) (Tr. @ 802-804). He also admitted that she performed walk-throughs of his classroom. (See id.) Lefkowitz received additional coaching from Principal Gehring until the flood at Cream School sometime in February. (Tr.@ 810-811) Finally, Mr. Lefkowitz admitted that he was also given the opportunity to observe an effective music teacher, which he did. (Tr. @ 880).

C. Admissions Regarding Individual Education Plans (IEPs)

Mr. Lefkowitz described having concerns with the students in his class who may have had IEPs. He explained that in the 2013-2014 school year, he requested copies of the IEPs, but was unable to obtain them. However, after this initial difficulty, he never went back and tried to retrieve them. (See 4T 871:9-872:25.) He admitted that he never alerted any of the observers about these concerns, wrote about them in his post-conference forms, or submitted rebuttals of his observations due to these concerns. (Tr. @872-873, 876-877).

During the 2014-2015 school year, other than asking Ms. Goode a few times at most for the IEPs that would apply to his students, he never tried again to obtain the IEPs. (See 4T 874:3-876:10.) Rather, Mr. Lefkowitz testified that he "just got frustrated and stopped asking altogether." (Tr. @ 869 -871).

D. Admissions Regarding 2014-2015 Domain 4 Scoring

Mr. Lefkowitz testified that after the flood at Cream during the 2014-2015 school year, he was unable to get access to his Domain 4 binder. (Tr. @ 823). He testified that Ms. Gehring said she would "take into consideration that a lot of the documents were not able to be produced, because they were at the Cream School and were in places that were inaccessible to the teachers." (Tr. @824). He also admitted that he had four (4) months to collect Domain 4 evidence, but did not do so. (Tr. @ 860-861). In fact, only after being questioned regarding

whether he collected any evidence in those months did he allege that Principal Gehring said not to bring any Domain 4 evidence to be considered.

Mr. Lefkowitz admitted that he did not contact anyone at the District to dispute his scores or submit a rebuttal or grievance even though he knew he was partially effective during the 2013-2014 school year and was on a CAP during the 2014-2015 school year. (Tr. @864 He explained that he did not do anything because he had already been RIF'ed at the time.

E. Admissions Regarding the Timing of Observations #2 and #3 in the 2013-2014 School Year

Mr. Lefkowitz alleges that in the 2013-2014 school year, his post-observation conference with Mr. Ketterer for his second observation occurred either on the same day as or after his third observation with Principal Thompson. (Tr. @ 892-893). Mr. Lefkowitz admitted, however, that he did not mention this to Principal Thompson either during her observation or at his post-conference. He admitted that he never mentioned this to anyone else nor did he ever submit a rebuttal to either observation. (Dist. brief @ 28-31).

## VII. Legal Standard

In its argument, the District reiterates that the legal standard for an arbitrator's review of an inefficiency tenure charge is set forth in N.J.S.A. 18A:6-17.2 as follows:

> in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of

> this section are applicable, the arbitrator shall determine if that fact materially impacted the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the [district] and the employee shall be dismissed. (Emphasis District).

The District maintains that it "followed, or at least substantially followed, the evaluation process, but Mr. Lefkowitz failed to achieve an effective summative rating in either the 2013-14 or 2014-15 school years."

Referring to the "Lefkowitz admissions," the District argues that "the required training was provided to observers during the 2013-14 school year and each was appropriately certified and working in a supervisory position." Mr. Mashore, Mr. Ketterer and Principal Thompson testified that they were extensively trained on the Danielson Framework and thereby met the requirement of N.J.A.C. 6A:10-2.2(b). Also, Ketterer and Thompson hold standard supervisor certificates, and Mashore holds a standard principal certificate. Mashore also holds a standard principal certificate and Thompson holds a provisional principal certificate.

In accordance with N.J.A.C. 6A:10-1.2, all of the observers worked in a supervisory capacity: Mashore served as a Vice Principal, Ketterer served as a Teacher Trainer Evaluator, and Thompson was Lefkowitz's principal and direct supervisor during 2013-14.

Pursuant to N.J.A.C. 6A:10-2.2(b), Lefkowitz, in his teaching position, was trained on the rubric. Mashore and Ketterer attested to this training in their testimony. They received Danielson training and SGO training. The District notes that "there is no statutory requirement for 'music specific' Danielson

training." Ketterer testified that all teachers were given a copy of the critical attributes upon which they were to be observed. Principal Thompson testified that teachers at Davis received training and coaching during 2013-14.

The District further maintains that it observed the Respondent three (3) times in accordance with N.J.A.C. 6A:10-4.4(c) in the first year, with each observation lasting at least twenty (20) minutes. At least one observation occurred during the first half of the academic year and at least one occurred during the second half of the academic year.

The District next delineates that for each of Lefkowitz's three (3) observations in 2013-14, a post-observation conference was held within fifteen (15) days pursuant to N.J.A.C. 6A:10-4.4(b).

The District maintains that N.J.A.C. 6A:10-4.4(c) was satisfied when Mashore conducted a pre-observation conference with Lefkowitz preceding his announced observation. Pillsbury testified that Thompson inputted Lefkowitz's SG0 scores, a 4 and a 2.9 respectively, into Teachscape. Subsequently, Thompson entered Lefkowitz's SGO scores into his summative evaluation. (P. Ex. #75). Also, Lefkowitz had a summative evaluation conference on June 12, 2014 and Thompson included his Domain 4 score into his summative evaluation.

The Respondent was placed on a CAP and met with Goode on September 12, 2014 to review his CAP. Lefkowitz acknowledged his signature was on the CAP directly under the statement which read: "My signature below indicates that I have received a copy of this Corrective Action Plan and that I understand and contributed to its contents. (P. Ex. #3). It is undisputed that a

teacher on a CAP and his supervisor must meet by February 15th to review his progress toward his goals in the CAP. N.J.A.C. 6A:10-2.5(m). It is undisputed that Mr. Lefkowitz met with either Hope Edwards Perry or Principal Gehring on February 11, 2015 to review his progress in accordance with his CAP. (Tr. @ 33-34)(P. Ex. #8). Mr. Lefkowitz admitted that he met with someone on that date and that he signed off on the mid-year CAP review portion of his CAP document."

Gehring testified that Lefkowitz was provided with "weekly coaching sessions, grade-level meetings and professional development sessions each week." Prior to Ms. Goode's death, she also met weekly with Lefkowitz concerning his CAP. According to the testimony of Gehring and Lefkowitz, he participated in a mid-year CAP review on February 11, 2015. In addition, the District notes that Lefkowitz was given the opportunity to observe an effective music teacher but chose not do so.

According to the District, the Respondent failed to achieve an effective summative rating for the 2013-2014 school year, despite the fact the District followed the evaluation process.

Similarly, for the 2014-15 school year, the District observed Lefkowitz four times, on September 11, 2014 (Goode), October 16, 2014 (Gehring), November 21, 2014 (Gehring) and March 10, 2015 (Gehring). The particulars of the observation process were adhered to as in 2013-14, including observations of at least 20 minutes, post-observation conferences within 15 days, and one pre-observation conference preceding the announced and 4th observation.

Respondent also had a summative evaluation conference on May 26, 2015 where his Domain 4 scores were included in his summative rating. Lefkowitz admitted that he did not bring any documents to be reviewed at his Domain 4/summative meeting.

VIII. Arbitrary and Capricious

Referring to the statutory criteria, the District asserts that its "actions with regard to Mr. Lefkowitz were neither arbitrary nor capricious." Defining "arbitrary and/or capricious" in the case law as an action having "no rational basis" or a "willful and unreasoning action, without consideration and in disregard of circumstances," the District maintains that "the fact the District observed Mr. Lefkowitz allegedly without considering that certain students had IEPs was not an arbitrary and capricious action."

The District alludes to the testimony of Ketterer that it was the teacher's responsibility to obtain the IEPs and implement them. The District deems dubious Lefkowitz's claim that he could not obtain the student IEPs in 10 months. "While Mr. Lefkowitz described weak efforts to obtain the IEPs, he admitted that he got frustrated and gave up." He is also deemed "not credible where he admitted that he never brought any of his concerns to his principals in his post-observation conference or by way of rebutting his observation scores." (See, Tr. @ 872-873; 876-877).

The District further disputes the Respondent's contention that the scoring of critical attributes and consideration of evidence was arbitrary and/or capricious. "This claim lacks any iota of merit. Mr. Pillsbury testified that there is

no requirement that evidence be inputted into Teachscape in support of a component/subdomain in order for an observer to score same."

"In short, since the evaluator's determination as to the quality of an employee's classroom performance is not subject to review under TEACHNJ and the observer has the discretion regarding how to score the components/ subdomains within a particular observation as far as assigning evidence and critical attributes in Teachscape, the District's actions cannot be considered arbitrary or capricious."

The District contends that Principal Thompson's observation of Lefkowitz on March 12, 2014 was not arbitrary and/or capricious. Although this third observation occurred on the same day as or sometime before the post-observation for his second observation, the District maintains that "there is no statutory requirement which states that a pre-observation conference must occur prior to the next observation. There was testimony that sometimes observations would occur in overlapping cycles." Also, Lefkowitz never brought this concern to the Principal's attention. Moreover, "even if this action was considered to be arbitrary and capricious, there is no way it materially affected the outcome of Mr. Lefkowitz's evaluation..."

## IX. Mistake of Fact

The District argues that "no mistakes of fact were made with regard to Mr. Lefkowitz." Mr. Pillsbury testified that the SGO scores of 4 and 2.9, which were entered by Ms. Thompson into Teachscape, negate the Respondent's claim that he should have received two 4s for his 2013-14 SGOs. "It can be inferred that at

the end of the school year, as Mr. Pillsbury testified, Ms. Thompson determined that a 72% success rate was not enough to give Mr. Lefkowitz a score of 4 on that particular SGO and therefore, determined that he would receive a 2.9." Irrespective of his SGO scores, the District contends that Lefkowitz would still have been rated "partially effective," and placed on a CAP for the 2014-15 school year.

Lefkowitz's claim for the 2014-15 school year that he should have received a 2.31 on his SGO #1 score instead of a 2.19 is refuted by Gehring's testimony that Lefkowitz erred when he gave himself a zero ("0") in some categories when one (1) is actually the lowest score. The letter submitted by Gehring explains the change to 2.19 as follows:

1. Lefkowitz filled the "Results of Student Growth Objective" portion of the SGO form out incorrectly. He gave himself a Teacher SGO Score of 0 for the High Preparadeness Group. A 1 is the lowest score you can receive. His Teacher SGO score should be high: 1, medium: 2, low: 4.

2. The medium students at target score should be 85% (as reflected on the attached spreadsheet), not 75%, which he noted.

3. Also, at the end of the year, he had 12 students in the medium group, not 15 as he reported on the form (total number of students was actually 18, not 21) and thus, his weight (based on students per group) is wrong. To get the weight (based on student's per group), you do the following: high: 3/18=.17 (as opposed to what he did, which was 3/21), medium: 12/18=.67, high=3/18=.17.

(See id.) Mr. Lefkowitz argues for a straight average (1+2+4/3=2.33). This is incorrect, in the 2014-2015 school year, the scores were weighted (e.g. the score of 2 in the medium group is weighted heavier than the other scores b/c they only encompassed 3 students each). The correct weighted score is high: 17*1=.17, medium: 67*2=1.34, high: 17*4=.68. Total SGO

score is 2.19. Therefore, there was no mistake of fact. (Dist. brief @ 45).

It is the District's opinion that, even if there were a mistake of fact and his SGO score was 2.31, Lefkowitz's summative rating would still have been partially effective. Therefore, the SGO calculation could not have materially affected the outcome of his evaluation.

X. The District's Scoring Method is Proper and in Sync with the TEACH NJ Statute and the District's Policy

The pertinent District policy reads as follows:

> All observations will be scored based on the evidence collected during the observation and additional evidence collected since the previous observation. At the end of the year, scores from all observations throughout the year are averaged at the domain level and then weighted appropriately to produce an overall Teacher Practice rating of 1-4. (See Exhibit P-52.)

Contrary to the Respondent's position that the District average all the subdomain scores within a particular domain equally, to obtain the average at the domain level, the District averages each domain per observation, then averages all of the domain averages to obtain a final domain score. The Lefkowitz method is as follows:

> Total Domain 3 Score, SY 13-14: 3+2+3+2+3 (Observation #1) +2+1+2+1 (Observation #2) +3+2+3+2+3 (Observation #3) = 32/14=2.28

The District applies a scoring system utilized by the "overwhelming majority across the State using Teachscape...TEACHNJ does not provide any requirement regarding how the scores for the four domains must be weighed or calculated to arrive at the numerical teacher practice score, which would then be converted into one of the four (4) rating categories. Therefore Lefkowitz's

argument that the component/subdomains must be assigned equal weights is completely without merit..."

In reliance on the testimony of Ms. Karlie Termotto, the District maintains that it reasonably utilized the Teachscape pre-loaded formula to determine Lefkowitz's teacher practice score as discussed supra. Were Lefkowitz's contention to prevail, "every teacher facing tenure charges for inefficiency would file motions for summary decision challenging the method utilized to calculate their teacher practice score and championing whatever method yielded an effective rating from their subdomain/domain scores. This would lead to widely inconsistent results within the District, as teachers with the same subdomain/domain scores would be assigned different ratings (e.g. some effective and some partially effective or ineffective). Further, it would permit teachers who should have received ineffective or partially effective ratings to remain with the District without fear of removal or incentive to improve the quality of their instruction."

## XI. Both Natalie Goode's Full Observation Report and Karlie Termotto's Testimony must be admitted into Evidence

The District takes the position that Exhibit P-22, the full-observation report of Ms. Goode, should be admitted on three grounds: "(1) Mr. Lefkowitz waived any future reliance on N.J.S.A. 18A:6-17.1(b)(3) when he requested such documents in his interrogatories to the District and the parties agreed to extend that statutory timeframe; and/or (2) Exhibit P-22 is simply an incomplete copy of Exhibit P-77 (which was produced timely) due to a printing error in Teachscape."

Since the Respondent Interrogation No. 23 specifically requests "copies of any and all documents contained on Teachscape with regard to Respondent...," the District produced Exhibit P. #22. As a result, the District argues that this request waived any reliance on the statutory deadline. Also, the Respondent used other documents produced at the same time as P. #22. Further, the exhibit was produced well in advance of the first hearing date with this matter.

With respect to the Respondent's claim that the testimony of Ms. Termotto should be excluded on the ground that she was not named as witness by the District upon referral of the case to the arbitrator, the District notes that the need to call Ms. Termotto only arose following the decision of the arbitrator on Mr. Lefkowitz's Motion for Summary Decision. (See Decision of Arbitrator re: M. Lefkowitz's Motion for Summary Decision.) In denying said Motion, "the arbitrator requested that testimony be heard on the matter at the hearing. As such, the District amended its witness list to include Ms. Termotto, who could provide testimony on that issue. Lefkowitz had sufficient notice of the District's intent to call Ms. Termotto as a witness and thus, was not prejudiced by her testimony." (Dist. brief @ 51).

Therefore, Ms. Termotto's testimony should not be excluded but instead, should be admitted into evidence in this matter.

The District distinguishes I/M/O Michael Wilson, State-Operated School District of Newark (Dkt. No. 302-10/15) from the instant case in that "the parties did not agree to extend the statutory time period, there was not an arbitrator decision requesting testimony on a particular issue, and there were no

interrogatories requesting the specific documents to be produced, and there was no printing error ..."

Finally, the District concludes that Mr. Lefkowitz must be dismissed from his position with the Camden City School District because he failed to "show that any of the actions falling into one of the four [statutory] categories impacted the outcome of the evaluation."

Respondent Position

The Respondent, Michael Lefkowitz, argues that the District's Amended Charge of Inefficiency pursuant to N.J.S.A.18A:6-17.3 should be dismissed because "the District failed to allege Lefkowitz was 'partially effective' for two (2) consecutive school years." Respondent further argues that "Lefkowitz was an 'effective' teacher for the 2013-2014 School Year and the District failed to properly calculate, pursuant to its own Evaluation Policy, 1) Lefkowitz' subdomain scores for the Teacher Practice portion of his Summative Score, and 2) Lefkowitz' Student Growth Objective ("SGO") scores. As a result of the District's miscalculation and nonconformance with its own Evaluation Policy and approved SGOs, Lefkowitz received a 2013-2014 Summative Score of 2.56, a "partially effective" rating, when he should have received a Summative Score of 2.73, an "effective rating. In the event, the Arbitrator determines that the District did not deviate from its Evaluation Policy, the Arbitrator should find that the Evaluation Policy is arbitrary and capricious."

"Second, the District's Evaluations failed to substantially adhere to its Evaluation Policy by failing to observe Lefkowitz in the first observation cycle,

failing to provide Lefkowitz with any evidence, notes, and critical attributes associated with his Domain 4 subdomain scores for the 2013-2014 School Year, and failed to provide any evidence, notes, or critical attributes to several other subdomain scores."

"Third, the District's action during the 2013-2014 and 2014-2015 School Years were arbitrary and capricious with regard to its failure to provide Lefkowitz with his students' IEPs and failing to implement a uniform system of teacher evaluation as evidenced by the testimony of each of Lefkowitz' observers who all utilized different evaluation procedures."

"Fourth, the District failed to provide Lefkowitz with the necessary documents requested during discovery. As well, the District inappropriately attempted to introduce evidence at the arbitration hearings that were not produced in a timely manner pursuant to the TEACHNJ ACT."

"Fifth, the Arbitrator should uphold his bench decision denying the District untimely filed Motion for Summary Decision for the reasons set forth on the record during the February 11, 2016 arbitration meeting." (Resp. brief @ 1-2).

After reviewing the procedural history and Lefkowitz's educational background, Lefkowitz focuses on his assignment to the Davis Elementary School where he taught vocal music, instructed general music classes, in-school and after-school choir practices and participated in other performances with the students. "In addition, Lefkowitz taught entire classes of students just like any other teacher, unlike the instrumental music teacher who taught one to three students at a time."

During the 2014-15 school year, when Lefkowitz was transferred to the Cream School, "his students ranged in ages from 3-4 years old pre-K, to 10-12 years old 6th grade. There were approximately 2-4 classes per grade, and Lefkowitz was the only music teacher who taught each of these classes on a weekly basis."

IEPs

"Students with Individual Education Plans ('IEPs') were not precluded from participating in Lefkowitz' music class. (Tr. @ 753- 754). To Lefkowitz' knowledge, there were no District level policies for requesting students' IEPs for review. (Tr. @754). At no time in the District, including during the 2013-2014 or 2014-2015 School Year, did anyone present Lefkowitz with any of his students' IEPs. (Tr. @ 754). Lefkowitz indicated that reviewing the IEPs for his students would be useful in designing specific instructional strategies for students with a hearing, visual, or a behavioral disability that would affect their ability in the classroom." (Tr. @ 755).

"During the 2013-2014 School Year, Lefkowitz had concerns that some of his students may have IEPs, so he affirmatively requested, both verbally and through email, the IEPs for his students from his administrators. (Tr.@ 754- 755). Specifically, he requested on numerous occasions the IEPs for his students from their classroom teachers, the nurse, the guidance counselor, and the principal, all without success because they were either too busy or instructed him to ask someone else. During the 2014-2015 School Year, Lefkowitz also had concerns regarding whether his students have IEPs, and requested them accordingly. (4T

813:20 to 815:1). In both school years, he was unable to obtain and review the IEPs for any of his students." (Tr. @ 755-758; 815)(Resp. brief @ 10).

Extra-Curricular Activities

While at Davis Elementary, Lefkowitz maintains that he "participated in numerous extracurricular activities, which included the preparation and participation of vocal music winter and spring concerts, holiday concerts, black history month concerts, Chinese New Year concerts, Hispanic appreciation month concerts. Some of these concerts were attended by a local television station due to the positive reputation associated with the music program. In addition, he tutored students in piano and successfully helped them prepare for auditions to gain admission, with scholarship, into the Moorestown Friends School, which is a private school ranked among the best in the State of New Jersey for academics and extracurricular activities, on scholarship." (Tr. @ 717-719)

Music Supervisor

"Prior to the 2013-2014 school year, Lefkowitz was assessed by the building principal and the music supervisor. The role of the music supervisor was also to lead PD opportunities for music teachers in the District. In addition, the music supervisor would confer with the building principal regarding the evaluation of music teachers and offer specific advice to improve music instruction. Lefkowitz reported to and relied upon the music supervisor for general support such as instruction specific questions, feedback on lessons, implementation on advices, and any other concerns. (Tr. @ 751). However, the

position of the music supervisor was abolished just prior to the commencement of the 2013-2014 School year, and no one has since assumed the music supervisor's duties and responsibilities. (Tr. @ 729-730)(Resp. brief @ 11).

2012-2013 Evaluation

The Respondent has cited the evaluation ratings he received prior to the evaluation period at issue in the instant case, namely 2013-14 and 2014-15. He notes that on November 27, 2012, he was rated "satisfactory" by Principal Thompson. Also, on January 8, 2013, Principal Thompson rated him "proficient" in 3 out of 4 Domains, and "basic" in the remaining domain using a different evaluation form.

Danielson Framework 2013-2014

According to Lefkowitz, the document titled "Camden Teacher Evaluation Overview ('Evaluation Policy') was the only document he received regarding the District's evaluation policies for the 2013-14 school year. At no time was Lefkowitz advised that he had the ability to request additional observations." He also was not advised that he could request a change in a subdomain score during a post-observation conference.

Evaluation Policy

The Respondent interpreted the Evaluation Policy language that "All observations will be scored based on the evidence collected during the observation and additional evidence collected since the previous observation...to mean that an observer would only score a particular subdomain on the evidence recorded." (Tr. @ 764).

With respect to the Evaluation Policy Statement, "At the end of the year, scores from all the observations throughout the year are averaged at the domain level and then weighted appropriately to produce an overall teacher practice rating of 1 to 4," Lefkowitz did not "understand this phrase to mean that the District would first average each [domain] at the observation level, and then again at the domain level before weighing the Domains into the Teacher Practice score accordingly." Also, Lefkowitz "did not understand the possible ramifications of a subdomain score of 'insufficient evidence' on the overall observation."

Regarding his SGOs for 2014-15, "Lefkowitz expressed his concern to Ms. Goode that he had no experience in preparing a tiered SGO and did know his students well enough to set a prior 'baseline data.'" (Tr. @ 771-772). Also, Lefkowitz received no training on the Danielson Model or SGO specific to music or special area instruction.

2013-2014 School Year

With respect to his first observation on January 21, 2014, Lefkowitz maintains that "while every subdomain in Domains 1, 2 and 3 received a score from Mr. Mashore, for Domain 1, no evidence, notes, critical attributes, or summaries were provided for any of the subdomains; for Domain 2, no critical attributes or summaries were provided for any of the subdomains with minimal notes and evidence provided for and some of the subdomains; for Domain 3, minimal notes, evidence, and critical attributes were provided for and some of the subdomains. No scores were provided for Domain 4." (P. Ex. #35).

Regarding the March 4, 2014 observation by Ketterer, Lefkowitz notes that "for Domain 1, Mr. Ketterer only scored subdomain Ia and Ie without providing any notes, evidence, or summaries in support of those scores; for Domains 2 and 3, Mr. Ketterer provided insufficient notes, evidence and/or critical attributes in support of some of the subdomain scores; and for Domain 4, no scores were provided. The Post-Observation Conference occurred on March 21, 2014." (P. Ex. #32).

Lefkowitz encountered students "with extreme behavioral inconsistencies and high energy." The Respondent did not consider Ketterer, a teacher trainer, to be a supervisor.

Regarding the March 13, 2014 observation conducted by Principal Thompson, Lefkowitz notes that "[w]hile every domain score in Domains 1, 2, and 3 received a score, Ms. Thompson did not provide any notes, evidence, critical attributes, or summaries, to any of the subdomain scores. The District did produce a document that contained Ms. Thompson's notes and evidence, but it was untagged to any specific subdomains. No Domain 4 scores were provided. (P. Ex. #41). The Post-Observation Conference occurred on the same day, March 13, 2014." (P. Exs. #40, 41, 42).

Since Thompson observed the same class Ketterer had observed a week prior, with a very similar lesson, he had not participated in a post-observation conference with Ketterer. Therefore, he could not use the feedback from Ketterer prior to Thompson's observation.

Lefkowitz had no recollection that he was to be placed on a CAP. Unlike Mashore and Thompson, who had background knowledge of the students in his classes and made positive comments, Ketterer "was coming in cold" and made "very negative" comments.

2014-2015 School Year

The September 11, 2014 observation was conducted by Ms. Goode. "[F]or Domains 1, 2 and 3 Ms. Goode provided insufficient notes, evidence, and/or critical attributes in support of some of the subdomain scores; and for Domain 4, no scores were provided."

According to Lefkowitz, on September 12, 2014, he was presented with a CAP "drafted solely by the District without any input or collaboration from Lefkowitz." (Tr. @ 802).

The second observation was conducted on October 16, 2014 by Principal Gehring. "While every subdomain score in Domains 1, 2 and 3 received a score, Ms. Gehring provided inconsistent notes, evidence, critical attributes and/or summaries to the subdomain scores. No Domain 4 scores were produced." (P. Ex. #9).

The third observation was also conducted by Gehring on November 21, 2014. The same comment as above was made regarding this observation.

Cream School Flood

The flood at Cream caused Lefkowitz and other teachers to relocate to the Hatch Family School ("Hatch"). "Lefkowitz was advised to bring a week's worth of materials to the new school...As a result, Lefkowitz did not have adequate materials at Hatch, did not have a classroom, and never was allowed back to Cream School." During this period, Lefkowitz testified that "coaching was not as consistent."

Mid-Year CAP Review

Ms. Perry-Edwards, Vice Principal, requested evidence that she would review in preparation for the CAP meeting. "After receipt of the evidence, Ms. Perry-Edwards indicated Lefkowitz was making progress toward each of his goals on the CAP." (P. Ex. #3).

March 10, 2015 Observation

Lefkowitz's fourth and final observation occurred on March 10, 2015. Principal Gehring conducted the observation. The Respondent raised the same concerns about the lack of evidence, notes, critical attributes and/or summaries for each subdomain in Domains 1, 2, and 3. "Only subdomain 4a was scored in Domain 4 without any notes, evidence or summaries."

Coaching Sessions

Lefkowitz contends that Gehring's coaching sessions were inconsistent "with about half of the sessions cancelling with no rescheduling. When the coaching sessions did occur, they lasted about 5-15 minutes, with Ms. Gehring multi-tasking on the phone or computer. Lefkowitz did not receive substantive instructional feedback in music at any time during the 2014-2015 School Year.

(Tr. @ 811-812). Once Lefkowitz moved to Hatch Family School following the flood at Cream School, all coaching sessions ceased."

Additional Testimony

Respondent alludes to Mashore's testimony that a teacher on a CAP should be observed for an entire lesson as evidence that his evaluation was insufficient. Mashore's testimony that he was trained to assign critical attributes to subdomains that received a score of ineffective or partially effective is deemed relevant. Also, he testified that for a teacher to obtain a highly effective score of four (4), "the students would need to lead the class and do a majority of the work."

Ketterer's testimony is cited that IEPs are important for a music teacher to review in order to provide "differential instruction" and accommodate disabilities. Ketterer assumed that "every class he observes has at least some students with IEPs and that the teacher has reviewed them." As he put it, "[i]n music, you would look at the accommodations, although you're not teaching – the student's disability is not in music per se, although he may have difficulty in literacy." According to Ketterer, he is able "to identify critical attributes from the standpoint of a music teacher that a non-music teacher may not have observed." (Tr. @ 340).

Ms. Thompson approved Lefkowitz's SGOs for 2013-14 and testified that he should have received a score of "4" for both SGOs. She has never given a subdomain score of "insufficient evidence." District Exhibit #40 contained her evidence for Lefkowitz's observation, untagged to any subdomains. Thompson

referred to District Policy indicating that one observation should ideally occur within each cycle.

Ms. Gehring testified that Ms. Goode coached Lefkowitz during the "first cycle" (September to November) and she coached him during the "second cycle" (December to February). Ms. Goode was supposed to coach him during the "third cycle" (March to April) before she passed away. Gehring had a practice of assigning a score of "insufficient evidence" to subdomain 4a if a teacher did not timely submit the post-observation conference form. She testified that Lefkowitz was not provided with any IEPs for his students during 2014-2015.

With respect to Gehring's practice of taking notes and evidence, and assigning it to critical attributes, she testified that it is possible to have different levels of critical attributes for a single subdomain (i.e., an "effective" critical attribute and a "partially" effective critical attribute). (Tr. @ 141- 145). In that situation, it becomes a "professional judgment call" as to what subdomain score should be assigned. However, if there were multiple critical attributes assigned, the weight of the critical attributes would not be noted anywhere on the observation. (Tr. @145- 146).

According to Ms. Gehring, critical attributes, notes and evidence are not required before assigning a subdomain score, whether or not it is a positive or negative score. (Tr. @146- 148).

With regard to Lefkowitz's CAP for 2014-15, she did not review his 2013-14 observations or speak to any of his previous observers. "Ms. Gehring was

part of the School Improvement Panel, which produced meeting minutes kept by Ms. Goode in her own binders."

Mr. Pillsbury reviewed the summative score ranges set by the State as follows: "Mr. Pillsbury indicated the summative score ranges set by the State are as follows: 1 – 1.84 (ineffective); 1.85 to 2.64 (partially effective); 2.65 to 3.49 (effective); and 3.50 to 4.0 (highly effective). (Tr. @ 544). Mr. Pillsbury further testified that a Domain Average is derived from the average of the subdomain scores within a Domain, by observation first, then by averaging those results together (the 'Formula'). (Tr. @ 539). This method was called 'the default method in Teachscape' because it was allegedly 'preloaded' into the system from Teachscape. (Tr. @ 552-553). However, Mr. Pillsbury indicated that the Evaluation Policy does not state it averages scores within each observation." (Tr. @ 639).

"The information regarding the Formula being preloaded into Teachscape was derived solely from conversations Mr. Pillsbury had with Ms. Termotto."

Respondent finds inconsistent Pillsbury's testimony regarding the need for evidence. On the one hand, he testified that a teacher should not be given a score if there is no evidence. (Tr. @ 550). On the other hand, he testified with regard to evidence and assigning a score "nothing is required," "no critical attributes are required," and that "a teacher could get just an evaluation with just numbers, no evidence, no critical attributes." In response to the arbitrator's question, Pillsbury testified that "observers may 'feel' a teacher deserves a score 'based on [the observer's] judgment." He ultimately stated that 'everyone should

be collecting some kind of notes and evidence' and that it would not be the best practice to exclude evidence before assigning a score." (Tr. @ 663-664).

Pillsbury acknowledged that "if Lefkowitz had received a "4" for both SGOs, his summative score would have been 2.64, just 0.01 point below an 'effective rating'"

Ms. Karlie Termotto ("Termotto"), an employee of Frontline Technologies, a company which recently acquired Teachscape, testified that the District Evaluation and Advisory Committee ("DEAC") determines the scoring methodologies of its evaluation policies. She denied the existence of a Teachscape default scoring method; however, Teachscape did provide a recommendation to the District. She has no personal knowledge of the "particular scoring method" utilized by other districts. With respect to the District's formula, Termotto agreed that it can take less data to generate an observation that would be weighted equally when compared to another observation with more data. (Tr. @@ 237). Respondent objects to "Termotto's testimony as evidence because it was not timely produced by the District."

Legal Argument

After reviewing the TEACHNJ standard of review, the four factors to be considered by the arbitrator in rendering a decision and the board of education's "ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met," the Respondent argues that "the Amended Tenure Charge must be dismissed because Lefkowitz was not rated 'ineffective' and/or 'partially effective' for two (2) consecutive years."

As the Respondent argued in its Motion for Summary Decision, Lefkowitz maintains that he was an "effective teacher for the 2013-2014 School Year." The Respondent further argues that "[t]he District improperly calculated Lefkowitz' Teacher Practice Score by failing to adhere to its own scoring policies. Had the District followed its own scoring policies, Lefkowitz would have been rated an "effective" teacher for the 2013-2014 School Year. In addition, the District's calculation method is arbitrary and capricious, and results in mistakes of fact with regard to Lefkowitz's observations."

Alluding to the Arbitrator's January 9, 2016 Award and Opinion where the Arbitrator opines that the phrase "averaged at the domain level" was ambiguous and required an interpretation, at this juncture, Respondent contends "there is no longer a genuine issue of material fact precluding the Arbitrator from finding in favor of Lefkowitz on this issue. Therefore, and for the reasons stated more fully below, Lefkowitz must be found to have been 'effective' during the 2013-2014 school year, and the amended Tenure Charge must be dismissed with prejudice."

Moreover, the credibility of Pillsbury is deemed dubious with respect to his certification that the Teachscape's default scoring method is utilized by 190 school districts in New Jersey. Absent personal knowledge of such facts, Pillsbury presumably "became aware of those facts in his conversations with Ms. Termotto." In addition, Termotto "refuted any contention that Teachscape had a 'default scoring formula.'" Finally, with respect to Pillsbury's contention that the Formula is used to track teacher progress throughout the year, his testimony that

32% of a teacher's overall score is not available until the end of the year ostensibly negates this assertion.

In arguing that "the Amended Tenure Charge should be dismissed because the District failed to calculate Lefkowitz's Teacher Practice Score pursuant to its evaluation policy," the Respondent construes the phrase "averaged at the domain level" as consisting of only two specific calculations. The first calculation takes "all observations through the year" and averages those subdomain scores on the "domain level." The second calculation takes those "domain level" averages and weighs them accordingly (i.e. 20% for Domains 1 and 4, and 30% for Domains 2 and 3)."

Since nothing in the Evaluation Policy requires that another calculation must first be done on the "observational level," as Pillsbury acknowledged, Respondent argues that his Teacher Practice score was distorted.

The Respondent next reiterates the examples of a proper method of calculating the subdomain scores within a particular Domain as set forth in his Motion for Summary Decision as follows:

By way of example, assume a teacher, John Doe, received the following subdomain scores for Domain 1:[4]

Observation One (3, 3, 3)

Observation Two (3, 3, 3,)

Observation Three (1, no score, no score).

[4] This method of calculation shall be referred to hereinafter as the "Camden Teacher Evaluation Overview Method" or "CTEO Method" for short.

To obtain the "average at the domain level" the District simply needs to add all the subdomain scores and divide that answer by the total number of subdomain scores. Thus, in this example, John Doe's overall score for Domain 1 will be 2.71. The following steps were used to calculate that score:

**Step 1** – add all the subdomain scores for Domain 1 (3, 3, 3, 3, 3, 3, 1).

**Step 2** – divide the answer in Step 1 (19) by the total number of subdomain scores (7).

Illustration: 19/7 = 2.71

However, the District does not calculate Domain Scores in this manner, and in accordance with its own Evaluation Policy. Instead, the District calculates the Domain Score by averaging each Domain per Observation, then averaging all of these Domain averages to obtain a final Domain Score.[5] The following steps are used by the District to calculate Domain Scores using the above John Doe example:

**Step 1** – add all the subdomain scores for each observation.

Illustration:

Observation 1: 3+3+3 = 9
Observation 2: 3+3+3 = 9
Observation 3: 1 = 1

**Step 2** – divide each answer in Step 1 by the total number of subdomain scores in each observation.

Illustration:

Observation 1: 9/3 = 3
Observation 2: 9/3 = 3

[5] This method of calculation shall be referred to hereinafter as the "District's Actual Method" or "DA Method" for short.

Observation 3: 1/1 = 1

**Step 3** – add all the Step 2 answers (3, 3, 1) together.

Illustration: 3+3+1 = 7

**Step 4** – divide the answer in Step 3 (7) by the total number of observations (3).

Illustration: 7/3 = 2.33

From the Respondent's perspective, "[e]ach calculation yields a different Domain Score because Observation 3 has missed subdomain scores. Under the DAM, the single subdomain score for Observation 3 receives much greater weight in the overall Domain score than it would if the District followed the CTEO. Said another way, under the DAM, John Doe's Observation 3 Missing Subdomain scores effectively become 1's, or default to the average of the Observation Domain. However, if John Doe received subdomain scores for every subdomain, then both methods of calculation would yield the same result."

According to Respondent, for the 2013-14 School Year, "Domains 1, 2 and 3 were calculated to be lower under DAM than they would have been if the District used the CTEOM. This ultimately affected his Summative score by rating him 'partially effective,' when he was otherwise an 'effective' teacher for the 2013-2014 School Year."

The Respondent next proceeds to give several examples illustrating how the DAM "improperly inflates or deflates a teacher's Domain score depending on the number of subdomains assigned a score of 'insufficient evidence.'"

The germane scoring circumstances are those where the DAM lowers a teacher's score from effective to partially effective, or partially effective to ineffective.

Through a series of charts, the Respondent analyzes how the effect of the DAM and the factoring in of "insufficient evidence" materially affects the outcome of the teacher's evaluation. The inclusion of an "insufficient evidence" score on a subdomain is shown to have a disproportionate impact on the teacher practice calculation for a particular Domain. A fictitious teacher with ten (10) "partially effective" subdomain scores and only one (1) "highly effective" subdomain score is deemed effective using DAM. Utilizing subdomain percentages, the Respondent asserts that under DAM, "a score of 'Insufficient Evidence' will pass its weigh[t] on to the other subdomains that receive a numerical score, which could lower or raise the domain score."

In Respondent's case, "two (2) 'Ineffective' subdomain scores received in Observation 2 were 33.3%, or 16.67% each, of the Domain Score, where all other subdomain scores in the Domain were only 6.67% of the Domain Score. This is the definition of arbitrary and capricious scoring and may amount to a form of Simpson's Paradox whereby the aggregate data (the Teacher Practice Score) is not truly reflective of the underlying data, and thus leads to improper conclusions. Respondent is in essence being punished for the observer's failure to score the other subdomains in Observation 2."

In addition to the arbitrary and capricious statutory criteria manifest in the DAM, the Respondent argues that his evaluations for the 2013-14 and 2014-15

school years "failed to adhere substantially to the evaluation process." Alluding to Thompson's testimony regarding the observation cycles, Lefkowitz notes that he "was observed three times in the first cycle and once in the third cycle."

Second, the development of the CAP after the first observation occurred in 2014-15 is deemed a violation because Lefkowitz was not apprised of his goals and objectives in advance of the first observation.

Third, "Lefkowitz did not receive adequate coaching and support during the 2014-15 School Year. "While Ms. Goode provided regular coaching sessions, she did not provide any substantive instructional feedback to Lefkowitz, like the music supervisor would have." When Gehring took over, he "received less feedback and attention, with almost half of his sessions cancelled." Following the flood at the Cream School, "[a]ll coaching essentially ceased at that point and Lefkowitz was forced into a new building with no supplies for the remainder of the 2014-15 school year."

The Respondent maintains that contrary to the Evaluation Policy, his observations entailed "numerous subdomain scores without any notes, evidence, critical attributes and/or summaries." Also, he "did not receive any support whatsoever for 2013-2014 Domain 4 scores."

Alluding again to the "arbitrary and capricious" statutory criterion, the Respondent claims that "the District failed to provide Lefkowitz with his student IEPs."

Pursuant to N.J.A.C. 6A:14-3.7(a)(2), "[e]very student's IEP shall be accessible to each regular education teacher, special education teacher, related

services provider, and other service provider who is responsible for its implementation." Pursuant to N.J.A.C. 6A:14-3.7(a)(3), "[t]he district board of education shall inform each teacher and provider described in (a) (2) above at his or her specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports to be provided for the student in accordance with the IEP" and "shall maintain documentation that the teacher and provider, as applicable, has been informed of his or her specific responsibilities related to implementing the student's IEP[.]" (Emphasis Resp.).

Indeed it has been held that the New Jersey Administrative Code is "unambiguous in requiring that both regular education teachers and support services providers have access to a student's IEP." Z.R., v. Fort Lee Board of Education, 2008 N.J. AGEN LEXIS 828, 260.

According to Lefkowitz, notwithstanding his "numerous attempts and requests for both the 2013-14 and 2014-15 school years," his efforts were of no avail. The lack of IEPs precluded Lefkowitz from "implementing appropriate classroom management procedures given he was not made aware of the unique conditions affecting his students."

The District Evaluation Policy was purportedly "arbitrary and capricious" because it was inconsistently applied by Lefkowitz's observers during the 2013-2014 and 2014-2015 school years and did not result in "a fair, accurate and comprehensive picture of the teacher's performance."

Since "Lefkowitz's observers differed in their understanding of the Evaluation Policy with regard to the necessity of evidence, [they] were

inconsistent as to whether notes, evidence, critical attributes, and/or summaries were necessary before a subdomain score could be assigned...[I]t is axiomatic that Lefkowitz was not being evaluated by the same standard."

Mr. Thompson and Mr. Ketterer are described as giving "vastly different scores during observation of the same class with a similar lesson." He received mostly "effective" subdomain scores from Thompson as opposed to mostly "ineffective subdomain scores from Ketterer even though he did not have his post-observation feedback from Ketterer prior to the Thompson observation."

Respondent was not advised that Ketterer, who was not employed in a supervisory capacity during 2013-2014, as a "Teacher Trainer and Evaluator" had any "supervisory authority over him." Moreover, the "Teacher Trainer & Evaluator" job description makes no reference to any supervisory role, authority, or other similar duties that position has with respect to teachers. (See R-C, CCSD ML 231-233). Instead, under the section captioned 'Supervises,' it specifically states 'N/A' Here, the statute requires that an individual be employed in a supervisory role before they are eligible to observe teachers."

The Respondent avers that "[t]he Amended Tenure Charge should be dismissed because the District failed to produce evidence in a timely manner and/or failed to produce documents responsive to Lefkowitz's interrogatories."

With respect to this claim, Respondent maintains that "the District failed to produce and/or notice Ms. Termotto's testimony and District Exhibit P-22 'upon referral of the case for arbitration.'" In support of its contention, the Respondent cites Wilson and the State Operated School District of the City of Newark, Essex

County, (Dkt. No. 302-10/15) where Arbitrator Lewis R. Amis dismissed the tenure charge of inefficiency because the school district "untimely provided its evidence 14 days following the referral of the matter to arbitration." Also cited is I/M/O Tenure Hearing of Ebert, State-Operated School District of Newark (Dkt. No. 267-9/14) where Arbitrator Denenberg also dismissed the tenure charge of inefficiency due to the school district's failure to provide its evidence in a timely manner as set forth in the TEACHNJ Act.

The Respondent contends that the District did not produce any documents responsive to his Interrogatory No. 11, namely DEAC evaluation policies and procedures. Also, not produced were documents responsive to Interrogatory No. 8, Lefkowitz training documents on the Evaluation Rubric. "The District did not produce any documents responsive to this Interrogatory, but merely attached documents showing Mr. Lefkowitz attended these training sessions/workshops," without specific reference to the Danielson Model.

Additional documents were not produced are set forth in Interrogatory No. 23 as follows:

> Provide copies of any and all documents contained on Teachscape with regard to Respondent, including but not limited to, observations, Corrective Action Plans, walkthrough notes, artifacts, and evidence in support of Domain 4 for the 2013-2014 and 2014-2015 school years, as well as prior years, if applicable.

The Arbitrator is urged to uphold his bench decision and deny the District's Motion for Summary Decision. Lefkowitz reiterates the points made in his Motion for Summary Decision in that he filed an answer, rather than a Motion for Summary Decision in lieu of a response, and his Answer to the Amended

Tenure Charge conforms to the applicable administrative codes." And even if the requirements of N.J.A.C. 6A:3-5.3(a) apply, Lefkowitz's answer conforms to all the "necessary requirements."

**DISCUSSION**

It is undisputed that the Arbitrator's review of inefficiency tenure charges pursuant to N.J.S.A. 18A: 6-17.2 is limited to: "(1) whether the evaluation substantially adhered to the evaluation process; (2) whether there was a mistake of fact in the evaluation; (3) whether the charges were brought for a prohibited reason; (4) whether the District's actions were arbitrary and capricious."

I. The District's Evaluation Policy Prior to the 2013-2014 School Year

As a preliminary matter, the Arbitrator concurs with the District in finding that its "Evaluation Policy and Process prior to the 2013-2014 school year is irrelevant and cannot be considered under N.J.S.A. 18A:6-17.2."

Despite the Respondent's reference to the evaluations he received during the 2012-2013 school year, including two observations conducted by Principal Thompson and ratings of "satisfactory" and "proficient" respectively, this evidence is irrelevant.

The Respondent has been charged with inefficiency under the TEACHNJ statute, which had not been enacted in 2012-2013. During the preceding period, the District was utilizing an evaluation system distinguishable from the Danielson Framework. Since the Respondent has been rated "partially effective" for two consecutive years in 2013-2014 and 2014-2015 and charged under TEACHNJ, any ratings he received prior to the District's decision to implement the

Danielson Framework pursuant to the enactment of the statute have no bearing on the issue before the Arbitrator. As the District has correctly argued, Lefkowitz's performance under an evaluation system prior to 2013-2014 is not only irrelevant but also "outside the bounds of what the arbitrator may consider under TEACHNJ."

II. The District's Evaluation Scoring Method

The crux of the Respondent's defense to the tenure charge of inefficiency is his claim that the District improperly calculated his Teacher Practice Scores by failing to adhere to its own scoring policy. But for the Districts purported failure to adhere to its own scoring policies, Lefkowitz contends that he would have been rated an "effective" teacher for the 2013-2014 School Year.

The Arbitrator, in his January 9, 2016 Interim Award and Opinion, denying the Respondent's Motion for Summary Decision, found that the phrase "averaged at the domain level" was ambiguous and required an evidentiary hearing for clarification. In addition to finding a genuine issue of material fact that precluded a finding in favor of the Respondent in his Motion for Summary Decision, the Arbitrator further acknowledged that "an issue of credibility had arisen with respect to Pillsbury's Certification that the Teachscape default scoring method is utilized in 190 school districts in New Jersey."

Following the hearing, the Respondent argues that "there is no longer a genuine issue of material fact precluding the Arbitrator from finding in favor of Lefkowitz on this issue. Therefore, and for the reasons stated more fully below,

Lefkowitz must be found to have been 'effective' during the 2013-2014 School Year, and the amended Tenure Charge must be dismissed with prejudice."

Considering the evidence in its entirety, the Arbitrator is persuaded that the District's scoring method complies with TEACHNJ and the alternative method of calculating the Teaching Practice Score as proposed by the Respondent is unsupported by the evidentiary record. Although the Respondent's alternative method of calculating his teacher practice score by "averaging at the domain level," designated the "Camden Teacher Evaluation Overview Method" or "CTEO" for short, produces a different outcome, the Arbitrator is not persuaded that the District's Actual Method ("DAM") is arbitrary or capricious.

Whereas the Respondent notes that pursuant to N.J.A.C. 6A:10-1.2, "[t]he purpose of a scoring guide is to provide a transparent and reliable evaluation process," TEACHNJ "merely requires that the teacher practice instrument include scoring guides that differentiate among a minimum of four (4) levels of performance and provide a conversion to the four (4) rating categories of ineffective, partially effective, effective, and highly effective. Inasmuch as TEACHNJ does not specify how scores for the four (4) levels of performance or Domains must be calculated, absent a preponderance of evidence to the contrary, the District could exercise its discretion in selecting the method of calculating the Teacher Practice score it deemed "transparent and reliable."

The District has established that its selection of the Danielson Framework as the method for calculating its Teacher Practice Score was neither arbitrary nor capricious but rather consistent with the decision made by several other New

Jersey school districts to adopt an evaluation rubric approved by the NJDOE. Having selected the Danielson Framework as its evaluation rubric, the District was required to contract with Teachscape, which not only owns the copyright for the Framework, but also "is currently the only software program available to implement the Framework."

The testimony of Pillsbury and Termotto clarified the District's use of Teachscape as the method for calculating the Teacher Practice Score given its incorporation as the pre-loaded formula or "default method," which consisted averaging at the domain level during the 2013-2014 and 2014-2015 school years. In the Arbitrator's opinion, the fact that Pillsbury and District personnel referred to the District's Method of Calculating the Teacher Practice Score as the "default" method whereas Termotto referred to it as the "pre-loaded formula" constitutes a semantic distinction that neither diminishes their credibility nor supports the contention that the method, irrespective of its description, is arbitrary and capricious.

The District takes the subdomain scores for each of the four (4) domains, scored on a scale of 1-4, based on evidence of the teacher's performance during a classroom observation, and averages them to obtain the domain scores for that particular observation. The domain scores for each observation are then averaged to obtain the total domain scores for the school year. The total domain scores are next assigned to specific percentage/weight of the Teacher Practice Score and added together to obtain the Teacher Practice score for the school year. The District provided the following illustrations:

This method is best demonstrated by reviewing Mr. Lefkowitz's Domain 3 scores during the 2013-2014 school year:

Observation #1, Domain 3: 2.6, effective (3+2+3+2+3=13/5=2.6)

3a: Communicating with students: Effective, 3

3b: Using questions and discussion techniques: Partially Effective, 2

3c: Engaging students in learning: Effective, 3

3d: Using assessment in instruction: Partially Effective, 2

3e: Demonstrating flexibility and responsiveness: Effective, 3

Observation #2: Domain 3: 1.5, ineffective (2+1+2+1=6/4=1.5)

3a: Communicating with students: Partially Effective, 2

3b: Using questions and discussion techniques: Ineffective, 1

3c: Engaging students in learning: Partially Effective, 2

3d: Using assessment in instruction: Ineffective, 1

3e: Demonstrating flexibility and responsiveness: Insufficient evidence

Observation #3: Domain 3: 2.6, effective (3+2+3+2+3=13/5=2.6)

3a: Communicating with students: Effective, 3

3b: Using questions and discussion techniques: Partially Effective, 2

3c: Engaging students in learning: Effective, 3

3d: Using assessment in instruction: Partially Effective, 2

3e: Demonstrating flexibility and responsiveness: Effective, 3

(See P-75.) The three Domain 3 scores are averaged to produce a total Domain 3 score of "2.23" for the 2013-2014 school year (2.6+1.5+2.6=6.7/3=2.23).

id.; 551:15-553:6.)[6] The Domain 3 score is then assigned its percentage/weight of the overall Teacher Practice score for the academic year (2.23 *.3=0.669). (Tr. @ 539) This process was repeated for the remaining domains and produced the following scores:

Domain 1, SY 13-14: 2.33 *.20=0.466
Domain 2, SY 13-14: 2.43 *.30=0.729
Domain 3, SY 13-14: 2.23 *.30=0.669
Domain 4, SY 13-14: 2.67 *.20=0.534

These scores were then added, producing a Teacher Practice Score for the 2013-2014 school year of 2.398 or "2.4" (0.466+0.729+0.669+0.534). Teacher Practice scores were assigned their respective weights/percentages (15% and 85% respectively), and added together to produce a summative rating which corresponds with one of the four (4) ratings categories:

Lefkowitz's SY 13-14 Summative Score: 3.45 *.15=0.5175 (SGO) + 2.398 *.85 (Teacher Practice) = 2.5558 or 2.56, Partially Effective.

In contrast, the calculation method proposed by the Respondent would first add all the scores for Domain 3 (3+2+3+2+3/2+1+2+1/3+2+3+2+3=32 and

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[6] The District notes that "[t]hroughout these proceedings, Mr. Lefkowitz has maintained that when certain components/subdomains within a particular domain are assigned "insufficient evidence," that particular domain arbitrarily has greater weight in the overall Teacher Practice Score than domains in which all components/subdomains have numerical scores. This is simply incorrect. Both Mr. Pillsbury and Ms. Termotto testified that domains having component/subdomain scores of insufficient evidence do not receive greater weight under the Teachscape pre-loaded formula, as each observation is viewed as a snapshot of teacher performance on that given day and thus, the domain scores for each observation are kept separate and averaged together at the end of the year to obtain the total domain average (e.g. Domain 2 scores for each of the three observations are averaged to obtain the total Domain 3 score for the year). (See 2T 247: 6-248:21; 3T 559:13-560:15; 3T 631:7-632:20.) In fact, Ms. Termotto was only aware of one district utilizing Mr. Lefkowitz's proposed method of averaging all the component/subdomain scores at the end of the year." (See 3T 248:22-249:6.)

second divide the answer in Step 1 (32) by the total number of subdomain scores (14) = 32 ÷ 14= 2.85.

As compared to the District's calculation of 2.23, a higher number of 2.85 is calculated.

Using a different set of subdomain scores for a fictitious John Doe teacher, with three observations, encompassing nine (9) subdomains for Domain 1, with two (2) insufficient evidence scores, the Respondent offers the following calculations:

Observation One (3, 3, 3)
Observation Two (3, 3, 3)
Observation Three (1, no score, no score).

In the Respondent's CTEO Method, averaging at the Domain level would entail adding all the subdomain scores and dividing that answer by the total number of subdomain scores, namely:

3+3+3+3+3+3+1 = 19 ÷ 7 = 2.71

In contrast, the District's Method ("DAM") calculates the Domain Score by averaging each Domain per observation, then averaging all of these Domain averages to obtain a final Domain score.

Step 1 – add all the subdomain scores for each observation.

Illustration:

Observation 1: 3+3+3 = 9
Observation 2: 3+3+3 = 9
Observation 3: 1=1

Step 2 – divide each answer in Step 1 by the total number of subdomain scores in each observation.

Illustration:

Observation 1: 9/3 = 3
Observation 2: 9/3 = 3
Observation 3: 1/1 = 1

Step 3 – add all the Step 2 answers (3, 3, 1) together.

Illustration: 3+3+1 = 7

Step 4 – divide the answer in Step 3 (7) by the total number of observations (3).

Illustration: 7/3 = 2.33

According to the Respondent's CTEO Method, these respective calculations yield a different Domain Score because the missing (insufficient evidence) scores in Observation 3 under the District's Actual Method disproportionately receives much greater weight in the overall Domain Score as would not be the case if the District followed Respondent's CTEO Method.

Since the District's Method is shown to have a detrimental impact on Lefkowitz's Teacher Practice Score to the extent he would have been rated "effective" rather than "partially effective" for the 2013-2014 school year, Respondent maintains that the "District Method is arbitrary and capricious scoring that is inconsistent with the Evaluation Policy."

In the Arbitrator's opinion, the fact that Respondent has generated another method of calculating his Teacher Practice Score which is more beneficial to him is not tantamount to a conclusion that the District's Method is arbitrary or inaccurate. Probably, there are multiple permutations and combinations of averaging and calculating the subdomain and Domain scores that yield a range of results that are not necessarily arbitrary.

Since the method of averaging at the Domain level is only one variable that can affect a Teacher Practice Score and subsequently a summative rating, other components of domain scoring are similarly susceptible to alternative calculations. For example, increasing the weight assigned to the four (4) domains could change the Respondent's Teacher Practice Score. For example, increasing the percentage weight of Domain 4 where Lefkowitz received 2.67 to 30% of the total and reducing the weight of Domain 3 where Lefkowitz received 2.23 to 20% would have increased his teacher practice score to 2.442 as follows:

> Domain 1 (0.466); Domain 2 (0.729); Domain 3 (0.446); Domain 4 (0.801) = 2.442[7]

A Teacher Practice Score of 2.442, when added to his SGO of 0.5175 = 2.592; therefore, still partially effective (1.85-2.64).

Absent evidence that the District scoring method irrationally deviates from the statute or unreasonably implements the District's Evaluation Policy, the District's exercise of discretion in selecting Teachscape and its concomitant scoring policy must prevail.

In this regard, the District notes that if every teacher were allowed to experiment with the Teacher Practice Scoring Method until s(he) found the subjective method most conducive to an effective rating, the District's method of calculating the Teacher Practice Score would be reduced to a nullity. Moreover, as the District correctly projects, "it would be required to re-calculate the summative ratings for all of Lefkowitz's 1100+ colleagues, resulting in an

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[7] The rounding up effect from 2.38 would have left Lefkowitz at "2.4" in any event and his Summative Score would have remained unchanged.

avalanche of tenure charges for inefficiency being filed against teachers who were previously deemed effective."

In the Arbitrator's opinion, so long as the Respondent's Teacher Practice score was calculated using a method that conforms to the general concept of "averaging at the domain level" and no evidence was adduced that Lefkowitz was placed at a disadvantaged vis-à-vis his similarly evaluated colleagues, the Arbitrator can discern no grounds for singling out Lefkowitz for special treatment. Absent evidence, preferably expert testimony, discrediting the District's interpretation of the phrase "averaged at the domain level," in its Evaluation Policy, the Respondent's claim cannot be sustained.

In this connection, the Arbitrator finds credible the testimony of Pillsbury and Termotto that approximately 170 New Jersey school districts, who utilize the Danielson Framework, also were compelled to utilize Teachscape in calculating their Teacher Practice scores. The fact Pillsbury initially obtained this information from Termotto constitutes admissible hearsay evidence.

III. Substantial Adherence to the Evaluation Process

Insofar as the District's adherence to the evaluation process for the 2013-2014 and 2014-2015 school years is concerned, the Respondent has raised four (4) claims:

(1) the District failed to observe him within the observation cycles or rounds for each school year;

(2) the District untimely developed his Corrective Action Plan ("CAP");

(3) the District did not provide him with adequate coaching and support during the 2014-2015 school year;

(4) in multiple observations during 2013-2014 and 2014-2015, he received numerous subdomain scores without any notes, evidence, critical attributes and/or summaries.

A. Observation Cycles

According to the Respondent, the District violated its own policy by not observing him throughout the school year within each of the three (3) observation cycles. Relying on the testimony of Principal Thompson regarding the timeframe for the three cycles, Lefkowitz contends that in 2013-2014, he was "observed once in the second cycle and twice in the third cycle, with the latter two observations occurring within one week of each other. During the 2014-2015 school year, Lefkowitz was observed three times in the first cycle and once in the third cycle."

Notwithstanding the testimony of Thompson regarding the observation cycles and their inclusion in the parties' collective bargaining agreement, the Respondent does not cite any District policy requiring that a specific number teacher observations be allocated to the purported cycles. Given Thompson's testimony that neither TEACHNJ nor District policy requires the use of these cycles, the Respondent's reliance on her testimony is misplaced. She subsequently testified that due to scheduling conflicts, an observation scheduled in one cycle could be moved to the next cycle. (Tr. @ 449).

Contrary to the Respondent's assertions, the Camden Teacher Evaluation Overview for the 2013-2014 school year states:

> Formal observations began in early November and will continue up until summative evaluation conferences for both tenured and non-

> tenured teachers. While observers were given a schedule of observation rounds to guide them, they will continue to observe and coach teachers throughout the district outside of those rounds, where necessary, to prepare for summative conferencing. (P. Ex. #52).

Similarly, the Overview for the 2014-2015 school year states:

> Observations will begin in September 2014 and will continue up until summative conferences for both tenured and non-tenured teachers. Classroom walkthroughs will occur throughout the entire school year. Observation schedules will be developed within each building and will guide completion of the observations. Observers will continue to observe and coach teachers throughout the year to provide support and coaching where necessary and to prepare for summative conferencing.

Since N.J.A.C. 6A:10-4.4(c) requires only that one observation occur during the first half of the school year and one observation occur during the second half of the school year, the evidence indicates that the District was in compliance with this regulation. Given the commencement of the second half of the school year on February 1, 2014, Lefkowitz's observation by Mashore on January 21, 2014 fell within the first half of the 2013-2014 school year. His second (3/4/14) and third (3/13/14) observations occurred during the second half of the school year. During the 2014-2015 school year, Lefkowitz was observed three (3) times prior to February 1, 2015, or in the first half of the school year, and once (3/10/15) in the second half.

Other than the Respondent's testimony that the proximity of the two March 2014 observations deprived him of the opportunity to obtain feedback before being observed again, there is no evidence that this factor either constituted a substantial deviation from the evaluation process or materially affected the outcome of his evaluation. It is noteworthy that Lefkowitz neither

raised this issue during his post-observation conferences with Ketterer and Thompson nor submitted a rebuttal.

B. Corrective Action Plan ("CAP")

The Respondent avers that the development of his CAP after his first observation occurred in 2013-2014 constituted a failure to adhere to the District's evaluation process. According to Lefkowitz, since his CAP was not in place as of his first observation on September 11, 2014 by Ms. Goode, he was "unaware of what goals and focus areas he would need to focus on." He also maintains that the CAP was developed without his input or collaboration. Although he signed the CAP to avoid being "adversarial," he testified that he did not contribute to its contents. (Tr. @ 802).

The Respondent has not provided any statutory/regulatory support for his position. As the District correctly notes, N.J.A.C. 6A:10-2.5(b) requires only that "...then the corrective action plan shall be developed and the teaching staff member and his or her supervisor shall meet to discuss the corrective action plan prior to September 15th of the following school year." Given this language, there is no support for the Respondent's position that observations are precluded prior to the initial CAP meeting.

Moreover, there is ample evidence that Lefkowitz had full access to his observation reports and scores once they were entered into Teachscape, had the opportunity to review the scores with his observers during his 2013-2014 post-observation conferences, had received coaching in all the areas in which he was rated partially effective or insufficient evidence on various subdomains, and

had reviewed the aggregate feedback and observation reports with Principal Thompson during his Summative Conference on June 12, 2014. Principal Thompson testified credibly that not only was Lefkowitz provided with coaching during 2013-14 through walk-throughs, she also discussed his need for improvement during the Summative Conference. There is also a record of Lefkowitz's Professional Development plan, including professional development in-service training on Danielson, Teachscape and related subjects. (P. Ex. #46).

Lefkowitz's claim that he had no input into the development of his CAP is refuted by his signature under the statement:

> My signature below indicates that I have received a copy of this Corrective Action Plan and that I understand and contributed to its contents. (P. Ex. #3).

Moreover, Principal Gehring testified credibly that Ms. Goode gave Lefkowitz the opportunity to make adjustments to his CAP, after "Natalie drafted it based on what she thought were the highest needs for him to improve so that he can keep his job," but he declined to do so. (Tr. @ 152). Here again, Lefkowitz did not submit a rebuttal.

C. Support and Coaching During the 2014-2015 School Year

Lefkowitz asserts that he did not receive adequate coaching and support during the 2014-2015 school year. In his recollection, he received consistent coaching from Ms. Goode, but this ended when Ms. Gehring took over and the flood occurred at the Cream School. Once Ms. Gehring took over, Lefkowitz contends "he received even less feedback and attention, with almost half of the sessions cancelled."

Respondent acknowledges that by the commencement of the 2014-2015 school year, he had been fully apprised of the deficiencies that resulted in him being placed on a CAP for 2014-2015. Lefkowitz further acknowledges that Ms. Goode provided him with weekly coaching sessions as well as support through grade level meetings, professional development with her on Mondays, and feedback via frequent informal walk-throughs.

The record evidence indicates that when Gehring assumed the coaching responsibility for Lefkowitz prior to the holiday break and retained those responsibilities after Ms. Goode's unfortunate passing, she also provided consistent coaching prior to the mid-year CAP review on February 12, 2015. Lefkowitz admitted that he had a coaching session with Ms. Gehring prior to the March 10, 2015 observation, and three coaching sessions from February 2105 to the end of the year. (Tr. @ 885-886). It was not until the mid-February 2015 flood when all students and staff had to be relocated to Hatch that the formal weekly coaching sessions ceased.

The Arbitrator is not persuaded that the one month cessation of his coaching sessions between his February 12, 2015 mid-year CAP review and his final observation on March 10, 2015 materially affected the outcome of his evaluation. As the District notes, Lefkowitz had been previously observed formally three (3) times in 2014-2015 concurrently with weekly coaching sessions provided by Goode/Gehring. It is also noteworthy that the March 10, 2015 observation was rated "his best" by Gehring. The Respondent's improved performance was attributed, in part, to the presence of the classroom teacher in

the room, which assisted in classroom management – the area in which Lefkowitz was in most need for improvement and because Gehring gave him the "benefit of the doubt" due to the flood.

Given evidence that the highest observation score Lefkowitz received during the two years at issue in his tenure charge resulted from his 3/10/15 observation, Respondent cannot reasonably claim that the four (4) week period during which he did not receive coaching at Hatch adversely or materially affected the outcome of his evaluation. If this had been the case, he had the opportunity to raise his concerns with Gehring either during their pre-observation or post-observation conference. Lefkowitz also did not avail himself of his right to submit a rebuttal to the observation.

D. In Multiple Observations, Observers gave Subdomain Scores without any Notes, Evidence, Critical Attributes and/or Summaries

Although there was clearly ambivalence in the testimony of District witnesses as to whether the availability of evidence was a prerequisite in their scoring of subdomains/components, the Respondent failed to prove that specific evidence was required in order to substantially adhere to the evaluation process. On the one hand, Mashore testified that for certain subdomains/components where he observed effective teaching practice, he did not include evidence in the Teachscape input because there was nothing negative to bring to Lefkowitz's attention. On the other hand, Pillsbury initially testified that an observer's task is to "align the evidence to components or subdomains...So a classroom observation is basically the observer going in, observing the lesson, taking their notes, assigning scores for those components...if you don't see any evidence for

that specific component – and you don't feel...they should be getting a score for nothing that's when you would put insufficient evidence, because it's not weighted at all." Later, Pillsbury testified, "[w]hen they're typing their notes, if they don't see anything, yes, they could still assign a score. They could say I give a 4 because I didn't see any evidence of bad behavior." (Tr. @ 565-567). Pillsbury reinforced this testimony when he explained that with regard to evidence and assigning a score that "nothing is required," "a teacher could get just an evaluation with just numbers, no evidence, no critical attributes." (Tr. @ 625).

However, the determinations of the evaluators/observers regarding their collection of evidence during Lefkowitz's classroom observations and their decisions with respect to assigning that evidence or the lack thereof to critical attributes is beyond the scope of the arbitrator's review. N.J.S.A. 18A:6-17.2(c) clearly states that "the evaluator's determination as to the quality of the employee's classroom performance shall not be subject to an arbitrator's review."

The Arbitrator construes this statutory provision as permitting significant deviation in the scoring practices of evaluators so long as these deviations do not materially affect the outcome of the evaluation. Evidence that Mashore may have assigned a score for a subdomain without including evidence in the Teachscape report and Gehring assigned a sub-domain score without any critical attributes, or notes, or evidence such as "the behavior is excellent the entire time and there's no evidence of misbehavior" are, in the Arbitrator's

interpretation of the statute, both permissible, and more importantly, beyond the scope of the Arbitrator's review.

## IV. Arbitrary and Capricious

### A. IEPs

The Respondent alleges that the District violated N.J.A.C. 6A:14-3.7(a)(2) when it did not provide Lefkowitz with access to the IEPs for the students in his classes and violated N.J.A.C. 6A:14-3.7(a)(3) when it did not "inform each teacher and provider described in a (a)(2) above of his or her specific responsibilities related to implementing the student's IEP and the specific accommodations..." Respondent further alleges that the District also violated "the Administrative Code provisions in failing to advise and/or provide him with any of his students' IEPs, notwithstanding Lefkowitz's numerous attempts and requests for both the 2013-2014 and 2014-2015 School Years to obtain them."

Considering the evidence in its entirety, the Arbitrator is not persuaded that Lefkowitz exercised due diligence or made a reasonable effort to obtain the IEPs for the students in his classes. Whereas Lefkowitz testified that during the 2013-2014 school year, he requested the IEPs through email, he provided no proof of his email requests. (Tr. @ 754). Although Lefkowitz testified that when he asked Principal Thompson how he could get the IEPs she referred him to the guidance counselor, there is no evidence that he followed through in his efforts. In fact, Lefkowitz testified that after making two attempts to obtain the IEPs, "he got frustrated and gave up." In addition, there is a dearth of evidence that Lefkowitz raised this issue during his post-observation conferences when the

need to improve his classroom management arose. He neither filed a grievance nor a rebuttal on the subject.

Principal Thompson described the process for obtaining IEPs as follows:

> "...they have a special ed teacher who makes the teacher, whatever teacher it is, aware that they have a student in that room [with an IEP]...[T]hey just request it [the IEPs]..." (Tr. @ 239-240).

For the 2014-2015 school year, Lefkowitz testified that he requested IEPs from Ms. Goode, but did not pursue these requests during the numerous coaching sessions she conducted or raise this issue in any of his post-observation reflection forms. (Tr. @ 873-876). He acknowledged being told by Ms. Gehring during 2014-2015 that the IEPs were accessible for teachers in the main office. As she put it, "All IEPs are housed in the office on the first floor. He didn't have to request, he can just go and physically get it." (Tr. @ 161-162).

The Arbitrator finds incredulous Lefkowitz's testimony that despite raising the IEP issue with Principal Thompson, the guidance counselor and the nurse during 2013-14, he made no progress in obtaining the IEPs. During 2014-15, despite being told by Principal Gehring that the IEPs were available in the main office, he never discovered where they were housed and admitted that his concern that "teachers were yelled at by the office staff" discouraged his further pursuit. Ms. Goode purportedly "brought in information about the students, but didn't actually show me the IEPs that I had requested." (Tr. @ 874-876).

In the absence of any email or other correspondence from Lefkowitz regarding his request for the IEPs, any reference to IEPs in his post-observation conference, or any rebuttals where the IEP subject was mentioned, the Arbitrator

cannot credit his claim that the District acted in an arbitrary and capricious manner in denying him access to the IEPs of his students. Interestingly, the testimony of Ms. Ketterer corroborates the position of the District in that he assumed that each teacher he observed would have reviewed the IEPs for students in his class, and this assumption was based on the fact that it was the teacher's responsibility to obtain the IEPs. (Tr. @ 307).

B. Ms. Thompson and Mr. Ketterer gave vastly different scores during an observation of the same class with a similar lesson

During the 2013-2014 school year, Ketterer and Thompson each observed the same class a week apart. However, Lefkowitz was not able to incorporate or utilize any feedback from Ketterer prior to Thompson's observation. To the extent the variation in his scores are a function of the individual observer's assignment of evidence or critical attributes to the sub-domains within an observation, the Arbitrator, pursuant to N.J.A.C. 18A:6-17.2(c) is precluded from reviewing this aspect of the Respondent's observations. Moreover, the fact that two observers recorded vastly different scores during the observation of the same class within a week, in addition to the observer's scoring style, could be attributed to the difference in the Respondent's performance during those two observations.

C. Ketterer's Supervisory Role During the 2013-2014 School Year

The Respondent challenges the authority of Ketterer to conduct an observation of him during the 2013-2014 School Year because "he was not employed in a supervisor role or capacity." Citing N.J.A.C. 18A:6-119 that "an evaluation shall include formal observations, as well as post conferences,

conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate or supervisor certificate," Lefkowitz contends that he was never advised by the District that Mr. Ketterer, a "Teacher Trainer and Evaluator," was his "supervisor" or possessed any "supervisory authority" over him during the 2013-2014 School Year. According to the Respondent, "Mr. Ketterer did not assert any supervisor authority over Lefkowitz' and indeed Lefkowitz' did not understand Ketterer to be a supervisor."

The Arbitrator dismisses the Respondent's claim that Ketterer was not properly certified to serve in a supervisory capacity and conduct formal observations as part of the District's evaluation process. The Respondent's misconception of the "Teacher Trainer and Evaluator" position does not negate the District's approval of Ketterer's supervisory authority and related role of evaluating teachers, and providing teachers with coaching and feedback on their performance. Inasmuch as the job description, Teacher Trainer & Evaluator requires the holder to possess a "valid principal or supervisory license in the State of New Jersey" and among "qualifications and responsibilities: support the teacher observation and feedback cycle by: conducting observations and evaluations of teachers across the district," the Arbitrator is convinced that Ketterer was qualified to observe Lefkowitz. (R. Ex. #C, CCSD ML 231).

D. The District's Failure to Produce its Evidence in a Timely Manner and Assert Proper Objections to Lefkowitz's Discovery Requests Requires its Exclusion

The Respondent argues that the testimony of Ms. Karlie Termotto and District Exhibit No. P-22 should be excluded because Termotto was not on the District's witness list on or before December 18, 2015 "upon referral of the case for arbitration."

The Arbitrator shall admit the testimony of Ms. Termotto as an exception to the statutory rule because her testimony arose only in response to the Arbitrator's request, set forth in his dismissal of the Respondent's Motion for Summary Decision, for clarification of the District scoring method, specifically the phrase "averaged at the Domain level." In addition, Mr. Pillsbury's testimony corroborates that of Ms. Termotto regarding the District's scoring method.

The cases cited by the Respondent are distinguishable, and the Arbitrator discerns no basis to dismiss the tenure charge on this ground.

In I/M/O Wilson, there was no waiver of the statutory time period by serving interrogatories after the statutory deadline, seeking "copies of any and all documents contained on Teachscape with regard to Respondent..." and no decision of the Arbitrator in response to Respondent's Motion for Summary Decision requesting additional testimony regarding the District's scoring method.

The Arbitrator shall also admit Petitioner's Exhibit No. 22, which represents the long form version of the observation begun by Ms. Goode on September 11, 2014 and completed on September 17, 2014. As such, P-22 is the best evidence of the observation conducted by Ms. Goode and, irrespective

of the inclusion of P-22, the P-77 truncated scores have been entered into Teachscape and used to calculate Lefkowitz's summative rating. The Arbitrator also credits the testimony of Mr. Pillsbury that Exhibit P. 22 is a correct and full copy of P-77 which was produced in the District's initial disclosures, but due to a printing error less complete than P-77. Given this evidence, the Arbitrator discerns no prejudice to Respondent in admitting P-22.

Moreover, the Arbitrator is persuaded that an exception to the rule regarding the District's submission of evidence upon the referral to arbitration arises when the document is generated in response to the Respondent's interrogatories or request for documents.

The Respondent further asserts that the tenure charge should be dismissed because the District failed to provide documents in response to Interrogatories Nos. 3, 5, 8, 11 and 23, which substantially prejudiced his defenses. "Lefkowitz initially raised this argument after two full days of hearing were complete via his attorney's February 19, 2016 correspondence to this office." The District maintains that it "asserted valid and lawful objections to each and every one of the subject interrogatories when it provided its responses on January 22, 2016 pursuant to the discovery schedule agreed upon by the parties. After receipt of the District's responses, Lefkowitz did not send a deficiency letter seeking more specific responses to the subject interrogatories or file any type of action with the Arbitrator seeking to compel such responses or any additional production of documents. As such, the District believed that

Lefkowitz did not oppose its lawful and appropriate objections to the subject interrogatories."

Inasmuch as Lefkowitz not only had the District's responses to the subject interrogatories approximately three (3) weeks before the start of the hearing on February 11, 2016 and also had access to these materials in Teachscape during the 2013-2014 and 2014-2015 School Years, the Arbitrator is persuaded that his defense was not prejudiced. Moreover, the Respondent had the opportunity to raise these discovery issues with the Arbitrator and seek his intervention in order to compel the responses and/or additional production of documents prior to the commencement of the hearing and opted not to do so.

E. District's Motion for Summary Decision

The Arbitrator reaffirms his denial of the District's Motion for Summary Decision. The basis for the denial was the District's untimely filing of the Motion ten (10) days before the start of the arbitration hearing.

Conclusion

Having found that none of the actions delineated by the Respondent satisfies one or more of the four (4) areas of allowable challenge under the statute pursuant to an Arbitrator's review of inefficiency tenure charges, the Arbitrator concludes that Mr. Lefkowitz must be dismissed from his position with the State-Operated Camden City School District.

The Respondent failed to establish that his evaluation by the District for the two (2) consecutive years, 2013-2014 and 2014-2015, where he was rated "partially effective," failed to substantially adhere to the evaluation process. The

Arbitrator is persuaded that in evaluating the Respondent's performance, including his three (3) classroom observations in 2013-2014, his Corrective Action Plan, and his four (4) classroom observations in 2014-2015, the District followed, or at least substantially followed the evaluation process. His observations conformed with N.J.A.C. 6A:10-4.4(c) in that at least one observation occurred during the first half of the school year and one observation occurred during the second half of the school year. In addition, the Respondent was given ample opportunity to improve his performance through coaching sessions, informal walk-throughs, as well as in pre and post observations with his observers and supervisors.

The Respondent further failed to establish that the District's actions were arbitrary or capricious. The District complied with TEACHNJ in calculating his Teacher Practice Score utilizing the State approved Danielson Framework and Teachscape software program. The Respondent's Teacher Practice score was calculated using a method applied to all teachers in the District that was also consistent with the statute. The methods used by the observers in collecting and assigning evidence to score the Teacher Practice components/subdomains was not subject to challenge as per N.J.S.A. 18A:6-17(c).

In addition, the correction of an error made by Lefkowitz in calculating his 2014-2015 SGO scores resulted in an increase in his summative rating from 2.26 to 2.36. Nevertheless, Lefkowitz's summative rating remained "partially effective" for 2014-2015.

In the final analysis, the District has sustained its burden of proof by a preponderance of the credible evidence. It has established and implemented an evaluation policy in accordance with TEACHNJ and District policy. It has preferred a tenure charge of inefficiency against Lefkowitz based upon his two consecutive partially effective summative ratings for 2013-2014 and 2014-2015. In the absence of preponderant evidence that the District's actions were arbitrary or capricious, substantially deviated from its evaluation process, encompassed mistake of fact, or the tenure charge was brought for a prohibited reason, the Arbitrator is required to uphold the Respondent's dismissal.

Accordingly, the Respondent, Michael Lefkowitz, is dismissed from his position as a teacher with the Camden City School District.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

**AWARD**

Pursuant to the TEACHNJ Statute, the Respondent, Michael Lefkowitz, shall be dismissed from his position as a teacher in the State-Operated School District of the City of Camden, New Jersey.

*Robert T. Simmelkjaer*

April 27, 2016

Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

On the 27th day of April 2016, before me came Robert T. Simmelkjaer to me known as the person who executed for foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 329-10/15 sustaining tenure charges as set forth above.

April 27, 2016

Notary Public

165-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

**IN THE MATTER OF THE TENURE HEARING OF JEFFREY TAGLIARENI**

| | | |
|---|---|---|
| **SCHOOL DISTRICT OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY** | : | |
| **Petitioner** | : | **AGENCY DOCKET NO. 347-11/15** |
| **and** | : | |
| **JEFFREY TAGLIARENI** | : | |
| **Respondent** | : | |

**Before: Carol F. Laskin, Esquire, Arbitrator**

**APPEARANCES:**

**For the Petitioner**
**Fogarty & Hara**
**Stephen R. Fogarty, Esquire**
**David Disler, Esquire**

**For the Respondent**
**Mellk and O'Neill**
**Edward A. Cridge, Esquire**

On November 12, 2015, the School District of the Township of Montgomery, Somerset County ("Board" or "District") filed a Certificate of Determination including, *inter alia*, the Board's resolution of tenure charges against Jeffrey Tagliareni ("Respondent" or "Tagliareni"). On December 7, 2015, the tenure charges were referred to the undersigned pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109.*

On December 23, 2015, Respondent filed a Motion for Summary

Decision requesting the tenure charges be dismissed. On January 8, 2015, after two telephonic hearings and review of the parties' arguments, the undersigned ***denied*** the motion. Prior to the commencement of the hearing, the parties argued over evidentiary matters, resulting in the Protective Order entered with consent by the parties.

Three days of hearings were conducted at the District's administrative office; January 15, 2016, February 17, 2016 and February 18, 2016. Two additional days were scheduled. Immediately prior to the fourth day of hearing, Tagliareni submitted a unilateral, voluntary resignation (Exhibit 1). The Board, by resolution on March 16, 2016 unanimously accepted Respondent's "Letter of Resignation", effective the close of business on March 31, 2016 (Exhibit 2).

*N.J.A.C. 6A:3-5.6 Withdrawal, Settlement or Mooting of Tenure Charges* requires the undersigned to review the Letter of Resignation and acceptance by the Board to determine whether the tenure charges should be dismissed as moot. In recent tenure hearings, upon receipt of a resignation, arbitrators questioned what, if any, legitimate interest the Petitioner maintained to pursue the charges. (See Arbitrator Simmelkjaer decision in *In the Matter of the Tenure Charges c. Jerome C. Higgins, State District of the Township of Edison, Middlesex County, Dkt. No. 121-5/14* and cases cited therein).

In the instant matter, Respondent submitted a unilateral, voluntary and irrevocable resignation from his employment with the School District of the Township of Montgomery, Somerset County. Respondent has no claim to any employment or back pay. Thus, Petitioner has no other legitimate interest arising out of the instant matter. Accordingly, the following Award is issued:

**AWARD**

Pursuant to *N.J.A.C. 6A:3-5.6*, the Montgomery Township Board of Education's March 16, 2016 Resolution accepting Tagliareni's Letter of Resignation, effective March 31, 2016, certified by the Business Administrator/Board Secretary does hereby conclude the tenure hearing. The charges against Jeffrey Tagliareni, are, hereby, ***dismissed*** as moot.

DATED: April 28, 2016

Carol F. Laskin

CAROL F. LASKIN, ESQUIRE

**STATE OF NEW JERSEY :**

**COUNTY OF CAMDEN :**

**I CERTIFY that on** April 28, 2016

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: April 28, 2016

Lynda A Green

NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

Jeffrey Tagliareni
71 Cobalt Ridge Drive
Levittown PA 19057
(609)-955-0220
JeffTagliareni@gmail.com

March 3, 2016

Nancy Gartenberg, Superintendent
Montgomery Township School District
Board of Education
1014 Route 601
Skillman, NJ 08558-2119

**Re: Letter of Resignation**

Dear Superintendent Gartenberg:

Please accept my resignation from my position with the Montgomery Township School District. This resignation shall be effective upon the 61st day following your receipt of this letter, or, if the Board of Education is willing to accept my resignation on less than 60 days' notice, at the close of business on March 31, 2016.

Thank you.

Sincerely,

Jeffrey Tagliareni

**EXHIBIT 1**

4.2

RESOLUTION

BE IT RESOLVED that the Montgomery Township Board of Education accepts Jeffrey Tagliareni's letter of resignation, effective the close of business on March 31, 2016.

ROLL CALL VOTE

Moved by: Mr. Doshi

Seconded by: Mr. Cavalli

AYES: Mr. Cavalli, Ms. Chenette, Ms. Donnay, Mr. Doshi, Mr. Hladick, Mr. Huff, Mr. Jacey and Ms. Witt

NAYS: None

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Montgomery Township Board of Education by a majority vote at its duly authorized meeting on March 15, 2016.

Annette M. Wells
Business Administrator/Board Secretary

Dated: March 16, 2016



EXHIBIT 2

167-16

OAL DKT. NO. EDU 05044-16
AGENCY DKT. NO. 100-4/16

| | | |
|---|---|---|
| J.L., on behalf of minor child, T.D., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF TRUSTEES OF THE NORTH STAR ACADEMY CHARTER SCHOOL, ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is appealing the decision of the North Star Academy Charter School Board of Trustees (Board) to continue the suspension of T.D. from school through May 20, 2016 for the assault of a staff member. The ALJ granted the petitioner's request for emergent relief.

By way of factual background, the record demonstrates that T.D. was initially suspended on December 14, 2015 for assaulting a staff member and was informed that a recommendation for an additional period of suspension or expulsion would be considered at the next Board meeting. (Board's Brief, Exhibit 1) At the Board's meeting on February 10, 2016, the Board "determined that the conduct warranted suspension from school for ten additional days" and that T.D. "may return to school on March 22, 2016." (Board's Brief, Exhibit 4) Thereafter, the Board again considered T.D.'s suspension at the March 21, 2016 Board meeting, including the administration's recommendation to "continue the long term suspension for an additional 38 school days in order to complete and consider the evaluation for eligibility for special education that [J.L.] requested", *i.e.*, through May 20, 2016. (Board's Brief, Exhibit 8)

Noting that completion of the special education evaluation process was pending only the psychiatric exam, the Board determined that the "incomplete IEP team evaluation warranted the continuation of [T.D.'s] suspension in order to gather all the necessary information to determine the appropriate course of action following [T.D.'s] suspension." (*Ibid.*)

Upon review, the Commissioner concurs with the ALJ that petitioner is entitled to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Specifically, the party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Under *N.J.A.C.* 6A:16-7.3(c), the "[s]uspension of a general education student shall not be continued beyond the district board of education's second regularly scheduled meeting following the suspension, unless the district board of education so determines pursuant to *N.J.S.A.* 18A:37-5." In accordance with *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

i. The nature and severity of the offense;
ii. The district board of education removal decision;
iii. The results of any relevant testing, assessments or evaluations of the student; and
iv. The recommendation of the chief school administrator, after considering input from the principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

The Board's determination at its March 21, 2016 meeting to suspend T.D. through May 20, 2016 in order to complete the evaluation for eligibility for special education is not authorized by *N.J.A.C.* 6A:16-7.3(c). The regulation does not permit a district to keep a child out of school while determining if a child is eligible for special education services, and a long-term suspension for such reasons is an improper use of *N.J.A.C.* 6A:16-7.3(c). The determination regarding a long-term suspension and an evaluation for special education are in no way related; the Commissioner only has jurisdiction over the long-term suspension – a disciplinary matter – and not over special education matters. *See N.J.S.A.* 18A:16-9. Thus, a district may not conflate the issues as the Board has done here.

The Commissioner notes that "[t]he results of any relevant testing, assessments or evaluations of the student" is included in the criteria relevant to determining a long-term suspension. *N.J.A.C.* 6A:16-7.3(c). As such, the Board would have been permitted to require a psychological or psychiatric examination prior to T.D.'s return to school for purposes of determining whether it was safe for her to return or whether she was a danger to herself or other students. However, in this circumstance, there is no evidence in the record that the Board required a psychiatric or psychological evaluation as a condition of T.D.'s return to school. Instead, the only mention of a psychiatric evaluation in the record is in the context of T.D.'s psychiatric evaluation for special education services – a process which was requested by J.L. Accordingly, the legal right regarding long-term suspensions is well settled and the petitioner has demonstrated a likelihood of success on the merits.

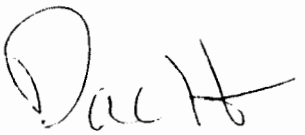
The Commissioner finds that T.D. will suffer irreparable harm if she is not immediately permitted to return to the general education setting. Keeping T.D. from school in violation of the *N.J.A.C.* 6A:16-7.3 constitutes irreparable harm. *See Dolores Sanchez v. Board of Education of the City of Camden, Camden County*, Commissioner Decision No. 107-03,

decided March 6, 2003, *aff'd* State Board June 4, 2003 (finding irreparable harm stemming from a statutory violation when a Board illegally transferred a principal to the position of assistant principal); *see also Daniel Flynn v. Board of Education of the Freehold Regional School District, Monmouth County*, Commissioner Decision No. 243-09, decided August 9, 2009. Preventing T.D. from attending school while she is being evaluated for special education services deprives her from interaction with her peers, without any authority to do so.

Finally, when balancing the equities and interests of the parties, petitioner will suffer greater harm if emergent relief is not granted. T.D. has been deprived of involvement in school activities and events as well as interaction with other students, without any statutory or regulatory authority. Conversely, the Board will not suffer any harm if emergent relief is granted as it is acting in violation of state regulation.

Accordingly, the recommended Order of the OAL granting petitioner's application for emergent relief is adopted as modified. The continued suspension of T.D. from March 22, 2016 to May 20, 2016 is reversed and the Board is directed to permit T.D. to return to school. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 5/03/16
Date of Mailing: 5/03/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**ORDER GRANTING**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 05044-16
AGY REF NO. 100-4/16

**J.L, ON BEHALF OF HER MINOR CHILD T.D.,**

Petitioner

v.

**BOARD OF TRUSTEES OF THE NORTH STAR ACADEMY CHARTER SCHOOL, ESSEX COUNTY**

Respondent,

---

**Shira Baron**, Esq., for Petitioner (Education Law Center, attorneys)

**Cherie L. Adams**, Esq., for Respondent (Adams, Guitierrez & Lattiboudere, LLC, attorneys)

BEFORE **THOMAS R. BETANCOURT**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a Verified Petition and Motion for Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on

April 1, 2016. In support of the Motion for Emergent Relief petitioners also filed an Affidavit of petitioner J.L. and a brief in support of the motion.

Said motion seeks order authorizing the immediate reinstatement of petitioner, T.D., to North Star Academy; and, directing respondent to assess any academic curriculum and home instruction missed by T.D. during 2015 and 2016, and to provide same to T.D. in the form of supplemental tutoring and summer programs.

Respondent filed its brief in opposition to the Motion for Emergent Relief, together with Exhibits 1 through 8 and the certification of Jason Russell, Associate Chief Operating Officer, on April 20, 2016.

Because of the issues presented in the Verified Petition the matter was docketed by both the Office Special Education (as Docket No. 2016-24244E) and the Bureau of Controversies and Disputes (as Docket No. 100-4/16).

DOE requested that the OAL docket and review the matter as a special education (EDS) case and issue a final decision pursuant to N.J.A.C. 6A:14-2.7. The OAL issued a docket number of EDS 05098-16.

The Motion for Emergent Relief, while touching upon special education issues, is not a special education motion. Accordingly, the issues raised in the Verified Petition regarding special education issues will not be addressed in the within Order.

## FACTUAL BACKGROUND

Petitioner, T.D., is a student at North Star Academy Charter School (North Star). She is presently in the eighth grade.

T.D. has been attending North Star since August 2012.

T.D. has a history of suspension since enrolling in North Star. An incident occurring on December 14, 2015, resulted in a ten day suspension.

The notice to T.D.'s parents regarding the suspension advised that the suspension would run through January 11, 2016. (Exhibit 1 Respondent's brief). It also advised that T.D. might receive an additional suspension, or expulsion, after a meeting of the Board of Trustees. That meeting was scheduled for January 25, 2016. That meeting was not held due to inclement weather.

The Board of Trustees did meet on February 10, 2016. At that meeting the Board determined that T.D. would continue under suspension until March 22, 2016, at which time she could return to school. The Board, by letter dated February 11, 2016, advised the parents of T.D. accordingly. (Exhibit 4 Respondent's brief). Said letter did not attach any conditions on T.D.'s return to school.

By letter dated March 22, 2016, the Board advised the parents of T.D. that her suspension would continue through May 20, 2016. The rationale stated in said letter was to evaluate T.D. for eligibility for special education in response to the parents of T.D. request. (Exhibit 8 Respondent's brief). Nothing in the documentary record indicates that the parents agreed to a continuation of T.D.'s suspension pending an evaluation for eligibility for special education, or for a clearance from a medical professional to return to school.

No notice of the meeting wherein a continuation of T.D.'s suspension occurred was provided to the parents of T.D.

Nothing contained in the March 22, 2016 letter from North Star indicates that T.D. will be returned to school upon the completion of the special education eligibility assessment. There is no date certain form T.D.'s return.

T.D. continues to be suspended to date.

During the course of T.D.'s suspension she has received appropriate education services from North Star for ten hours per week.

## LEGAL ANALYSIS AND CONCLUSION

Initially, it must be determined if petitioners are entitled to emergent relief.

A party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7:

1. Issues involving a break in the delivery of services;
2. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
3. Issues concerning placement pending outcome of due process proceedings; and
4. Issues involving graduation or participation in graduation ceremonies.

As the present matter concerns a disciplinary action, petitioners are entitled to seek emergent relief.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:3-1.6(b)).

The four factors ("the Factors"), include:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. T.D. by being continued to be suspended for an extended period of time suffers irreparable harm. See C.F. v. City of Wildwood Board of Education, 96 N.J.A.R. 2d (EDU) 619, 621 (holding indefinite placement of a student on homebound instruction demonstrated irreparable harm). See also B.K. v. Princeton Regional Board of Education, OAL DKT. No. EDS 4813-13 (April 15, 2013), where it was found on a motion for emergent relief referring to home instruction that "such an educational option is to be used by a district in limited circumstances and for a limited time period."

Factor Two. The legal right underlying petitioner's claim is settled.

N.J.S.A. 18A:372.4 provides that a suspended student is entitled to a hearing before the Board of Education. The continuation of T.D.'s suspension to May 20, 2016, was without notice or hearing. There was no intervening incident with T.D. of any kind. Respondent's claim that the continued suspension was based upon the parents' consent is simply not accurate. Nothing in the documentary record reflects this and petitioner denies it. T.D. had the legal right to a hearing and it was not provided.

Factor Four. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief will not be granted. Here it is clear that by denying T.D. access to school, T.D. is denied access to any school activity or event, interaction with her peers and interaction with her teachers. That cannot be replaced by continued home instruction. The harm to respondent is speculative in their claim that T.D. may be a threat to other students and her teachers. This is based upon one incident where there was physical contact.

Lastly, respondent advised T.D. and her parents that she would be permitted to return to school on March 22, 2016, without conditions. That simply never happened. The unilateral decision to extend her suspension, without notice or hearing cannot be permitted to stand.

I **CONCLUDE** that the continuation of T.D.'s suspension from March 22, 2016 to May 20, 2016 was without merit and should be **REVERSED**.

## ORDER

It is hereby **ORDERED** that the continued suspension of T.D. from March 22, 2016 to May 20, 2016 is **REVERSED** and

It is further **ORDERED** that Respondent permit the immediate return of T.D. to North Star Academy.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 22, 2016

DATE

**THOMAS R. BETANCOURT**, ALJ

db

## APPENDIX

List of Moving Papers

For Petitioner:

Verified Petition

Motion for Emergent Relief

Affidavit of Petitioner J.L.

Brief in support of motion

University Hospital Emergency Department after care instructions of 12/19/15

For Respondent:

Brief in response to motion

Affidavit of Jason Russell

Exhibits 1 through 8

168-16

IN THE MATTER OF THE TENURE CHARGES REGARDING

THOMAS SCHAEFER

DOCKET NO. 247-9/15

AND THE

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

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

AWARD

---

APPEARANCES:

FOR THE DISTRICT:

TERESA L. MOORE, ESQ.
RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
HEADQUARTERS PLAZA
ONE SPEEDWELL AVENUE
MORRISTOWN, NEW JERSEY 07962-1981

FOR MR. SCHAEFER:

SAMUEL WENOCOUR, ESQ.
OXFELD COHEN, PC
60 PARK PLACE, SIXTH FLOOR
NEWARK, NEW JERSEY 07102

DATES OF HEARING:

NOVEMBER 24, 2015
JANUARY 19, 2016
FEBRUARY 3, 2016
FEBRUARY 10, 2016
FEBRUARY 18, 2016

## I. PROCEDURAL BACKGROUND

The State-Operated School District of the City of Paterson, Passaic County ("District" or "Employer") initiated and the State District Superintendent certified to the Commissioner of Education a tenure charge seeking the termination of employment of Thomas Schaefer ("Respondent" or "Mr. Schaefer"), who is employed as a tenured Teacher within the District. By letter dated October 13, 2015, the Commissioner of Education referred the charges to this

Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. By agreement of the parties, the hearing of this matter was commenced on November 24, 2015. At that time, although no testimony was taken, discussions were held, documentation and exhibits were reviewed, and an outline of the full case proceeding was developed. The taking of testimony commenced on January 19, 2016, at the offices of the District, 90 Delaware Avenue, Paterson, New Jersey, and continued on February 3, February 10, and February 18, 2016. Throughout this proceeding, both parties were ably represented by legal counsel, and Respondent was present at all times. Each party was provided a full and fair opportunity to present evidence through documents and testimony. All witnesses were sequestered, other than Respondent, and all testified under oath and were subject to direct, cross, and redirect examination. The parties agreed to the presence of a court reporter and to the subsequent preparation and use of a transcript of the evidential hearings. When the taking of evidence was concluded on February 18, 2016, counsel agreed to present written closing arguments. As the result of various intervening events, including a weather emergency, family leave for one participant, and the agreement of the parties to proceed first to an interim decision in another arbitration addressing issues with potentially District-wide effect regarding the Paterson Evaluation System, the Commission approved an extension until April 30, 2016, for the issuance of this Award. In accordance, the deadline for closing briefs was established and then extended by agreement of the parties. Same, which were meticulously developed and documented, were timely conveyed to the Arbitrator, whereupon receipt of which the record was closed. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full, fair, and careful consideration to all evidence of record, all arguments, and all authorities and citations offered by the parties.

## II. THE CHARGES AND APPLICABLE STANDARDS

Based upon the Notice of Tenure Charge of Inefficiency issued by the District, the State District Superintendent's finding of probable cause to credit the evidence in support of the charges, and Respondent's Answer, the Office of the Commissioner of Education concluded that the charges, if true, were sufficient to warrant dismissal or reduction in salary, "subject to determination by the arbitrator of respondent's defenses. . . ." Thus, by letter dated October 13, 2015, the charges

were referred to this Arbitrator by the Bureau of Controversies and Disputes pursuant to N.J.S.A.18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, for her review.

The District asserts one charge, citing "inefficiency," contending that Respondent was rated as Partially Effective in two consecutive annual summative evaluations. The charge also asserts that Respondent failed to effectively perform the duties of a teacher, to effectively prepare for instruction, to effectively use data to inform instruction, to effectively deliver quality instruction to his students, to effectively intervene to meet the diverse needs of his students, to effectively foster a safe, effective, respectful, and collaborative classroom environment, to effectively exhibit leadership, and to effectively fulfill his professional responsibilities.

The actual summative ratings for the school years of 2013-2014 and 2014-2015 are not in dispute and are established in the record through the admission of joint exhibits documenting the cited scores. Respondent raises a number of arguments challenging the validity of the processes used, the manner in which the evaluation system was implemented and applied to Respondent, and specific conclusions reached therein, but there is no dispute as to the scores themselves, which were as follows: in the 2013-2014 annual summative evaluation, Respondent was rated partially effective based on a teacher practice score of 2.00 and a student growth objective score of 1.00, for an overall score of 1.85; and, in the 2014-2015 annual summative evaluation, Respondent was rated partially effective, based on a teacher practice score of 1.60 and a student growth objective score of 0.80, for an overall score of 2.40. This then resulted in two consecutive years of ratings of less than effective, which enabled the District to seek termination of employment.

The District has the ultimate burden of establishing that the statutory criteria for tenure charges have been met, but N.J.S.A. 18A:6-17.2(a) addresses specifically the standards for determination of cases involving charges of inefficiency. Under these provisions, the Arbitrator is to determine, in the first instance, only the following: whether the Respondent's evaluations failed to adhere substantially to the evaluation process, including but not limited to a corrective action plan: whether there was a mistake of fact in the evaluation; if the charge would not have been brought

against Respondent but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by federal law or other conduct prohibited by State or federal law; or if the District's actions were arbitrary and capricious. If one of these shortcomings is found from the evidence adduced at hearing, the Arbitrator then must determine if that fact materially affected the outcome of Respondent's evaluation. If the established factors did not, then the charges must stand and removal will follow.

As an initial matter, however, the parties to this action, along with the parties in three other tenure proceedings, agreed that the challenges to the Paterson Evaluation System would be consolidated and addressed in a single interim award that potentially would have District-wide effect, which was issued by Arbitrator Gifford on January 14, 2016. In examining the District's evaluation system, Arbitrator Gifford concluded that "there is insufficient evidence to conclude at this point in the proceedings that the District has failed to meet its legal requirements." *In the Matter of the Tenure Charge of Carrie Osborne, et al.*, Agency Docket No. 288-9/15 (Jan. 14, 2016). The Respondents before Arbitrator Gifford had contended that the District had unilaterally implemented Student Growth Objectives, which would have been contrary to the statutory system, which requires that the teacher develop, "in consultation with his or her supervisor or a principal's designee, each student growth objective," with the principal making the final determination if the teacher does not agree with the student growth objectives. Arbitrator Gifford considered the allegation of unilateral implementation and concluded that any failings in this regard are to be reviewed on a case-by-case basis. The Respondents also challenged the calculation of teacher observation and evaluation scores, contending that the District had failed to disclose scoring rubric information, refused to explain the calculation of standard scores for observations and the Annual Summary Report, failed to implement and enforce objective observation scoring rules, and had not disclosed how sub-indicators are factored into overall scores. On these issues, Arbitrator Gifford indicated that the evidence had been presented in a broad context and can be detailed in future cases to indicate the steps the District has taken with regard to training and disclosure.

## III. FACTS AND ANALYSIS

### A. Background

Respondent has taught in the District for more than 15 years and earned tenure in 2002. Grievant entered the teaching profession after having completed his bachelor's degree in journalism and having worked for several years as an accountant. He first secured teaching positions in parochial schools and New York City Public Schools. After becoming certified in New Jersey as an Elementary School Teacher, Respondent worked for one year (1995-96) in the District, teaching eighth grade. His contract was not renewed, and he taught elsewhere until hired again by the District in 1999. In the ensuing 14 years, Respondent taught at various schools within the District, teaching several subjects and differing grades. In addition to holding his initial certificate as an elementary school teacher, he later became certified as a teacher of business studies, bookkeeping, accounting and English.

Respondent's recent service included an assignment, in the 2010-2011 school year, to the John F. Kennedy High School, teaching business education, followed by a year at the Sports Business Academy, also teaching business education. For the 2012-2013 school year, Respondent moved to the New Roberto Clemente Middle School (NRC), where he was one of two Educational Technology Teachers for sixth, seventh and eighth grades. In teaching these programs, Respondent was trained in and used the District's computer technology curriculum, Learning.com, which includes lesson plans, lessons and assessments for students in various grades.

### B. The Evaluation Process at NRC

At the end of Respondent's first year at NRC, 2012-2013, the District began the training process to implement the new Paterson Evaluation System. Respondent underwent training in these processes, which was designed to introduce the teacher evaluation process. Respondent also was given the Paterson Public Schools Teacher Performance Evaluation Packet, a comprehensive

document that sets forth the process in detail. The Evaluation Packet, or handbook, as it is commonly called, outlines the evaluation process and includes summaries, a glossary, goals and objectives, examples of the evaluation instrument, and an outline of the planning process for SGOs. It also contains 55 pages of question and answers. Within the handbook is an outline of the specific elements of each of the seven performance standards for the Teacher Practice Rubrics, which are: preparation for instruction; use of data to inform instruction; delivers quality instruction; interventions to meet diverse needs; classroom environment; leadership; and professional responsibilities. Within each standard are subcategories and rating elements reflecting whether a score would be considered unsatisfactory, progressing, proficient, or exemplary and also indicating the weight to be accorded each score.

With the commencement of the following school year, 2013-2014, came the actual implementation of the evaluation system, which Respondent recalled as including group training sessions or professional development sessions in which the evaluation process and scoring systems were addressed. He recalled specifically a session presented by NRC Vice Principals Ventura and Garcia in which he posed questions regarding the scoring process. Respondent has asserted throughout, however, that he did not understand aspects of the scoring process and that questions posed at training sessions and references to the handbooks did not provide answers.

One of the first steps, at the beginning of the school year, was for teachers to develop their SGOs for the purpose of tracking the development and progress of their students. Respondent alleges that the SGOs for both years were unilaterally determined and imposed by the District. Yet in testimony, Respondent addressed the assistance he received in formulating his SGO for the first year. He met with Principal Hector Montes, and they discussed the approach to development of his SGO. Principal Montes suggested to Respondent, as he did with most teachers, that at least one sixth-grade class be included, as this would provide a benchmark to show the students' progress as they advanced within the middle school. Respondent's chosen growth objective for that school year was that "[a]t least 70% of students will show improvement in their total proficiency level between the pre and the post assessments," a number that Respondent believed, in retrospect, was overly ambitious. Respondent testified in varying ways regarding the

development of this number and approach. He said that Principal Montes had "suggested" that the use of sixth grade classes for the logical reason of tracking their progress over the course of three years, yet he also testified that this was a "directive." He also testified that Dennis Vroegindewy, the Director of Libraries and Technology, told him to use 70% and that when Vice Principal Garcia later said that the number could be reduced, he did not do so because he felt he needed to comply with what Mr. Vroegindewey had said and also because he believed that he could achieve this goal.

Respondent testified that, later that year, he learned that at least one technology teacher in another school was using a 3% measure for the SGO. Respondent attempted to contrast 3% with 70% without acknowledging that they were being used as completely different measures, with the 70% applying to the number of students advancing to the next level and the 3% being used to measure the students' degree of improvement. He then went on in testimony, however, to explain the 3% calculation in a manner that reflected that he had a thorough understanding of that analysis at the time he discovered it, even though, after he had incorporated it the following year as his SGO, he repeatedly professed to supervisors that he did not understand what the 3% was or to what it applied. Respondent also testified at hearing both (a) that he learned of the more appealing 3% measure not long after the start of the year when he was still at NRC and yet (b) that for the following school year, at a different school, the use of 3% had been "assigned" by the then-Principal and had been "her idea."

From a careful evaluation of testimony and all other evidence of record, the Arbitrator finds that the Respondent's contention that the District unilaterally imposed the SGO levels that were used in both years is not supported by the evidence of record. Rather, the record establishes that Respondent agreed to the use of these standards. Further, as will be addressed below, the Arbitrator finds that Respondent was being disingenuous when, during and especially at the close of the following school year, 2015-2015, he purported to have no understanding of the application of the 3% element of his then-SGO.

In keeping with the new evaluation system, Respondent's teaching in the 2013-2014 year was given three formal observations, in which the seven factors incorporated in the evaluation program were assessed. These formal observations were conducted on October 16, 2013 (by Assistant Principal Jorge Ventura), January 16, 2014 (by Assistant Principal Ramona Garcia); and April 4, 2014 (by Principal Hector Montes with Mr. Vroegindewy). The evaluations produced mixed ratings in the seven categories. The factor of greatest concern was from the October 16, 2013, observation by Mr. Ventura, in Standard #3, "Delivers Quality Instruction." Respondent on this observation received a rating of unsatisfactory, with the notes indicating that he gave unclear directions to students, causing students to ask for clarification, led learning that was "passive rather than active," incorporated excessive "busy work," monopolized discussions, called on one student primarily, and sparked "low intellectual involvement."

Respondent also received ratings of "Progressing I/Partially Effective" in categories such as Preparation for Instruction, Use of Data to Inform Instruction, Interventions to Meet Diverse Needs, and Classroom Environment. In the April 2014 observation, Mr. Montes provided several ratings of "Progressing II" in categories of Preparation, Use of Data, Delivering Quality Instruction, and Intervention to Meet Diverse Needs. In all evaluation documents, significant commentary was provided, citing specific examples and areas in which improvement was needed. Each category indicated the value attached to that rating. The requisite meetings were held after each observation and rating, so that discussion could be held to enable Respondent to better integrate the comments and rating into his performance. Respondent submitted rebuttals to each, indicating that he had reviewed and considered the information stated therein.

Respondent contends that there was unfairness and there were procedural flaws in each of these three formal observations. At hearing, Respondent testified that, especially with regard to the October observation, there had been problems with the operation of the computers, resulting in the commencement of class being actually only on October 6, just a week prior to the evaluation. The result, he said, was that he had very little time to get up to speed to teaching in this environment, and the students were still involved with pre-testing in Learning.com. Mr. Ventura testified, however, that he and Respondent spoke about this, and he pointed out to Respondent

that if he did not have necessary data ready for the students a week into the class, it was not clear when he would have it ready. Mr. Ventura also noted to Respondent that there various ways in which the material may be taught, whether in a lab or a classroom, and the teacher needs to be able to engage in effective teaching in these different settings. Respondent at one point complained that he did not have adequate access to computers, noting issues with electricity, but Mr. Ventura testified in response that he had explained to Respondent before and at the time of the review that he had to stop leaving the laptop carts plugged in for long periods of time, as it was causing the batteries to diminish, and that this was why he was left with laptops that would not successfully maintain a charge.

Respondent also contends that it was inappropriate that the observation was of a bilingual class and that it was conducted by an administrator who spoke Spanish and thus could relate more directly to the students. He argues further that there was a mistake in the evaluation notation that he did not have data binders in the classroom when, in fact, the observer, in this instance, Mr. Ventura, had not looked in the correct place. Respondent also argues that he had been unfairly criticized in the observation by Principal Montes for not using smartboards when, in fact, the smartboard that he was assigned was broken. Mr. Montes testified, however, that he had not been aware until the observation that the smartboard was not operating and that, had Respondent notified him, he would have addressed the problem. Mr. Montes testified without contradiction that he takes pride in ensuring that such logistical matters are rectified immediately and that teachers know that they can email or call as soon as a technological problem arises and it will be addressed. Respondent's failure to attempt to have the smartboard repaired or replaced was an example of Respondent's inclination (noted also by other administrators) to be "very passive" as opposed to "being proactive and trying to find answers."

Respondent also alleges that the District did not comply during this school year with the evaluation process regarding informal walkthroughs. The record, however, indicates that at least four informal walkthroughs of Respondent's classes were performed at NRC in 2013-2014. According to the manual, a walkthrough is not more than ten minutes in duration and "identifies and informs teacher practice in the areas of classroom environment, instruction, and student

encouragement." These walkthroughs were cited in the document prepared at the end of the year (the CAP, addressed below) to outline corrective efforts to be undertaken to help Respondent improve his performance.

From the foregoing information and the full record as it relates to the formal observation and evaluation process for Teacher Practice in 2013-2014, the Arbitrator finds no showing that the District failed to adhere substantially to the evaluation process, engaged in any mistake of fact in the evaluations, or was arbitrary and capricious.

### C. Other Issues at NRC

In the 2013-2014 school year at NRC, Respondent received a written reprimand for "unbecoming conduct" relating to Respondent having referred, in class, to a good student who had received his first detention as "detention kid" and, when the student objected, Respondent asked, "Are you going to tell your mommy?" Respondent was reminded in the written reprimand of the humiliation that this caused the student and that the District expected him to adhere to the high standards of performance and responsibility and professional rapport with students, earning their respect while treating them with respect. In testimony, Respondent acknowledged the incident and noted that his remarks had been inappropriate.

In May of 2014, Grievant initiated three grievances. In one, he challenged the assignment to teach in a content area that he said was outside of his certification. (See discussion below.) In this regard, Respondent testified that raised the issue because he wanted to get off the Corrective Action Plan (CAP) and he wanted to teach something he knew so that he could be successful. (Although the CAP was not in place as of May 2014, it would be clear from the nature of the evaluations that the summative evaluation was likely to be Partially Effective and that, therefore, a CAP would have to be put in place.) The grievance was denied and nothing in the record indicates that it was pursued further. Respondent also initiated a grievance alleging that he had been denied access to appropriate technology and materials that would enhance his level of instruction. In this regard, Respondent noted that he was referring especially to a "smart board"

that was not functioning, as addressed above. The District, he said, was aware of this but did not take steps to repair it. Another grievance initiated in May 2014 related to an alleged failure of Principal Montes to write comments on Respondent's lesson plans or to provide a copy of rubrics or of the observations a full workday prior to a conference to discuss observations.[1]

### D. Summative Evaluation for 2013-2014

In June 2014, as prescribed in the Paterson Evaluation System, the Respondent's Annual Summative Performance rating was developed from the weighted combination of the Teacher Practice and Student Grown Objective scores. The Teacher Practice Score, based upon the three evaluations by three different administrators, as noted above, with weighting as indicated on the evaluation instrument that had been provided to Respondent, was a total score of 44.0. That score then translated to a Teacher Practice Score of 2.0 on the District's four-point scale, which is clearly set forth on the Annual Summary Conference Form.

Respondent's SGO score was calculated at rating of 1, which is the lowest rating, based on the average of the progress of the two sixth-grade classes Respondent had designated to monitor for student growth. Respondent's target of advancement by 70% of the students had not been met. As noted above, Respondent had recognized that the objective of having 70% of students advance may have been overly ambitious. He knew that he could follow the suggestion of Mr. Vroegindewey and take steps to amend the SGO as the year progressed, but he did not do so.

When the Teacher Practice Score was combined with the SGO, Respondent received an annual summative rating of 1.85. This number was achieved by an allocation of 85% to the Teacher Practice Score and 15% to the SGO. That score was within the range specified in the Evaluation

[1] Respondent argues that he raised these, in addition to six grievance initiated in the following school year, to put the District on notice of what he believed were various deficiencies in the evaluation process. He argues that if the District had attended to these issues, rather than denying the grievances, problems that allegedly affected Respondent's performance and evaluations would have been rectified and the need for the instant charges eliminated. In this regard, the Respondent argues that the District's actions were arbitrary and capricious. The Arbitrator finds, however, that denial of grievances is not at issue or developed in this forum cannot form a basis for findings and conclusions in this case under the applicable statutory standards.

System as denoting performance that was only "Partially Effective." In fact, the score was at the lowest end of that rating group, hovering precariously above "Ineffective."

As a result of this rating, it was necessary, under N.J.A.C. 6A:10-2.5, for the District to develop and implement a Corrective Action Plan (CAP) for the upcoming school year. Vice Principal Venture testified to his recollection post-evaluation discussions with Respondent in which Respondent said that he knew that he would have to go on a CAP but that he wanted to confirm that, if he made it through the following year with acceptable evaluations, he would be off the CAP. Vice Principal Ventura expressed frustration that Respondent was focused less on achieving excellence and becoming a better teacher than timing the good and bad evaluations, seeking to confirm that, if he had an acceptable year, then he could have another sub-standard year and not be "in trouble."

Vice Principals Ventura and Garcia, along with Principle Montes, discussed the terms of the CAP, and then Mr. Ventura and Ms. Garcia actually developed it. Using the district-wide format, the CAP identified the areas in which improvement was needed and specified steps that would be taken by Respondent and also by administrative personnel to help Respondent achieve the needed improvement. Timelines also were established. Vice Principal Ventura testified that they had not discussed the CAP with Respondent, but they had intended to do so when school resumed in the fall.

**E. School 20 -- Implementation of the CAP**

Respondent, however, did not return to NRC for the following school year. For that year, the school schedule was to be changed. Respondent explained at hearing that, as the result of a grant, an additional hour of work was going to be required of teachers at NRC. Thus, he said, those teachers who did not want to or could not work the additional time were given the opportunity to leave the school. As a result, he said, he "opted out" and requested a transfer. Respondent had asked to be transferred to JFK High School. Respondent testified that, at first, at the end of the 2013-14 school year, he believed he was being transferred to JFK but in August he

was notified that, instead, he was being transferred to School 20, an elementary school, as the Educational Technology Teacher.

This, said Respondent, was the first time in his career that he had taught an age range below sixth grade. Although Respondent's first certification in New Jersey was in elementary education and he continues to hold that certification, the approach, he said, to teaching "babies" was very different from the approach with older children. He also has asserted in this proceeding that it was inappropriate for him to teach Technology, a subject for which he says he had no certification and has no desire to teach. A certificate or endorsement in educational technology is not required to teach that subject, however. Nonetheless, Respondent's New Jersey teaching certificate as an Elementary School Teacher qualifies him to teach a variety of subjects in grades K through six, including "computer and information literacy," and his certification in business education qualifies him to teach "keyboarding, computer data entry, word processing and exploration of related careers." N.J.A.C. 6A:9B-9.3(b)(2) (ii); 5.17(b); and 9.4(a)(1)(iv).

Respondent also argues that, by relying on Respondent's performance during this first year in a new school and with a new age group, the District was setting Respondent up to fail and, thus, acted arbitrarily and capriciously. As noted above, however, the points upon which the evaluations rest relate largely to matters and functions required for performing any teaching position, whether in a new environment or one of complete familiarity. Moreover, it was Respondent's choice to leave NRC, even though he knew that he had a received a Partially Effective rating and would be dealing with a CAP. The Arbitrator thus is not persuaded by Respondent's argument in this regard.

Respondent thus began teaching at School 20, serving its only Educational Technology Teacher. At the beginning of the school year, on September 10, 2014, Respondent met with School 20 Principal Antoinette Young. It is clear from the testimony that Respondent had known that he would be receiving a CAP but that he had not yet seen it. Ms. Young gave him the CAP that had been prepared at NRC, and the District asserts that Respondent and Ms. Young then agreed to use adopt it. The record does not establish that Respondent overtly agreed to this, but, as the

District has argued, he did have opportunities before and after the adoption at School 20 to raise issues regarding the structure and content of the CAP. Respondent testified that he was given the CAP on September 10 and then signed the document on September 11 because, he said, although Ms. Young had not been in a hurry for the document, there was a deadline by which she needed to submit it. Respondent noted with his signature, "Disclaimed. I did not contribute to this CAP on 9/10/14. Understanding is from a cursory review from Ms. Young." The three areas of improvement noted on the CAP, listed below, related to preparation of appropriate and timely lesson plans, using data to create and implement plans incorporating strategies for all student, and delivering high quality and motivating lessons. Respondent testified that these categories did not make sense to him, for he had no shortcomings in performance in those areas.

The three areas in which Respondent and Administrators would work to achieve improvement are set forth in the CAP, as follows:

1. Teacher needs to prepare and submit lesson plans on time that are aligned with the district's model curriculum and pacing grid and incorporate differentiation of instruction and modifications for subgroups.
2. Teacher needs to be able to gather, analyze and use data from multiple sources in order to create and implement lesson plans that incorporate strategies and activities for all students.
3. Develop ability to attain student focus by delivering lessons that are high quality and motivating to students.

The CAP noted the responsibilities of Respondent and supervision as to each area in which improvement was needed, and timeline was developed for each. (At hearing, however, Respondent took issue with each of the areas designated for attention, contending that there had been no need to seek improvement in any of the specified areas.) Many of the steps involved plans for Respondent to view videos, interact with data coaches, develop lesson plans. Supervision, which included the Principal, Assistant Principal, and the Director of Libraries and Technology, fulfilled various steps by ensuring, for example, that Respondent had access to training and professional development videos as well as open time in his schedule to view them, arranging for Respondent to meet with a representative of Learning.com, reviewing with Respondent his level of proficiency with Learning.com, arranging meetings with the supervisors

of ELA, Math and Special Education for training, reviewing lesson plans, providing sample lesson plans, and providing access to the IEPs for students. Mr. Vroegindewey was readily available, as was Frank Zalocki, the Data Coach, who met with Respondent a number of times. . His familiarity with Learning.com, the primary source for lesson planning and instruction, was assessed by Mr. Vroegindewey, who found him to be conversant with the program.

Deadlines existed in the CAP and, while Respondent has noted that some were missed, several items were regarded as being continuing functions and, for others, the timelines were extended to allow for completion.

Then, at the beginning of the calendar year, the administration changed at School 20, with Boris Simon, formerly Vice Principal, becoming Principal and Petula Harden-Brown coming in from another school as Vice Principal. Ms. Hardin-Brown thereafter met with Respondent to review the CAP and progress thereunder. She assessed progress regarding the various categories but found in several, such as the viewing of videos and preparation of written reflections, in which Respondent had done nothing. In addition, Principal Simon testified to having had numerous conversations with Respondent during the school year, often in the mornings or after school. He noted that Respondent occasionally would arrive early so that they could speak. Respondent, he said, was "proactive" in seeking conversations about how he could "get off of a CAP."

### F. Other Issues at School 20

In February 2015, Respondent received a written reprimand from Vice Principal Harden-Brown. The document, however, is not identified as a reprimand and, while Ms. Harden-Brown testified that it related to a lack of preparation for a parent meeting and what she described as a condescending approach to interaction with a parent, none of these allegations is reflected in the document issued to Respondent. The memorandum recommends and reiterates rules and policies. Of note, it also highlights Teacher Performance Rubric Standards three, five and seven. In any event, at hearing, Respondent acknowledged that the letter related to a discussion he had with a parent in which he had said that the student "might be failing" but at the same time had no

information to provide the parent to discuss the child's performance or grades. Respondent acknowledged that he should not have spoken with the parent in this manner.

### G. Evaluation Process at School 20

As the school year progressed at School 20, Respondent underwent four formal observations, each by a different administrator: September 29, 2014; November 24, 2014; March 10, 2015; and April 2, 2015. Respondent had noted to Principal Simon that he believed that evaluation of his performance in the classroom, where there are few computers, was unfair and that evaluations should be conducted in a computer lab. As a result, Principal Simon ensured that each formal observation was conducted when Respondent was teaching in a computer lab. (The District's witnesses, however, noted that teachers should be nimble in their ability to teach and address curriculum content in various environments, incorporating modalities that step beyond the computer screen.) The evaluations were in seventh grade, second grade, second grade again, and kindergarten, respectively. The rating were all either Proficient I (and no higher) or Progressing 1 and 2, with mostly Progressing 1, which is just one step beyond unsatisfactory. (There was one rating of unsatisfactory, but the District has acknowledged that this was a software error and, based upon the actual evaluation, should have been "Progressing 1.") The total weighted score of these evaluations was 51.37, which translated to 2.00.

Respondent has argued that each of these formal evaluations is tainted by the timing. In this regard, Respondent relies on *In the Matter of the Tenure Hearing of Patsy Cuntrera, Passaic County Vocational School District,* Agency Docket No. 223-8/15 (Gandel, 2015), with regard to the element of timing and spacing of evaluations. In that case, the teacher, who had had a good record and long service, had been dealing with a serious health issue and related absences. Arbitrator Gandel found that the evaluation process had been fatally tainted and rendered arbitrary and capricious in that one evaluation was conducted on the teacher's first day of return after a two-week absence and then additional evaluations were held on consecutive days following a return from another multi-week absence. That case, however, is readily distinguished in that the timing issues raised by Respondent relate not to absences or evaluations

without sufficient time between to absorb and implement the recommendations. Rather, Respondent here cites only issues relating to access to the computer lab, arguing that he should not have been evaluated on what were returns to the lab after periods of classroom teaching, another which Respondent says was only the fourth time teaching the class in the lab, and another on the heels of a schedule change. These factors, which Respondent says disadvantaged him, have been shown to be reflective of the manner in which these classes and access to the computer lab must be juggled. Not every class will be in the computer lab, yet Respondent persuaded Mr. Simon that it was unfair to evaluate him in any other setting, even though an adept teacher must be able to fulfill his or her functions in this area when teaching in a classroom as well as a lab. The District accommodated Respondent's concern in this regard. Thus, for Respondent to allege that there was a lack of fairness or an arbitrariness in conducting evaluations when he had not recently been in the lab or had been in the lab only four times with a particular class is unpersuasive.[2]

Respondent also alleges that the evaluation process was not properly followed at School 20 in that too few walkthroughs were conducted. The record contains documentation of three walkthroughs, two of which were conducted by Vice Principal Harden-Brown. In addition to these, Principal Simon testified that he conducted a number of additional walkthroughs in the fall of 2014. He was, he said, "often" in Respondent's classroom throughout the school year because Respondent had many classroom management issues. (Principal Simon noted that students often reported that Respondent "talked down" to them and that there also were frequent issues with staff members perceiving Respondent as being condescending. This, he said, led to several verbal altercations in the course of the year, including disputes with an aide in the Behavioral Disability class as well as with a security officer. These matters never led to formal discipline, as Mr. Simon addressed them as verbal discussions. The account, however, provides a foundation or basis supporting Principal Simon's recollection that he frequently was needed in Respondent's classroom. Respondent has asserted that, as he was subject to a CAP, he should

[2] Respondent also points out that a calculation error has been shown and acknowledged in the scoring of the evaluation conducted on November 24, 2014, in the category of substandard 3(c). That error, however, has not been shown to have an effect on the scores in the summative evaluation, which is what led to the charge of ineffectiveness.

have received at least eight walkthroughs in the year. Even assuming that the total informal involvements in his class did not constitute eight walk throughs, however, the Arbitrator cannot find that an omission of this nature rises to the level of a failure to adhere substantially to the evaluation process.

### H. Student Discipline at School 20

Respondent has alleged that the District did not deal effectively with student discipline issues at School 20, making his potential to perform as an instructor even more challenging. Principal Simon testified credibly, however, that, as there was a wealth of new teachers and administrators in School 20 in year 2013-2014, there were many student suspensions and office conduct referrals from within the behavior disability classes, but that the "regular ed" classes did not have significant issues. The exception, he said, was Respondent's classes. Mr. Simon said, however, that by the next school year the suspension rate and office conduct referral rate were "dramatically reduced."

### I. Year-End at School 20: Grades, SGO Calculation, and Summative Evaluation

The 2014-2015 school year ended with Respondent assigning a grade of A to every student in the building. This was highly unusual, according to Ms. Harden-Brown, and the administrators were aware that several students had been often out of Respondent's class, which would make a legitimate A unlikely for them. Ms. Harden-Brown testified that, when Respondent was asked about the grades, he replied only that that "they all did well." Respondent was instructed to review his records to be sure that he could provide evidence to support the grades.

Thereafter, an issue arose regarding completing the calculation of Respondent's SGO for the year. Respondent did not convey the information that was required to have that calculation made. He professed to not understanding what was intended by the SGO, which he had developed with former Principal Young, as noted above, and had fully understood the year before when he learned of the 3% approach taken by another technology teacher. Principal

Simon testified that, as Ms. Young had moved to another school, he instructed Respondent to reach out to her to discuss any questions regarding the approach they had discussed. Respondent did not do this. Mr. Simon waited for Respondent to produce the SGO data so that the summative evaluation could be completed and, ultimately, a support person from the District was made available to Respondent to assist him in making the calculations. This data was submitted in July. While Respondent had been able at hearing to explain, simply and directly, what the 3% SGO formula had been, Principal Simon testified that, even after retaining assistance and submitting calculations, when he asked Respondent to explain the calculations, Respondent could not provide any information. Mr. Simon testified that no other teachers had encountered such difficulties in addressing SGOs. Mr. Simon noted, too, that Respondent's answers in this regard were emblematic of his response to most questions or requests for even the simplest of information; Respondent would reply that he did not know and that he needed to be "re-tooled."

After the delay in obtaining data from Respondent and after arranging assistance for him to calculate his SGO, it was determined that Respondent would receive the highest possible score on the SGO, which was a 4.0. Mr. Simon testified that Respondent's SGO goal of 3% was not at all rigorous and that a much higher level of achievement than a 3% increase in students' targeted skill levels would be expected over the course of a year. Nonetheless, this is the score that was applied and used.

Based upon the evaluations and the SGO score, Respondent's Annual Summative Score for 2014-2015 was 2.0 for Teacher Practice and 4.0 for SGO. These were weighted at 80% and 20%, respectively, thus giving rise to a total score of 2.40. In the summative rating scale, this placed Respondent again in the range of Partially Effective. While higher than the prior year, it includes the high SGO rating, which the Arbitrator finds questionable because of Respondent's charade of not understanding what a 3% increase in performance would be or how it would be measured and calculated. In addition, the agreement to the SGO by then-Principal Young was generous in this regard, and the puzzlement over calculation merely added to the questionable validity of that number. Respondent has raised various arguments to suggest that the Teacher Practice Score should have been higher or, because of a lack of clarity or information about the

calculation, may not be credited. The Arbitrator, however, finds that Respondent's own actions have cast substantial doubt on the reliability of the one number that reflects success on his part and actually resulted in a higher number than otherwise would have been achieved.

Mr. Simon also testified that he had several conversations with Respondent in which Respondent insisted that he did not know how to calculate the Teacher Practice Score. Mr. Simon explained it to him, using the manual and showing him the forms. At every turn, however, Respondent would reply that he did not understand and needed to be "retooled." Respondent argues that Mr. Simon himself was befuddled by the process and contradicted himself in the course of testimony. The Arbitrator finds, however, that, while there are aspects of the evaluation instrument and process that are difficult to understand and while some calculations are completed by software and thus cannot readily be determined from the face of an evaluation document, the overall process is one that, with a little study, can be readily understood, even using only the materials in the manual. In addition, each element of each evaluation over the course of the two years had specific commentary from numerous administrators on the shortcomings observed in Respondent's performance as well as suggestions, in the evaluation and the CAP, as to steps to be taken for improvement.

Moreover, any shortcoming in this aspect would not materially affect Respondent's evaluation, whether by alteration of the numbers or by providing a glimmer of additional insight into the required areas of improvement. The score that Respondent received for the 2013-14 school year placed him at the very bottom of the range of Partially Effective. Thus, variations in calculation or ratings would not have been sufficient to alter the score upwards into the Effective range. Similarly, while the summative rating in 2014-15 was higher that the preceding year, this number included the highest rating possible for the SGO, which the Arbitrator regards as having been artificially high because of the adoption of an unusually low bar and Respondent's pretense of confusion. Further, substantial guidance and input were provided to Respondent from numerous credible administrators regarding the need and potential for improvement. As a result,

even if the evaluation system were flawed or the process not properly conducted, there is no showing that these factors would have materially affected the outcome of the Respondent's evaluation.

## AWARD

For the reasons stated in this Decision and Award, the Arbitrator finds that the District has met the burden of proving that, for the two consecutive school years of 2013-2014 and 2014-2015, Respondent received summative evaluations that, being "Partially Effective," were less than "Effective" and that these evaluations were properly conducted under applicable New Jersey laws and regulations. Therefore, the charge of "Inefficiency" is sustained and the dismissal of Respondent is upheld.

Dated: April 30, 2016

Jacquelin F. Drucker, Esq.
Arbitrator

State of New York )
) SS:
County of New York )

On this 30th day of April, 2016, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein. and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6018984
Qualified in New York County
Commission Expires February 1, 2019

172-16

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| RICKENYA TANNER, | : | |
| PETITIONER, | : | |
| v. | : | COMMISSIONER OF EDUCATION |
| BOARD OF TRUSTEES OF THE COMMUNITY CHARTER SCHOOL OF PATERSON, PASSAIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – formerly employed for the 2014-2015 school year by the respondent Community Charter School of Paterson (CCSP) – sought reinstatement of her employment as a full-time instructional assistant. Petitioner claimed that, because she did not receive written notice by May 15, 2015 of CCSP's determination to non-renew her employment for the following school year, she was automatically entitled to continued employment for the 2015-2016 school pursuant to *N.J.S.A.* 18A:27-10.2. CCSP contended that petitioner was not so entitled, and filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: petitioner was employed by the respondent during the 2014-2015 school year as an instructional assistant – a paraprofessional as defined in *N.J.S.A.* 18A:27-10.2(a); petitioner relies solely upon *N.J.S.A.* 18A:27-10.2 in support of her claimed right to contract renewal; an employee's right to receive notice by May 15 – as prescribed in *N.J.S.A.* 18A:27-10.2 – does not equate with a right to contract renewal for the succeeding year; although a corollary regulation governing non-tenured teaching staff does provide that when a board fails to give non-tenured teaching staff either a contract offer for the next year or proper notice that such employment will not be offered, the board shall be deemed to have offered employment for the following school year; however, no such parallel statute exists for paraprofessionals; and, even if petitioner had pled an implied contract claim – which she did not – that common-law grounded claim does not invoke the Commissioner's jurisdiction, as it does not involve a controversy arising under the school laws. The ALJ concluded that the school laws do not grant an automatic renewal of employment to a paraprofessional based on a board's violation of *N.J.S.A.* 18A:27-10.2; therefore, the petitioner has advanced no cause of action for renewal of her employment for the 2015-2016 school year, nor has she stated a claim upon which relief can be granted. Accordingly, the ALJ determined that dismissal of the petition is warranted.

Upon independent review, the Commissioner concurred with the findings and conclusions of the ALJ, for the reasons stated in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

Issued 5/06/16

OAL DKT. NO. EDU 14408-15
AGENCY DKT. NO. 203-7/15

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|---|---|---|
| RICKENYA TANNER, | : | |
| PETITIONER, | : | |
| v. | : | COMMISSIONER OF EDUCATION |
| BOARD OF TRUSTEES OF THE COMMUNITY CHARTER SCHOOL OF PATERSON, PASSAIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board's reply thereto.

Petitioner's exceptions substantially reiterate the substance of her submissions at the OAL. Because the Administrative Law Judge thoroughly addressed those arguments in the Initial Decision, further discussion herein is unnecessary.

Upon review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that *N.J.S.A.* 18A:27-10.2 does not entitle paraprofessionals to automatic reappointment based on a Board's failure to provide timely notice of non-renewal. As such, petitioner has failed to state a cause of action by which renewal of her employment for the 2015-2016 school year can be granted. Additionally, the Commissioner agrees with the ALJ that petitioner did not assert an implied contract claim, and even if she did, such a claim would not fall within the Commissioner's jurisdiction pursuant to *N.J.S.A.* 18A:6-9.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/16

Date of Mailing: 5/06/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 14408-15
AGENCY DKT. NO. 203-7/15

**RICKENYA TANNER,**
Petitioner,
v.
**COMMUNITY CHARTER SCHOOL OF PATERSON, PASSAIC COUNTY,**
Respondent.

---

**Nancy I. Oxfeld**, Esq., for petitioner (Oxfeld Cohen, attorneys)

**Thomas O. Johnston**, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: February 12, 2016 Decided: March 23, 2016

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

## STATEMENT OF THE CASE

Petitioner Rickenya Tanner seeks reinstatement of her employment as a full-time instructional assistant with respondent Community Charter School of Paterson (CCSP). CCSP controverts petitioner's claimed entitlement to employment.

## PROCEDURAL HISTORY

On July 31, 2015, petitioner filed a Petition of Appeal with the Commissioner of Education (Commissioner) seeking an order finding that she remains an employee of CCSP and directing CCSP to reinstate petitioner to a full-time position or assignment with at least the same terms and conditions of employment as she had during the 2014–2015 school year, together with increases in salary as may be required by law or policies and all other benefits of employment. CCSP filed a Motion to Dismiss in Lieu of Answer on September 14, 2015, and the Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on September 16, 2015, for determination as a contested case. I held a telephone conference with counsel on October 13, 2015, during which a briefing schedule was established with regard to CCSP's motion. Following requested extensions by both parties, petitioner filed a brief in opposition to the motion dated November 12, 2015, and CCSP filed a reply brief dated December 4, 2015. Oral argument was entertained on February 12, 2016, on which date the record closed.

## STATEMENT OF FACTS

In view of the procedural posture of this case, the facts alleged in petitioner's Petition of Appeal shall be accepted for purposes of the within motion.

Petitioner was employed by CCSP as an instructional assistant, and as a paraprofessional as defined in N.J.S.A. 18A:27-10.2(a), during the 2014–2015 school year. (Petition at ¶¶ 1, 4.) CCSP is a charter school established pursuant to N.J.S.A. 18A:36A-1, et seq., and receives funding under Title 1 of the federal Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. (Id. at ¶¶ 2, 3.) As of May 15, 2015, petitioner had received neither a written offer of a contract for employment for the next succeeding school year, nor a written notice from the chief school administrator that employment would not be offered. (Id. at ¶ 6.) On June 1, 2015, petitioner wrote to Mr. Valli, the chief executive officer of CCSP and the chief school administrator, accepting employment as a paraprofessional with CCSP for the 2015–2016 school year. (Id. at ¶¶ 8, 9.) On June 12, 2015, Mr. Valli responded to petitioner by stating that

a decision had been made not to renew petitioner's contract for the 2015–2016 school year. (Id. at ¶10.)[1]

## DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 6A:3-1.10, "upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true." See Sloan v. Klagholtz, 342 N.J. Super. 385, 394 (App. Div. 2001). Our courts have recognized that "[t]he test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). The "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), and "the legal requisites for [the petitioner's] claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App Div.), certif. denied, 176 N.J. 278 (2003). The decision must be based solely on the petition and the documents to which it referred. N.J. Citizen Action, Inc., supra, 391 N.J. Super. at 605. The focus of the analysis at this stage is not concerned with the ability of petitioner to prove the allegations contained in her petition, and she is afforded the benefit of all legitimate inferences that may be drawn in her favor. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005); Printing Mart-Morristown, supra, 116 N.J. at 746. However, "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted," Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987), and where the petition sets forth no legal basis for the relief sought. Banco Popular N. Am., supra, 184 N.J. at 166; see Gillison v. Newark Bd. of Educ., 95 N.J.A.R.2d (EDU) 157.

[1] CCSP's reply included a certification of counsel that attached copies of petitioner's June 1, 2015, letter and an "At Will Employment Contract," which provided for petitioner's employment for the school year beginning on August 18, 2014 and terminating on June 30, 2015. At this procedural stage, "consideration of the documents referred to in the [petition]," such as petitioner's June 1, 2015, letter and employment contract, "is proper and does not convert [respondent's motion to dismiss] . . . into [a] motion[ ] for summary judgment." N.J. Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div.), certif. denied, 192 N.J. 597 (2007).

Against this backdrop, petitioner asserts in her Petition that, "[p]ursuant to N.J.S.A. 18A:27-10.2, petitioner was entitled to receive on or before May 15, 2015 either a written offer of a contract for employment for the 2015–2016 school year from the respondent or written notice from the Chief School Administrator that employment will not be offered." (Petition at ¶ 5.) Petitioner avers that, "[a]s the respondent did not provide written notice that employment would not be offered for the 2015–2016 school year, petitioner is entitled to be reemployed by the respondent for the 2015–2016 school year," and "[o]nce respondent had failed to prove [sic] petitioner written notice as of May 15, 2015 that her employment would not be renewed for the following school year, the respondent no longer had a right to nonrenew the petitioner for the 2015–2016 school year." (Id. at ¶¶ 7, 11.) She further alleges that, "[a]s petitioner has accepted employment for the 2015–2016 school year, the respondent is required under law to reemploy the petitioner for the 2015–2016 school year, and to pay her at the appropriate salary required by law or policies of the respondent pursuant to at least the same terms and conditions of employment as she was employed under during the 2014–2015 school year." (Id. at ¶ 12.)

Chapter 27 of the school laws governs "employment and contracts." Pursuant to N.J.S.A. 18A:27-10:

> On or before May 15 in each year, each nontenured teaching staff member[2] continuously employed by a board of education since the preceding September 30 shall receive either
>
> > (a) A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education or

[2] A "teaching staff member" is defined in pertinent part as "a member of the professional staff of any district . . . holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners." N.J.S.A. 18A:1-1.

> (b) A written notice from the chief school administrator that such employment will not be offered.

In 2009, the Legislature enacted separate and distinct statutes governing the employment of paraprofessionals. See N.J.S.A. 18A:27-10.1 to -10.4.[3] Similar to N.J.S.A. 18A:27-10, a school district is required by statute to provide to a paraprofessional either a written offer of a contract for employment or written notice that employment will not be offered on or before May 15 in each year. Specifically, N.J.S.A. 18A:27-10.2(b) provides:

> On or before May 15 in each year, a paraprofessional continuously employed since the preceding September 30 in a school district that receives funding under Title I of the federal Elementary and Secondary Education Act of 1965 (20 U.S.C. § 6301 et seq.) shall receive either:
>
> > (1) a written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education; or
> >
> > (2) a written notice from the chief school administrator that employment will not be offered.

Accepting as true the facts asserted in the Petition of Appeal for purposes of the within motion, CCSP did not issue notice to petitioner that her contract would not be renewed for the 2015–2016 school year until June 12, 2015, and, therefore, did not comply with N.J.S.A. 18A:27-10.2(b). However, this does not end the inquiry. The question then becomes the remedy, if any, for the alleged defective notice. In this regard, petitioner asserts in her Petition of Appeal that because CCSP "did not provide written notice [on or before May 15, 2015] that employment would not be offered for the 2015–2016 school year, [she] is entitled to be reemployed by the respondent for the 2015–2016 school year" and CCSP "no longer had a right to nonrenew the petitioner for

[3] A "paraprofessional" is defined as "an individual who is employed in a school district as a school aide or classroom aide who assists a teaching staff member with the supervision of pupil activities." N.J.S.A. 18A:27-10.2(a).

the 2015–2016 school year." (Id. at ¶¶ 7, 11.) In other words, petitioner claims that she is automatically entitled to continued employment for the 2015–2016 school year because CCSP did not timely inform her of its decision not to renew her employment by May 15, 2015.

As noted, the employment of teaching staff members and paraprofessionals is specifically prescribed by statute. The principles governing statutory construction are well settled. The "overriding objective in determining the meaning of a statute is to 'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (citation omitted). The general rule of statutory construction requires an examination of the language of a statute to determine whether the language is clear or ambiguous and susceptible to more than one interpretation. "If the statute is clear and unambiguous on its face and admits of only one interpretation, [it is necessary to] delve no deeper than the act's literal terms to divine the Legislature's intent." State v. Butler, 89 N.J. 220, 226 (1982). As the Supreme Court explained in Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012) (citations omitted):

> The objective of all statutory interpretation is to discern and effectuate the intent of the Legislature. To achieve that objective, we begin by looking at the statute's plain language, ascribing to the words used "their ordinary meaning and significance." We do not view the statutory words in isolation but "in context with related provisions so as to give sense to the legislation as a whole." If the Legislature's intent is clear on the face of the statute, then we must apply the law as written. It is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.

The Legislature expressly addressed the consequence of failing to timely provide either an offer of a contract for employment or a notice that such employment will not be offered to a non-tenured teaching staff member. N.J.S.A. 18A:27-11 directs:

> Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that

> such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

N.J.S.A. 18A:27-11 is clear and unambiguous as to the intended recipients of the remedy of automatic renewal should a board of education fail to timely give the required offer of a contract or notice of non-renewal. The plain and unambiguous language of the statute limits that remedy to teaching staff members. Separate and distinct statutes address the employment of a paraprofessional. And, in contrast to the statutes governing teaching staff members, the statutory scheme governing paraprofessionals does not provide that a board of education shall be deemed to have offered continued employment for the next succeeding school year or for automatic renewal in situations where a board has failed to give the required notice by May 15. Succinctly stated, "[t]he Legislature is presumed familiar with prior legislation," and, had the Legislature intended to provide paraprofessionals the same relief as nontenured teaching staff members under N.J.S.A. 18A:27-11, "it would have been an easy matter to have expressed such an intent," as it did in the case of teaching staff members. N.J. Coal. of Health Care Prof'ls v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 256 (App. Div.), certif. denied, 162 N.J. 485 (1999).

The Petition of Appeal relies solely on N.J.S.A. 18A:27-10.2 in support of petitioner's claimed right to contract renewal. However, a right to receive notice by May 15 is not the same as a right to have a contract automatically renewed in the absence of such notice. The distinct nature of these rights is evidenced by the fact that, in the case of non-tenured teaching staff members, the notice requirement and the automatic-renewal remedy are found in two separate statutes. In short, the school laws do not grant an automatic renewal of employment to a paraprofessional based on a board's violation of N.J.S.A. 18A:27-10.2. Accordingly, even if CCSP failed to give petitioner the required notice by May 15, no statutory authority supports petitioner's claim of relief that she is entitled to continued employment for the 2015–2016 school year.

Indeed, the Commissioner has addressed and rejected the claim that a board of education's violation of N.J.S.A. 18A:27-10.2 entitled educational student aides to automatic reinstatement in Winslow Township Paraprofessional Organization Local 6171, AFT, AFL-CIO v. Winslow Township Board of Education, PRC 15022-13 and EDU 10977-11, Initial Decision (August 12, 2014), adopted, Commissioner (November 10, 2014), <http://njlaw.rutgers.edu/collections/oal/>. Although Administrative Law Judge Susan Scarola found that "the Board failed to timely notify employees that their jobs would be terminated as required by N.J.S.A. 18A:27-10.2," she concluded that "the regulations do not provide for any specific remedy," and the paraprofessionals in that case were not entitled to automatic reinstatement. In so ruling, Judge Scarola reasoned:

> The question then becomes, what is the remedy for defective notice? A corollary regulation governing non-tenured teaching staff provides that when a board fails to give a non-tenured teaching staff member either an offer of contract for employment for the succeeding year, or a notice that such employment will not be offered, the board shall be deemed to have offered that teaching staff member continued employment for the next succeeding school year. N.J.S.A. 18A:27-11. Similarly, N.J.S.A. 18A:17-20.1 governs the reappointment of superintendents, and provides that if neither an offer nor a notice of termination is given, then the superintendent will be deemed reappointed. It can be presumed that if the Legislature had intended automatic reappointment to be the remedy for defective notice with regard to paraprofessionals, it would have included similar language in the statute governing paraprofessionals, N.J.S.A. 18A:27-10.2. See Marino v. Marino, 200 N.J. 315, 330 (2009) (stating that statues that deal with the same matter or subject should be read in pari materia, construed together as a unitary and harmonious whole); see also Diprospero v. Penn, 183 N.J. 477, 496 (2005) (discussing the interpretive maxim expressio unius est exclusio alterius, meaning the expression of one thing is the exclusion of another). Therefore, although the Board gave defective notice, the educational student aides are not entitled to automatic reinstatement.

In its exceptions to the Commissioner in Winslow, the union contended that "the ALJ erroneously found that there was no remedy for the Board's violation of N.J.S.A.

18A:27-10.2" and argued that, "[e]ven though the statute does not include a provision for re-appointment, . . . a logical approach would be to borrow the remedial nature of N.J.S.A. 18A:27-11 concerning notice to teaching staff members, and reappoint the paraprofessionals because of the Board's faulty notice." Winslow, supra, PRC 15022-13 and EDU 10977-11, Final Decision (November 10, 2014). The Commissioner did not embrace that stance, and agreed with the ALJ's conclusion that "N.J.S.A. 18A:27-10.2 does not entitle the paraprofessionals to automatic reappointment based on the Board's failure to give notice by May 15, 2010 that employment would not be offered for the next school year." The same rationale applies with equal force in this case.

In her brief, petitioner attempts to distinguish the within matter from Winslow. Petitioner argues that she "is not claiming automatic renewal here," but, "[i]nstead, petitioner is claiming that the respondent's actions and petitioner's reliance on those actions created a binding contract." Petitioner contends in her brief that "[w]hen [she] never received notification of non-renewal, she reasonably believed that indicated she was being offered employment for the following year," and petitioner's "unequivocal acceptance of this offer created a binding contract between [her] and respondent." Simply put, petitioner's attempt to now assert an implied-contract claim is unavailing.

The Petition of Appeal is devoid of facts and allegations setting forth the elements of an implied-contract claim. Rather, the Petition of Appeal specifically states that the within controversy arises "under the school laws," and a fair reading of the Petition of Appeal discloses that the only asserted basis for petitioner's claim to reemployment is predicated on CCSP's alleged violation of N.J.S.A. 18A:27-10.2. Accordingly, petitioner's argument as to the existence of an implied contract, a claim that goes beyond the scope of the Petition of Appeal, is insufficient to defeat CCSP's motion to dismiss. Apart from this, the Petition of Appeal referenced an existing contract for the 2014–2015 school year, and that contract was still in effect at the time of petitioner's letter dated June 1, 2015, accepting employment which, according to petitioner, forms the foundation of a binding contract between the parties. The courts have recognized that an implied contract cannot be found where an express contract already covers the same subject matter. See Shapiro v. Solomon, 42 N.J. Super. 377, 385 (App. Div. 1956) ("where it appears that there is in fact a legally subsisting express

contract the law will not imply an agreement concerning the same subject matter"). Finally, the Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." Bd. of Educ. of E. Brunswick v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). It is recognized that "the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424–25 (App. Div. 2002). In determining the scope of the Commissioner's jurisdiction under N.J.S.A. 18A:6-9, the Appellate Division has held that "contract claims against boards [of education] do not arise under the school laws but rather from statutory or common law," and such claims are appropriately adjudicated in the courts. Id. at 425; see Picogna v. Bd. of Educ. of Cherry Hill, 249 N.J. Super. 332, 335 (App. Div. 1991) (holding that the "contract claim of a nontenured school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws," and "[w]hether petitioner's employment was wrongfully terminated under the contract and under the CEP Act is for the court, not the Commissioner, to decide"); S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of the Sch. Dist. of S. Orange and Maplewood, 146 N.J. Super. 457, 463 (App. Div. 1977) (holding that the Commissioner did not have jurisdiction over a dispute involving the interpretation of a sabbatical-leave provision set forth in a collective negotiations agreement between the board of education and the education association). Accordingly, even if petitioner had pled an implied contract claim, which she did not, that common-law-grounded claim does not invoke the Commissioner's jurisdiction, as it does not involve a controversy or dispute arising under the school laws. See N.J.S.A. 18A:6-9.

Based upon the foregoing, I **CONCLUDE** that petitioner has advanced no cause of action for renewal of her employment for the 2015–2016 school year and the Petition of Appeal fails to state a claim upon which relief can be granted. I **CONCLUDE** that dismissal of the Petition of Appeal is, therefore, warranted.

## ORDER

I **ORDER** that respondent's motion to dismiss the Petition of Appeal be and hereby is **GRANTED** and that the Petition of Appeal be and hereby is **DISMISSED**.

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

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

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

March 23, 2016
DATE

Margaret M. Monaco
**MARGARET M. MONACO**, ALJ

Date Received at Agency: March 23, 2016

Date Mailed to Parties: March 23, 2016

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# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

May 6, 2016

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Edward A. Cridge, Esq.
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Re: *L.A. and the Horace Mann Insurance Company v. Board of Education of the City of Trenton, Mercer County, OAL Dkt. No. EDU 6498-15, Agency Dkt. No. 225-8/11*

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Chief Administrative Law Judge (ALJ) Laura Sanders' order issued April 20, 2016 denying respondent's request to submit deposition testimony as competent evidence – as opposed to hearsay evidence, which is admissible in administrative proceedings pursuant to *N.J.A.C.* 1:1-15.5 – based upon the unavailability of a witness. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request is denied.

Sincerely,

David C. Hespe
Commissioner

DCH/MKD/BON

cc: Laura Sanders, Acting Director and Chief Administrative Law Judge
Clerk, Office of Administrative Law

**VIA FACSIMILE AND REGULAR MAIL**

174-16

OAL DKT. NO. EDU 9446-12
AGENCY DKT. NO. 148-5/12

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| TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS, | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed Settlement Agreement and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that Naomi Johnson-Lafleur signed the Settlement Agreement on behalf of the petitioners. The Settlement Agreement was not signed by the petitioners' attorney, who is the petitioners' duly authorized representative in litigation, nor does the file contain any evidence indicating that the other petitioners authorized Naomi Johnson-Lafleur to sign the agreement on their behalf. Therefore, the Commissioner cannot approve the within Settlement Agreement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/16
Date of Mailing: 5/09/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 09446-12

AGENCY DKT. NO. 148-5/12

**TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS,**

Petitioners,

v.

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

Respondent.

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**Aileen O'Driscoll,** Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

**Perry L. Lattiboudere,** Esq., for respondent (Adams Gutierrez and Lattiboudere, LLC, attorneys)

Record Closed: March 14, 2016 Decided: March 24, 2016

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on July 12, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 24, 2016
DATE

Patricia M. Kerins
**PATRICIA M. KERINS**, ALJ

Date Received at Agency: March 24, 2016 (emailed)

Date Mailed to Parties: March 24, 2016 (emailed)

/mel

IN THE MATTER OF THE TENURE :

HEARING OF KELLY CHESNEY, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWN OF : DECISION

KEARNY, HUDSON COUNTY. :

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## SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct against respondent – a tenured teacher under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and overwhelmingly warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

MAY 9, 2016

AGENCY DKT NO. 93-3/16

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| IN THE MATTER OF THE TENURE | : | |
| HEARING OF KELLY CHESNEY, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE TOWN OF | : | DECISION |
| KEARNY, HUDSON COUNTY. | : | |

For the Petitioner, Kenneth J. Lindenfelser, Esq.
No appearance by or on behalf of Respondent, Kelly Chesney

This matter was opened before the Commissioner of Education on March 24, 2016, through tenure charges of conduct unbecoming certified by Patricia Blood, Superintendent of the Kearny School District, together with supporting evidence against respondent, Kelly Chesney, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via UPS Overnight Delivery and certified mail on March 23, 2016. The petitioner also served a copy of the tenure charges on the respondent's union representative.

On March 28, 2016, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has been employed as a teacher in the District since September 1, 2002. On June 17, 2015, the respondent tested positive for cocaine. The respondent was directed by the District to follow Board Policy Regulation #3218 (Substance Abuse) and submit proof of the required counseling. On October 8, 2015, the respondent again tested positive for cocaine and was directed to follow Board Policy Regulation #3218. Respondent was also warned that any future positive test results for a controlled substance would result in the filing of tenure charges. After falling asleep in class on February 2, 2016, the petitioner directed the respondent to go for a substance use screening and the respondent again tested positive for cocaine.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charge of conduct unbecoming a teaching staff member has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/16

Date of Mailing: 5/09/16

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

175-16

IN THE MATTER OF THE TENURE HEARING :

OF DAVID SHIFFER, SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE TOWNSHIP OF WEST ORANGE, : DECISION

ESSEX COUNTY. :

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## SYNOPSIS

Petitioning Board filed tenure charges of insubordination and other just cause against respondent, a tenured custodian, and sought to terminate his employment with the district. Neither respondent nor any attorney acting on his behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(g), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the petitioner and dismissed the respondent from his tenured custodial position in petitioner's school district.

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

May 9, 2016

AGENCY DKT NO. 90-3/16

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| IN THE MATTER OF THE TENURE HEARING | : | |
| OF DAVID SHIFFER, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE TOWNSHIP OF WEST ORANGE, | : | DECISION |
| ESSEX COUNTY. | : | |

For the Petitioner, Matthew J. Giacobbe, Esq.
No appearance by or on behalf of Respondent, David Shiffer

This matter was opened before the Commissioner of Education on March 21, 2016, through tenure charges of insubordination certified by Jeffrey Rutzky, Superintendent of the West Orange School District ("District"), together with supporting evidence against respondent, David Shiffer, a tenured custodian in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via hand delivery, on March 15, 2016. The District also served a copy of the tenure charges on the respondent's union representative.

On March 22, 2016, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail return

receipt card indicates that the March 22, 2016 notice was delivered to the respondent on March 26, 2016. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate the respondent has been employed by the District as a tenured custodian since January 2006. In accordance with *N.J.S.A.* 18A:17-41 and Article XIII of the Collective Bargaining Agreement (CBA)[1] between the District and the Union, the District may terminate an employee who does not secure a Black Seal License[2] within 24 months of permanent employment. The job description for the Custodian position, approved by the District on June 21, 2010, also provides that the possession of a Black Seal License is a qualification of employment.

On January 18, 2011, the District provided the respondent with notice that he was required under the CBA to obtain a Black Seal License. Despite several additional notices from the District, the respondent failed to obtain a Black Seal License.[3] Therefore, on February 21, 2014, the District provided the respondent with written notice advising him that, based on his failure to secure a Black Seal License, he was being assessed a one day suspension and that he would not be entitled to overtime until he secured the requisite license. Again, the respondent failed to secure a Black Seal License and on May 1, 2014, the District provided the respondent with written notice advising him that, based on his failure to secure a Black Seal License, his salary increment was being withheld. The respondent was also advised that the failure to secure a Black Seal License by January 1, 2015 would result in his termination. To

[1] The CBA covered the period between July 1, 2011 and June 30, 2015.

[2] It appears that the Black Seal License is a type of Fireman's License that is also referred to as a low pressure boiler operator's license.

[3] The Statement of Evidence outlines several occasions upon which the District provided the respondent with notice that he was required to obtain a Black Seal License, and that his failure to do so would jeopardize his employment status. All of the notice dates will not be repeated here.

date, the respondent has failed to obtain the required Black Seal License, despite the District having provided him with ample notice and opportunities to secure the license.

Deeming the allegations to be admitted, and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that the District's charges of insubordination and other just cause against the respondent have been proven and warrant respondent's dismissal. The respondent's repeated failure to obtain the requisite Black Seal License despite numerous warnings and directives from the District demonstrates egregious insubordination and inability to fulfill the requirements of his position as a custodian in the District. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from his tenured position with the District.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/09/16

Date of Mailing: 5/09/16

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

177-16 JKH

BILLY CHESTER,

PETITIONER,

V.

MARGARET SNYDER AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

On April 11, 2014, petitioner filed an appeal, together with a request for emergent relief, alleging that respondent – a member of the Pennsauken Board of Education (Board) – had a disqualifying conflict of interest when she was sworn in to serve as a member of the Board in January 2014. Emergent relief was denied on April 28, 2014. Respondent filed a motion for summary decision, and a hearing was held in the matter on September 18, 2014.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact herein, and the matter is ripe for summary decision; respondent retired from employment in Pennsauken schools effective July 1, 2013, and claimed entitlement to payment from the Board for unused sick time; respondent was elected to the Board in November 2013; shortly thereafter, petitioner requested that the Board issue payment for her sick leave prior to December 20, 2013 in order to avoid a perceived conflict of interest under *N.J.S.A.* 18A:12-2; this request was denied at the Board's December meeting; on January 7, 2014, respondent executed a document which purported to transfer the sick leave claim against the Board to respondent's daughter, who was not a member of her household; later the same day, respondent took the oath as a Board member, certifying that she was qualified to take office; on January 23, 2014, the Board approved the payment of respondent's accumulated sick leave to her daughter; and – pursuant to a 2014 case entitled *Board of Education of the Westwood Regional School District, Bergen County v. Russell Miller,* OAL Dkt. No. EDU6392-13, Agency Dkt. No. 57-3/13 – a board member only has a duty to cure a conflict of interest so long as a current conflict of interest exists, and once the conflict is mooted, any duty to cure is likewise mooted. Accordingly, the ALJ concluded that the respondent is not required to forfeit her seat on the Board, and granted summary decision in favor of respondent.

The Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

Issued 5/06/16

OAL DKT. NO. EDU 4514-14
AGENCY DKT. NO. 89-4/14

| | | |
|---|---|---|
| BILLY CHESTER, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| MARGARET SNYDER AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY, | : | |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the respondent, Margaret Snyder, may have had a disqualifying conflict of interest pursuant to *N.J.S.A.* 18A:12-2 when she was sworn in as a member of the Pennsauken Board of Education (Board) on January 7, 2014. The Commissioner, however, is also in accord with the ALJ's determination that the issue became moot once the Board approved the payment of Ms. Snyder's sick leave on January 23, 2014. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/16
Date of Mailing: 5/09/16

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

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 04514-14

AGENCY DKT. NO. 89-4/14

**BILLY CHESTER,**

Petitioner,

v.

**MARGARET SNYDER AND**
**BOARD OF EDUCATION OF**
**THE TOWNSHIP OF PENNSAUKEN,**
**CAMDEN COUNTY,**

Respondents.

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**Matthew S. Wolf**, Esq., for petitioner Billy Chester (Matthew S. Wolf, Esquire, LLC, attorneys)

**Timothy J. Higgins,** Esq., for respondent Margaret Snyder (Law Offices of Timothy J. Higgins, attorneys)

**Amy R. Guerin,** Esq., for respondent the Board of Education of the Township of Pennsauken, Camden County (Parker McCay, P.A., attorneys)[1]

Record Closed: September 18, 2014 Decided: March 28, 2016

[1] Former Solicitor, Pennsauken Board of Education, Frank Piarulli, Esq., appeared at Oral Argument on September 18, 2014, for respondent the Board of Education of the Township of Pennsauken, Camden County

BEFORE **ELIA A. PELIOS**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Billy Chester (petitioner) filed a petition for due process seeking a determination that respondent Margaret Snyder (respondent Snyder) had a conflict of interest at the time she was sworn in as a member of the Board of Education of the Township of Pennsauken (respondent Board), and that her assumption of office is void ab initio.

On April 11, 2014, petitioner's petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, together with a request for emergency relief. On April 15, 2014, the emergent matter was filed along with the due process request with the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on April 17, 2014. Emergent relief was denied by the undersigned on April 28, 2014.

On July 28, 2014, respondent Snyder filed a motion for summary decision seeking dismissal of the petition in this matter. Petitioner filed a brief in opposition to the motion on August 7, 2014, and respondent Board filed a brief supporting respondent Snyder's motion on September 8, 2014. Oral argument was held on September 18, 2014.

## FACTUAL BACKGROUND

The petitioner filed a petition which contained the following enumerated alleged facts:

1. Petitioner Billy L. Chester is a tax-paying resident of the Township and school district of Pennsauken. He voted in the election which is the subject of this dispute. He is the president of the Pennsauken Republican Club.

2. Respondent Snyder was employed by the Pennsauken Board of Education and gave written notice of her retirement on or about March 1, 2013.

3. At the time of her retirement, respondent Snyder had a claim against the Board of Education for her unused sick time.

4. Respondent Snyder's retirement was effective July 1, 2013.

5. Respondent Snyder claimed entitlement to a payment of $14,129 from the Board of Education.

6. On June 4, 2013, while respondent Snyder was still employed by the Board of Education, she filed a nominating petition to run for the Board of Education. Respondent Snyder is a registered Democrat.

7. On November 5, 2013, respondent Snyder received the most votes in the election.

8. The voting result of the top four candidates for three contested positions were as follows:

   Respondent Margaret Snyder ..... 2,192
   Nicholas Perry ..... 2,041
   Plaintiff JoAim Young ..... 1,326
   Plaintiff Michael E. Stargell..... 1,296

9. On November 12, 2013, respondent Snyder emailed to school board members, Matthew McDevitt, District Superintendent Marylin Martinez, Director of Personnel Curt Wrzeszczynski, and the Board of Education Solicitor, with a request to resolve her claim for compensation.

10. On November 14, 2013, respondent Snyder submitted a letter dated November 13, 2013, to McDevitt, with copies to all Board of Education members regarding her claim for compensation.

11. In her letter dated November 13, 2013, respondent Snyder referred to her employment contract, the collective bargaining agreement, her retirement and the election.

12. In her letter dated November 13, 2013, respondent Snyder made a claim against the Board of Education, wherein she stated, on the second page:

> . . . I feel that paying me the accrued sick time prior to assuming office will cure the conflict, and be in keeping with the collective bargaining agreement. Also, the payment is a one-time payment and would be paid in January 2014, the same month I would assume office.

13. Respondent Snyder goes on to state:

> . . . it is now incumbent upon Pennsauken Board of Education to seek to cure the conflict. I am requesting that the Board move and approve a resolution that the one-time payment of my accrued sick time is made prior to my being sworn into office as a member of the Board of Education. Payment can be made up until the day before the reorganization meeting; therefore, curing the matter.

14. On November 14, 2013, respondent Snyder met with Board President Matt McDevitt, board member Carlos Rodriguez, Solicitor Piarulli, Superintendent Martinez, and the Board of Education Business Administrator, Celeste Rickets, "to discuss resolving my unused sick time payout request."

15. Respondent Snyder refers to her claim as a "petition."

16. On November 21, 2013, the Pennsauken Board of Education denied respondent Snyder's "petition."

17. On December 5, 2013, respondent Snyder made a claim on the Pennsauken Board of Education to reconsider its November 21, 2013, decision not to pay respondent Snyder's sick time in the manner in which she sought to have it

paid, i.e., before she took her oath of office.

18. Respondent Snyder's letter requesting reconsideration, Exhibit D to her certification, makes the following statement:

> . . . I am again respectfully requesting that the Board reconsider their previous decision and issue payment to me for unused sick pay by December 20, 2013, the last pay date of this calendar year as published on the payroll website.
>
> Please be advised that in addition to exercising the teacher option set forth in Article X1I(A)(6), that is, receiving accumulated sick time payment in my retirement year, I am also requesting payment by December 20 to avoid and cure any potential or perceived conflict that a payout delay may create under N.J.S.A. § 18A:12-2.

19. The request to make payment by December 20, 2013, was denied at the Board of Education's December 12, 2013, meeting.

20. On January 7, 2014, respondent Snyder executed a document which purported to transfer the claim against the Board of Education to her daughter (see attached assignment).

21. On January 7, 2014, respondent Snyder took the oath of office, certifying that she was qualified to take office.

22. On January 7, 2014, respondent Snyder had a conflict of interest in violation of N.J.S.A. 18A:12-2, which provides:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

23. On January 23, 2014, the Pennsauken Board of Education approved the payment of Snyder's accumulated sick leave, which payment was made to respondent Snyder's daughter.

Upon review of the pleadings and briefs in this matter, the preceding statements do not appear to be in dispute, and are hereby **FOUND** as **FACT.** Additionally, the parties do not dispute that the claim existed or that it would have been disqualifying, this is also **FOUND** as **FACT.**

## LEGAL ANAYLSIS AND CONCLUSION

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'
>
> [Brill, supra, 142 N.J. at 540 (citations omitted).]

The mere existence of disputed facts is not conclusive. An agency must grant a plenary hearing only if material disputed adjudicative facts exist. Bally Mfg. Corp. v. Casino Control Com'n, 85 N.J. 325, 334, 426 A.2d 1000 (1981), App. Div. 454 U.S. 804, 102 S.Ct.

77, 70 L.Ed.2d 74 (1981); Cunningham v. Dept. of Civil Service, 69 N.J. at 24-25, 350 A.2d 58. N.J.S.A. 52:14B-9.

Having reviewed the parties' submissions and arguments in support of, and opposition to the within motion, I **FIND** that there are no genuine issues of material fact pertinent to respondents' motions, and hereby **FIND** and adopt the statement of facts described earlier herein. Petitioner asserts that a dispute of material fact exists, specifically, that respondent Snyder's assignment of her claim to her daughter created an indirect claim, which disqualified respondent Snyder from taking the oath of office, rather than curing the disqualifying conflict. This assertion appears to be a plea for a conclusion of law rather than a finding fact, and as such is not deemed to be a disputed material fact for purpose of the herein motion.

N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county."

The parties do not dispute that respondent Snyder was elected to the respondent board and had an outstanding claim for a sick leave payout at that time. What is in dispute is whether or not respondent Snyder's assigning of her claim to her daughter, who is not a member of her household, on the date of respondent Snyder's taking of the oath of office effectively cured the conflict. Respondent Snyder and respondent Board believe it did, while petitioner maintains that it did not and that an indirect interest remained. Petitioner asserts that Snyder had a disqualifying conflict which was not cured by her assigning of her claim. Respondents both argue that the assignment did cure the conflict, prior to the oath of office being administered, and therefore is entitled to continue in office.

It is undisputed that respondent Board paid out on the underlying claim to respondent Snyder's daughter on January 23, 2014, after respondent Snyder took the oath of office yet before petitioner brought this challenge. The parties each cite to the Commissioner of Education's decision in Township of Barnegat, Ocean County, v. Robert A.

Houser, EDU 22948-07, Initial Decision (May 23, 2007), modified, Comm'r (July 30, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Petitioner points to the fact that the Commissioner held that the outstanding claim in the hands of a family member did render a board member's assumption of office void ab initio, while respondents point to the fact that the family member was also a member of the Board member's household, which is not the case in the present matter.

It is noteworthy that in Houser the Commissioner indicated a reluctance to undo the results of an election and to remove a member of the board, who had been duly elected and had been serving when the inconsistent interest was cured. The challenge was brought after assumption of the office (and after the claim was settled), and the Commissioner held that the matter was best rectified by readministering the oath to Houser.

Additionally, in a recent decision considering a petition seeking a determination that a board member was ineligible to serve due to a disqualifying conflict, the Commissioner of Education concurred with the findings and conclusions of Administrative Law Judge Leslie Z. Celentano in holding that "a board member only has a duty to cure a conflict of interest, so long as a current conflict of interest exists. Once the conflict is mooted, the duty to cure is mooted." Board of Education of the Westwood Regional School District, Bergen County v. Russell Miller, OAL Dkt No. EDU 6392-13, Agency Dkt. No. 57-3/13 (2014).

The facts in the present matter are sufficiently similar to those in Miller so as to tend toward a determination that even if respondent Snyder's assignment of her claim to her daughter did constitute an impermissible, disqualifying conflict, the curing of that conflict by the board's paying out of the claim effectively mooted that conflict, before the present matter was even brought. Accordingly, I **CONCLUDE** that respondent Snyder is not required to forfeit her seat on the Board, and that summary decision is appropriate in this matter.

## ORDER

Respondent Snyder's motion for summary decision is **GRANTED.** Petitioner's claim is hereby **DISMISSED.**

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

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

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

March 28, 2016
DATE

**ELIA A. PELIOS**, ALJ

Date Received at Agency: March 28, 2016

Date Mailed to Parties: 3/30/16

/nd

176-16

OAL DKT. NO. EDU 17354-15
AGENCY DKT. NO. 244-9/15

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|---|---|---|
| I.A., on behalf of minor children, Ju.D., G.D., Jo.D., AND M.D., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at the scheduled April 6, 2016 OAL hearing – has been reviewed. Petitioner filed no explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/16
Date of Mailing: 5/09/16

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

180-16

OAL DKT. NO. EDU 10002-15
AGENCY DKT. NO. 141-6/15

| | | |
|---|---|---|
| C.G., on behalf of minor child, A.G., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL, DISTRICT, CUMBERLAND COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/11/16

Date of Mailing: 5/11/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 10002-15
AGENCY DKT. NO. 341-6/15

**C.G. ON BEHALF OF**
**MINOR CHILD, A.G.,**
Petitioners,
v.
**BOARD OF EDUCATION OF**
**THE CUMBERLAND REGIONAL**
**SCHOOL DISTRICT,**
**CUMBERLAND COUNTY,**
Respondent.

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**C.G.,** petitoner, pro se

**Susan S. Hodges,** Esq., for respondent (Schwartz Simon Edelstein & Celso, LLC., attorneys)

Record Closed: April 5, 2016 Decided: April 7, 2016

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 10, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release indicating the terms thereof.

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

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

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

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

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

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

4/7/16
DATE

**W. TODD MILLER**, ALJ

Date Received at Agency: 4/12/16

Date Mailed to Parties: 4/12/16

C.G. o/b/o A.G. v. Cumberland Regional BOE
Docket No. 141-6/15

SETTLEMENT AGREEMENT

The Parties agree as follows:

1) A.G. will be referred to the child study team for a complete evaluation pursuant to N.J.A.C. 6A:16-10.1. A.G. will receive a psychiatric evaluation, by a physician agreed to by ~~both~~ parties, at the Districts expense.

2) ~~C.G.~~ C.G. o/b/o A.G. will continue to provide progress notes from A.G.'s physcian, Dr. Davenport and/or Dr. Michael Rosenberg every 60 days in support of her need for home instruction

3) A.G. will continue to receive home instruction from the district as long as paragraphs (1) + (2) above are met

4) The parties agree that A.G has received 80 credits thus far and that she needs 135 credits in order to satisfy graduation requirements. She is eligible for 20 credits per semester via home instruction, and is currently taking 20 credits this semester.

5) Petitioners agree to dismiss all remaining claims in the petition.

BOE:

Susan S. Hodges SSE+C

Petitioner

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF KIMBERLY BERRY, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE BOROUGH OF GLASSBORO, | : | DECISION |
| GLOUCESTER COUNTY. | : | |

## SYNOPSIS

Petitioning Board certified tenure charges of abandonment against respondent – a tenured teacher under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 5/11/16

AGENCY DKT NO. 83-3/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF KIMBERLY BERRY, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE BOROUGH OF GLASSBORO, | : | DECISION |
| GLOUCESTER COUNTY. | : | |

For the Petitioner, Andrew W. Li, Esq.
No appearance by or on behalf of Respondent, Kimberly Berry

This matter was opened before the Commissioner of Education on March 14, 2016 through tenure charges of abandonment certified by Mark J. Silverstein, Superintendent of the School District of the Borough of Glassboro, together with supporting evidence against respondent, Kimberly Berry, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address – via certified mail, return receipt requested – on February 25, 2016.

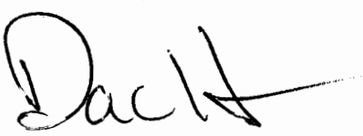
On March 15, 2016, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail return receipt card indicates that the March 15, 2016 notice was delivered on March 18, 2016. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in a prolonged absence from her teaching position in the District and has been absent from work since November 30, 2015. During the 2014-2015 school year, respondent took a leave of absence from January 20, 2015 through June 30, 2015. Thereafter, respondent returned to work for the beginning of the 2015-2016 school year, but was sent home for medical reasons on November 16, 2015. She then used her remaining sick and personal leave through November 20, 2015. Respondent did not return to work on November 30, 2015, following the Thanksgiving break, and subsequently requested leave under the Family Medical Leave Act (FMLA) – which was denied because she was ineligible for FMLA leave. Respondent then requested an unpaid leave of absence, which was also denied. To date, respondent remains absent without leave.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of abandonment of her teaching position have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 5/11/16

Date of Mailing: 5/11/16

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

NEWARK TEACHERS UNION LOCAL 481 AFT, AFL-CIO,

PETITIONER,

V.

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

RESPONDENT,

AND

IN THE MATTER OF ORLEANA SIMPSON, ET. AL, NEWARK PUBLIC SCHOOL DISTRICT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

This consolidated case arises out of the July 1, 2013 layoff of 136 Newark Public School (District) employees, including all 46 of the District's attendance officers. Before the Commissioner is the petition of the Newark Teachers' Union alleging that the District violated *N.J.S.A.* 18A:38-25 to -33 when it abolished the position of attendance officer; in the other matter, individual employees filed an appeal with the Civil Service Commission (CSC), claiming the layoff from their full-time positions was in bad faith. The respondent District contended that the layoff was undertaken for economic reasons, and did not violate the education laws because the role of the attendance officers had been transferred to school-based "Student Support Teams" (SST). The cases were consolidated for hearing in the Office of Administrative (OAL), with the Commissioner having predominant interest over the education law issues, and the CSC having jurisdiction over the remaining issues.

The ALJ found, *inter alia*, that: instead of appointing attendance officers as mandated by *N.J.S.A.* 18A:38-32, the District abolished that position and created the SST – comprised of a principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, nurse, and two teachers, whose duties on the SST are voluntary and in addition to their primary role at each school; the SST does not warn children, parents or guardians of persistent absences, as required by *N.J.S.A.* 18A:38-29, nor do members of the SST – except for the school resource officer – have authority to make an arrest; moreover, without attendance officers, no District employee is designated to look for truant students, in violation of *N.J.S.A.* 18A:38-28. Accordingly, the ALJ determined that the District is in violation of *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29, and *N.J.S.A.* 18A:38-32, and therefore ordered the layoff of the attendance officers reversed.

Upon full review and consideration, the Commissioner found, *inter alia*, that: a school district is permitted to designate a team – rather than individuals – to serve as attendance officers; in Newark, the SST now performs the duties and responsibilities of the attendance officer; the purpose of *N.J.S.A.* 18A:38-29 and the entire statute is to promote attendance, and the District's use of new technology to notify parents and guardians of attendance issues and truancy advances this cause. The Commissioner concluded that the District did not violate *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29 or *N.J.S.A.* 18A:38-32 when it laid-off 46 attendance officers and created school-based SSTs to carry out the functions previously performed by the school attendance officers. Accordingly, the Initial Decision of the OAL was rejected. The remaining aspects of the case were transferred to the Civil Service Commission for determination.

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

Issued 5/12/16

OAL DKT. NOS. EDU 17995-13 and CSV 14755-13 (consolidated)
AGENCY DKT. NO. 279-11/13

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| NEWARK TEACHERS UNION LOCAL 481 AFT, AFL-CIO, | : | |
| PETITIONER, | : | |
| V. | : | |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | COMMISSIONER OF EDUCATION |
| RESPONDENT, | : | DECISION |
| AND | : | |
| IN THE MATTER OF ORLEANA SIMPSON, ET. AL, NEWARK PUBLIC SCHOOL DISTRICT. | : | |

This consolidated case stems from a layoff of approximately 136 employees by the Newark School District (District), including 46 attendance officers.[1] In the first action, the individual employees (petitioners) filed a layoff appeal with the Civil Service Commission (CSC) challenging whether the layoff from their full-time positions was in good faith. In the second action, the Newark Teachers Union (NTU) filed a petition of appeal with the Commissioner, alleging that the District violated education laws when it abolished the position of attendance officer. On February 5, 2015, the petitions were consolidated for hearing before the Office of Administrative Law (OAL), with the Commissioner having the predominant interest over the education law issue and CSC having jurisdiction to determine any remaining issues. Thereafter, hearings in this matter were held on June 10 and September 9, 2015.

With respect to the education issue, the Administrative Law Judge (ALJ) determined that the District was in violation of *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29, and *N.J.S.A.* 18A:38-32 when it abolished the attendance officer position. Specifically, the ALJ found that instead of appointing

[1] It is undisputed that the positions of attendance counselor and attendance officer are synonymous. For consistency and ease of reference, the Commissioner will refer to the position as attendance officer.

attendance officers – pursuant to *N.J.S.A.* 18A:38-32 – the District created a student support team (SST) comprised of the principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, nurse, and two teachers. The ALJ also found that the SST does not warn children, parents or guardians of persistent absences, as required by *N.J.S.A.* 18A:38-29, nor do any members of the SST – except for the school resource officer – have authority to make an arrest. Further, the ALJ determined that without attendance officers, no District employee looks for truant students, in violation of *N.J.S.A.* 18A:38-28. Accordingly, the ALJ reversed the layoff of the attendance officers.

The record of this matter and the Initial Decision of the OAL have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the District, and the replies thereto filed by the NTU and petitioners. In its exceptions, the District argues that the ALJ erroneously found that it violated education laws when it eliminated the position of attendance officer.[2] Specifically, the District takes exception to the ALJ's finding that no one in the District is looking for truant students. (District's Exceptions at 4-6) The District contends that there is credible evidence in the record to support the finding that it carries out its statutory duty to monitor and locate truant students – without the title of attendance officer – through the power school system of records, which sends out warning notices to parents and/or schedules meetings when a student is absent for certain periods of time.

The District also argues that Abdul Rahman Saleem's testimony did not provide a credible account of his job duties as an attendance officer, and that the ALJ should not have relied upon it. (*Id.* at 6) Instead, the District argues that the ALJ should have relied upon the testimony of Eric Ingold,

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[2] The District also argues that the Commissioner does not have jurisdiction to review this matter as the CSC has sole jurisdiction. The Commissioner has jurisdiction over all controversies and disputes arising under the school laws of this State. *N.J.S.A.* 18A:6-9. Accordingly, the Commissioner has jurisdiction over the issue of whether the District's layoff of its attendance officers violated *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29, or *N.J.S.A.* 18A:38-32, as this claim arises under the State's education statute.

The District further contends that it did not act in bad faith when it eliminated the position of attendance officer. While the Commissioner has jurisdiction over the education issue, only the CSC has jurisdiction over whether the layoff of the attendance officers was in bad faith, as that issue does not arise under the State's school laws. *N.J.S.A.* 18A:6-9. As this issue will be transferred to the CSC following the Commissioner's decision, the Commissioner will not address the District's arguments with respect to whether the District acted in good faith.

the District's Executive Director for Safety and Security, who testified as to the efforts made by security guards, rapid response and school resource officers to combat truancy. (*Ibid.*)

The District contends that while *N.J.S.A.* 18A:38-32 allows it to "designate" persons to serve as attendance officers, the word "designate" should have a broad interpretation. (*Id.* at 7) "The discrepancy between the use of the word 'designated' and 'appointment' further implies that the legislature permits the District to identify employees to perform the statutory duties of an attendance officer" – without requiring the specific creation of an attendance officer position. (*Ibid.*)

The District notes that *N.J.S.A.* 18A:38-28 does not prohibit the District from laying-off attendance officers, but rather "provides guidance" for those assigned as attendance officers. (*Id.* at 8) Accordingly, the District argues that it did not violate *N.J.S.A.* 18A:38-28 when it laid off the attendance officers – a decision that was approved by the Civil Service Commission. (*Ibid.*)

The District also challenged the timeliness of the petition of appeal. (Id. at 12-13) Specifically, the District argues that the petition was filed with the Commissioner nearly one month beyond the 90-day filing deadline and that the ALJ erred in relaxing the 90-day rule.[3] (*Ibid.*)

In reply, the NTU contends that the ALJ correctly found the District in violation of the education statutes when it abolished the position of attendance officer. (NTU's Reply at 6) The NTU argues that by applying principles of statutory interpretation, it is clear that an attendance officer must be a separate position with certain job responsibilities. (*Id.* at 6-11) The NTU points out that the intent of the statute is to ensure that children attend school. (*Id.* at 6-7) As such, *N.J.S.A.* 18A:38-32 requires that school districts "*shall* appoint a suitable number of qualified persons to be designated as attendance officers and fix their compensation." (Emphasis added) (*Id.* at 8) The NTU contends that the language is "crystal clear" that attendance officers are required. (*Ibid.*) Further, *N.J.S.A.* 18A:38-27 and

[3] The ALJ found that because the issues raised in the NTU's petition of appeal involve matters of significant public interest, a relaxation of the 90-day filing deadline was warranted under *N.J.A.C.* 6A:3-1.16. Further, the ALJ noted that the District failed to raise timeliness as an affirmative defense (with the exception of the generic affirmative defense that NTU failed to state a claim), nor did it raise the issue before the ALJ in any of the court proceedings – including in the oral argument on the predominant interest motion – prior to the closing submissions. Considering the circumstances – the importance of attendance and the fact that the District did not address this issue with the court until after two days of hearing had concluded – a relaxation of the rules is warranted, and the Commissioner will consider the instant appeal. *See N.J.A.C.* 6A:3-1.16.

*N.J.S.A.* 18A:38-29 delineate certain job responsibilities and requirements for attendance officers, which the District seeks to "dilute . . . by implying that the District can designate individuals to assume the statutory duties." (*Id.* at 9)

The NTU additionally points out that the testimony of the District's own witnesses – Nadiyah Sa'id, Vanessa Rodriguez, and Eric Ingold – proves that the District does not have any employees who go into the community to look for truant students, the members of the SST are volunteers, and the District no longer uses buses to pick up truants. (*Id.* at 12-13)

Similar to that of the NTU, petitioners' reply to the District's exceptions also emphasizes that the ALJ's findings are supported by the weight of the evidence, and demonstrates that no one in Newark Public Schools presently serves as an attendance officer or performs the core functions of that role. (Petitioners' Reply at 8-11) Specifically, the District's own witness – Nadiyah Sa'id – confirmed that no one holds the attendance officer title, no one replaced the truancy team who formerly went into the community searching for truants, and the current SST consists of school-based volunteers who have other responsibilities besides attendance. (*Id.* at 8-10) Similarly, Vanessa Rodriguez and Eric Ingold testified that no one in the district was designated as an attendance officer. (*Id.* at 10-11) Eric Ingold further testified that the District no longer utilizes a bus with attendance officers who patrol the streets to combat truancy, but instead relies on the Newark Police Department to identify and pick up truants. (*Ibid.*) As such, petitioners dispute the District's argument that the ALJ only relied on the unsupported testimony of Abdual Rahman Saleem. (*Id.* at 17)

Petitioners contend that the ALJ correctly concluded that the District violated education statues by failing to have anyone in the statutorily-mandated attendance officer position. (*Id.* at 13-19) Petitioners point out that the reason the statute requires attendance officers is part of a larger statutory scheme to enforce compulsory education. (*Id.* at 13) Additionally, petitioners assert that the District attempted to distribute the job duties of the attendance officer to members of the SST, but that the SST does not perform the core duties of the attendance officer, *ie.*, "going out into the community and utilizing...police powers to actually locate and return truant students to school." (*Id.* at 15-16)

Upon review, the Commissioner agrees with the District that the layoff of the 46 attendance officers did not violate *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29, or *N.J.S.A.* 18A:38-32. Specifically, when evaluating a statute, the Commissioner must consider the Legislature's intent by considering the plain language of the statute. *State v. Munafo*, 222 *N.J.* 480, 488 (2015). When *N.J.S.A.* 18A:38-25 to -35 is read as a whole, it is clear that the purpose of enacting this legislation was to compel children to attend school. Specifically, *N.J.S.A.* 18A:38-25 states that parents or guardians of school-aged children "shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools[.]" To achieve that end, districts are required to designate attendance officers. *N.J.S.A.* 18A:38-32 provides that "[f]or the purpose of enforcing the provisions of this article, the board of education of each school district . . . shall appoint a suitable number of qualified persons to be designated as attendance officers, and shall fix their compensation."

Considering its plain language, the statute does not require the employment of individual employees to serve solely in the role of attendance officer, but rather that the district "designate" attendance offices to enforce the provisions of the statute. Designating a team to perform the core duties outlined in the statute is acceptable, provided that the ultimate goal of encouraging student attendance at school is achieved – regardless of whether the team members have additional job duties and responsibilities. *See Ann Quinlan v. Board of Education of the Township of North Bergen*, 73 *N.J. Super.* 40, 47-48 (App. Div. 1962) (permitting a school clerk to serve in the role and perform the duties of both clerk and attendance officer).

Here, the District has designated the SST – as a whole – as attendance officers. The roles and responsibilities of the SST were developed through a listening tour of approximately 25 meetings in which Nadiyah Sa'id, the District's Deputy Executive Director of College and Career Readiness, met with a variety of school employees – including principals, students, parents, attendance officers and court representatives – to develop "a new strategy for how the district would implement attendance support for

[its] students." (Testimony of Nadiyah Sa'id, 1T at 8)[4] Specifically, Sa'id sought to "work with the remaining attendance staff to get a clear understanding of [the] state code on attendance, work with the existing office staff to determine how things had been functioning, the various roles that contributed to the district's delivery of attendance support services" and to identify how the District could support all areas of attendance following the layoff of the attendance officers. (*Id.* at 9) Thereafter, the District developed the SST as part of a new attendance policy, in accordance with State attendance policy. (Initial Decision at 10-11)

The designation of the SST as attendance officers does not – in and of itself – violate *N.J.S.A.* 18A:38-32. The purpose of the SST is to monitor student attendance and combat truancy, the same function as the former attendance officers. Additionally, although *N.J.S.A.* 18A:38-32 requires that attendance officers receive compensation, there is no requirement that the position be full-time. It is undisputed from the record that the members of the SST – principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, nurse, and two teachers – are all employees of the District and receive compensation. As such, the District is permitted to designate a team – rather than individuals – to serve as attendance officers, and an analysis of whether the SST meets the statutory responsibilities of the attendance officer is therefore necessary.

In order to ensure that children attend school, *N.J.S.A.* 18A:38-29 provides that:

> The attendance officer shall examine into all violations of this article, shall warn any child violating any of the provisions of this article and the parent, guardian or other person having charge and control of the child of the consequences of the violation if persisted in, and shall notify such person in writing to cause the child to attend school within five days from the date on which notice is served, and regularly thereafter. The attendance officer shall have full police power to enforce the provisions of this article and may arrest without warrant any vagrant child or habitual truant or any child who is habitually incorrigible or who is vicious or immoral in conduct or illegally absent from school.

The record demonstrates – and the ALJ made findings of fact – that the power school clerk system sends out written notices to parents of children who are absent from school. If a student is absent for one to four

[4] This citation refers to a transcript of a hearing held on June 10, 2015.

days, the power school clerk mails a warning notice to the parent, and the teacher may also call the parent to determine the reason for the student's absence. (R-5; Initial Decision at 11; Testimony of Nadiyah Sa'id, 1T at 17, 19-20) When a student is absent for five to nine days, the SST is activated and invites the parent to a meeting with the SST to develop an action plan. (R-5; Initial Decision at 11; Testimony of Nadiyah Sa'id, 1T at 21) The SST will make a verbal or written request three times before making a home visit. (*Ibid.*) Thereafter, if a student is absent for ten or more days and the parent has not responded to the intervention efforts of the SST, the SST then reaches out to the court representative. (R-5, Testimony of Nadiyah Sa'id, 1T at 22-23)

As such, the SST performs the duties and responsibilities of the attendance officer with respect to warning parents and guardians of student absences and notifies parents in writing within five days, as required by *N.J.S.A.* 18A:38-29. Further, the school resource officer – a member of the SST – is a police officer, in accordance with *N.J.S.A.* 18A:38-29. The fact that the District utilizes technology to assist with the performance of its statutorily-mandated responsibilities is of no moment. The purpose of *N.J.S.A.* 18A:38-29 and the entire statute is to promote attendance, and advancements in technology are an asset to the cause.

Finally, *N.J.S.A.* 18A:38-28 requires:

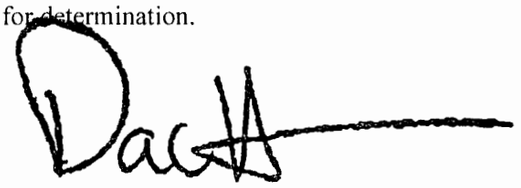
> Any attendance officer who shall find any child between six and 16 years of age who is a truant from school, shall take the child and deliver him to the parent, guardian or other person having charge and control of the child, or to the teacher of the school which such child is lawfully required to attend.

Although the District used four buses to round up truant students prior to the layoff of the attendance officers, such use of buses and patrolling the streets is not required by *N.J.S.A.* 18A:38-28. Considering the plain language of the statute, attendance officers "who shall find" truant students are required to return them to school or to their home. The phrase "who shall find" does not compel districts to develop a scheme wherein attendance officers are required to canvas the streets searching for truant students. To the contrary, *N.J.S.A.* 18A:38-28 does not delineate specifically how attendance officers will find students and leaves districts with discretion on how to find students. Advancements in technology will naturally

result in new and innovative ways to locate truant students. Through the SST and the power school clerk, the District finds truant students through parent contact and involvement after the student has been absent as few as one to four times. As such, the District is in compliance with *N.J.S.A.* 18A:38-28.

Accordingly, the Initial Decision of the OAL is rejected for the reasons expressed herein. The layoff of the attendance officers does not violate *N.J.S.A.* 18A:38-28, *N.J.S.A.* 18A:38-29, or *N.J.S.A.* 18A:38-32. In accordance with the predominant interest order, the remaining aspects of the case are now transferred to the Civil Service Commission for determination.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 5/12/16

Date of Mailing: 5/12/16

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

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**(CONSOLIDATED)**

**NEWARK TEACHERS UNION**
**LOCAL 481 AFT, AFL-CIO,**
Appellant,
v.
**STATE-OPERATED SCHOOL DISTRICT**
**OF THE CITY OF NEWARK, ESSEX COUNTY,**
Respondent.

OAL DKT. NO. EDU 17995-13
AGENCY DKT. NO. 279-11/13

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**IN THE MATTER OF ORLENA SIMPSON ET. AL,**
**NEWARK PUBLIC SCHOOL DISTRICT.**

OAL DKT. NO. CSV 14755-13
AGENCY DKT. NO. 2014-676

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**Colin M. Lynch**, Esq., for appellants Orlena Simpson, et. al (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

**Edward G. Liss**, Esq., for appellants Newark Teachers Union

**Christina Michelson**, Esq., for respondent Newark Public School District (Scarinci & Hollenbeck, attorneys)

**Ramon Rivera**, Esq., for respondent Newark Public School District (Scarinci & Hollenbeck, attorneys)

Record Closed: January 22, 2016 Decided: February 10, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

## PROCEDURAL HISTORY

Orlena Simpson, et. al (appellants), allege that their layoffs from permanent full-time civil service positions with respondent, Newark Public School District (NPS), was in bad faith. Respondent contends that the layoff was for economic reasons. The matter was filed before the Office of Administrative Law under OAL Docket Number CSV 14755-13 as a contested case by the Civil Service Commission. Appellant Newark Teachers Union (NTU) alleges that NPS abolished the position of attendance officer in violation of N.J.S.A. 18A:38-25 to -33. That matter was assigned OAL Docket Number EDU 17995-2013 and filed before the Office of Administrative Law as a contested case by the New Jersey Department of Education. Appellant Simpson filed a motion for consolidation and predominant interest determination on September 22, 2014. The Motion was granted with the Department of Education having predominant interest over the education law issue and the Civil Service Commission having predominant interest over the other issues in the matter. Hearings were held on June 10, 2015, and September 9, 2015. Simpson, et. al submitted a closing brief on December 7, 2015. NTU and NPS submitted closing briefs on December 8, 2015. The parties requested additional time to respond to the closing briefs, which I granted. NTU and NPS submitted reply briefs on January 5, 2016. Simpson, et. al submitted a reply brief on January 7, 2016. NPS submitted a supplemental brief on January 12, 2016. Simpson submitted a letter and attachment on January 22, 2016, at which time I closed the record.

## TESTIMONY AND FINDINGS OF FACT

The factual discussion is not intended to be a verbatim report of the testimony of all the witnesses. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented. I **FIND** the following uncontested facts:

On July 1, 2013, NPS laid off approximately 136 employees who were or are members of the Newark Teachers Union Local 481. Those laid off included forty-six attendance counselors, seven clerk 1's, fourteen community aides school, twenty-five community aides school/teacher's aides, twenty keyboarding clerk 1's, five keyboarding clerk 2's, and nineteen teachers' aides.

## TESTIMONY

Nadiyah Sa'id

Nadiyah Sa'id (Sa'id) is the Deputy Executive Director of College and Career Readiness with the NPS. She has previously worked for NPS in the capacity of supervisor and social worker. During the 2012-2013 school year she was a supervisor in the office of college and career readiness.

In April 2013, she was informed that NPS would be laying off all of its attendance counselors. Sa'id was not involved in the layoff decisions. The superintendent made the decision to lay off the attendance workers. Her office had to develop a new strategy for attendance, which became attendance policy 5133. A student support team (SST) was developed as part of the attendance policy. The SST consists of a principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, a nurse, and two teachers. The school resource officers are police officers. Each high school has one school resource officer. The elementary schools share school resource officers. Participation on the SST is voluntary but assigned by the principal. If a student has ten or more absences a pre-judicial meeting is scheduled with the court representative. Court representatives are representatives of the district. Sa'id does not know if there have been more court cases regarding attendance since the new system has been in place; however, the court representatives are in court every Tuesday. If a student is chronically absent—over ten absences in a school year—the SST is activated. At this time no one's going out looking for the students who are absent. Chronic absenteeism is a significant problem especially in the NPS high schools.

Sa'id helped create the attendance policy 5133, which was reviewed by the legal department. It was approved by the school advisory board then approved by the School Board by Resolution. Once policy 5133 was approved training in the policy was provided to principals, vice principals, support teams, and students.

On October 15 of every year NPS must provide the State with a rooster of all of its students.

Nafisah Hunter

Nafisah Hunter (Hunter) is the manager of non-instructional staff for NPS. She has been in that position for the past year. She was previously a human resources coordinator for non-instructional employees. In 2013 she became aware that there would be layoffs. She was at a meeting where it was announced that there would be layoffs due to the budget and provided with a list of names of employees impacted. She was not involved in determining who gets laid off. She submitted the layoff plan to civil service on May 24, 2013. She did not participate in budgetary discussions. The abolition of positions was for cost savings and efficiency.

A forty-five-day notice of layoffs was sent to all employees. Individual notices were sent to employees who were impacted. She met with the unions regarding the layoffs on April 24, 2013. This meeting was to inform the unions of the layoffs. The Civil Service Commission approved the layoff plan. Once the approval was received, the impacted employees were notified that either they are laid off or of their bumping rights.

She is not familiar with the job listing of attendance manager and not aware of the existence of the position. Civil Service Commission is given the reason for the layoffs. It has a thirty-day review period. Civil Service Commission does not request documents during this review period.

Valerie Wilson

Valerie Wilson (Wilson) has been the business manager for NPS since December 2010. Her duties include some budget functions. The budget process begins in December for the next school year. NPS looks at expenses and revenues to project the increasing cost for the next school year. A preliminary budget is filed in the first week of March and the final budget is filed in the first week of April. When determining the budget NPS looks at costs for the next school year and where they can create efficiency and economy. Wilson assisted in putting the 2013-2014 budget together.

The revenue is assumed when formulating the budget. There was no assumption of additional State aid. NPS looked for other sources of revenue. They also looked at what was mandated and what programs and staffing could be reduced to close the gap. The budget must be balanced. The superintendent of NPS oversees the priorities that are reflected in the budget.

The layoff plan was not final at the time of the meeting with the unions on April 24, 2013. NPS is required to meet with unions when there are going to be layoffs. It discusses the parameters of the layoffs with the unions. The unions can ask questions or suggest alternatives to the layoff. NPS knew the positions where the layoffs would occur but not the individuals that would be laid off. There is a very low number of students who go to school in the district but live out of district. The superintendent determines what positions will have layoffs. Civil Service Commission determines who will be laid off.

Vanessa Rodriguez

Vanessa Rodriguez is NPS chief talent officer. She began in January 2013. She oversees payroll, human resources, health department, benefits, educational efficiency, staffing and recruitment. She works with each department to meet goals. Human Resources implements layoffs. There was a notification meeting with the union regarding the layoff on April 23, 2013. John Abeigon and Michael Maillaro represented

the some of the union. The meeting was contentious and Abeigon and Maillaro left the meeting.

There was no alternative to the layoff. All other options were exhausted. NPS had a 56 million dollar budget gap due in part to the increase in charter school enrollment and the decrease in non-charter school enrollment. Student enrolment in NPS is decreasing yearly. Rodriguez does not know if State aid has been increased to NPS. The school business administrator asked all department heads to determine which positions are critical and which are not. NPS tried to renegotiate its contracts with vendors to close the budget gap. The budget had to align with the needs of the schools. A layoff plan was sent to civil service which was approved. The attendance rate at NPS was less than sixty percent.

Rodriguez did not have any impact on the decision as to who would be laid off. She does not oversee attendance. Teachers, guidance counselors, social workers, principals, and vice principals are all involved with attendance. She does not know if any of those received a salary increase to be a part of the new attendance policy. The new attendance policy is to collaborate with security. The attendance teams are now designated by the school. The primary attendance tasks were created by people who had experience in the schools. They were designed to cover what attendance counselors did. NPS does not presently have any one designated as an attendance counselor. There are sixty-six schools in Newark.

Eric Ingold

Eric Ingold (Ingold) is the NPS executive director for safety and security. He has held that position for approximately eighteen months. He was previously a lieutenant in the Newark Police Department. When he was a police officer, if he saw a juvenile who belonged in school, he would take the juvenile to the school. He is familiar with the attendance counselor position. Rapid response officers patrol the area around the school. The security guards maintain the safety of the school. The security officers are mainly stationed at the high schools. . The Newark Police Department's role regarding truancy has not changed after the layoffs. The duties of the safety officers have

changed to a restorative effort. There are no officers or guards whose sole purpose is to look for truants. If an administrator wants to do a home visit an officer will accompany her.

Ingold does not know of anyone designated as an attendance counselor. The job description of rapid response officer and security officer does not list truant officer. Safety officer is not a civil service position. During the 2013-2014 school year there were at least twelve occasions where the Newark police were called to pick up truant students. Ingold believes that there has been a decrease in truancy since the time that he was employed by the Newark Police Department.

Abdul Rahman Saleem

Abdul Rahman Saleem (Saleem) was employed by the NPS beginning in 1982. In 1992 he became an attendance counselor. His job duties as an attendance counselor was to find out why students did not come to school; counsel students and parents, gather information for court cases and give legal notices to parties for court actions. He visited homes of students with social workers, police officers, or alone. He interacted with Welfare and DYFS as part of his job. There were four yellow busses used by the attendance counselors to look for students.

Due to the layoff he was transferred to the position of security guard, which he did for one year. After he was transferred to the position of security guard, no one held the title of attendance counselor. There was a position of specialist attendance manager that remained vacant. Most of the security guards counseled the students, but that was not part of their duties.

When he was an attendance counselor he dealt with Newark special police. Newark special police are police officers who deal with schools and restaurants. Now the rapid response officers work with the Newark special police. After he was laid off the special police continued to do truancy work. The special police were in the schools doing security work. Rapid response officers broke up fights in the schools and responded to intruders.

When Saleem was an attendance counselor he went to court as well as handing court notices to parents. He did security while he was an attendance counselor because security would not always be present. The supervisors of the attendance counselors' were located at Camden Middle School. The four busses were for the four areas of Newark. The bus could have fifty to sixty truant students on them per day. There were approximately 350-700 truant students per week. The attendance counselor took the names of all of the students who were truant and kept logs. After the attendance counselors were laid off, the busses were no longer used.

Security guards are not involved with truancy. Once he was bumped to a security guard, he would see students who he knew from his time as an attendance counselor. They were hanging out on the corner. They had slipped out of school. He would see them when he was on a break. He would see the students in stores on Springfield Avenue during the mornings and afternoons.

Having reviewed the witnesses and evidence I **FIND** the following additional **FACTS**:

The total revenue for the NPS 2013 fiscal year was one billion seventeen thousand dollars. The revenue was less than expenses for the 2013-2014 school year. There was a 56.9 million dollar budget deficit. For the 2013-2014 school year State aid did not increase, there was a loss of a onetime only source of revenue and a significant increase in costs. The largest increase in expenses is payment to charter school which increased by 33.6 million dollars. Other cost increases included a 4.7 million dollar for strategic initiatives, four million dollars for educators without permanent sites (EWPS), 3 million dollars for salaries, 1.4 million dollars for construction at Barringer High School and West Side High School, and 800 thousand dollars for health benefits. The expenses exceeded revenue by 56.9 million dollars. There are approximately 279 EWPS. NPS experienced a budget deficient for the 2012-2013 fiscal year of 36.3 million dollars. In 2011-2012 there was a funding law suit where NPS received a one-time restoration of State aid that was used in the 2012-2013 school year.

State funding is based on the number of students enrolled on October 15 of the year. There is currently a moratorium from the State on increasing or decreasing funding. Enrollment in NPS has declined in the past few years. Although there are philanthropic organization which may provide funds to NPS, NPS must make a request for the funds. That request is not necessarily granted by the philanthropic organization.

Cost reductions were made in the following areas: school budgets 18.4 million dollars, central office restructuring/elimination of titles and vacancies 9.4 million dollars, portfolio changes 7.2 million dollars, reduction in non-recurring expenditures 7.1 million dollars, reduction in personal services, travel and supplies 6.6 million dollars, creation of more inclusive learning environments 6 million dollars, and efficiency increases in school operations and facilities 3.2 million dollars. The central office restructuring included layoffs. The district makes the choice of what to cut and not cut. There were supervisors, directors, and department chairs that were eliminated. Assistant superintendents were decreased from four to two. There is a reserve in elementary and high school budgets for flexibility to afford additional teachers.

The advertised recapitulation of balances shows the general operating balance of 39,309.035 dollars for 2013-2014, which is the fund balance. The fund balance is monies in excess of obligations. Each district is required to retain two percent of its budget in the fund balance. Two percent of NPS's budget is 17 million dollars. Anything over that amount is allocated to the next year. The remaining money in the fund balance was used by NPS before the gap funding was determined. The fund balance did not decrease the 56 million dollar budget deficit.

The superintendent determines what positions will have layoffs. Civil Service Commission determines who will be laid off. The district met with the unions on April 23, 2013, where it was announced that there would be layoffs due to the budget. Hunter submitted the layoff plan to civil service on May 24, 2013. 145 people were laid off. Temporary employees were terminated. A forty-five-day notice of layoffs was sent to all employees. Individual notices were sent to employees who were impacted. Hunter sent an email to the Civil Service Commission revising the layoff plan on May 23, 2013. The Civil Service Commission approved the layoff plan. Once the approval

was received the impacted employees were notified that either they are laid off or of their bumping rights.

There was no hiring freeze for teachers or crucial staff positions in the 2013-2014 school year. The EWPS are teachers that are not in a budgeted position in the district. They are budgeted out of the central office line. These teachers are all in classrooms, either as a teacher or co-teacher. One reason for EWPS is the decline in enrollment. Teachers apply for their positions. They are interviewed. If they are not chosen to retain their position or do no choose to be interviewed they become EWPS. NPS is consistently recruiting and hiring and staffing in the hard-to-staff areas of math, science, and bilingual.

The position of attendance counselor was abolished. Attendance counselors job was to report to the school and obtain form of absences then contact the families or make house visits. They would make referrals for families to mitigate obstacles. The attendance counselors who were in the truant section would attempt to locate the students and bring them to the school. If the student would not come to school it was referred to a court representative. One of the core functions of attendance counselors was home visitation. In addition that had community based contacts that would help them find students. They asked local business not to sell to students during school hours. Attendance counselors also found out if students living out of district were attending NPS. Prior to the abolition of the position NPS had four busses that the attendance counselors used to look for students. There were approximately 350-700 students truant weekly. The SST now has some of the responsibilities that the attendance counselors had. The Civil Service code number for attendance counselors is 00829. No one in the district is working under that code number.

Sa'id did a listening tour meeting with staff principals, students, and parents regarding attendance regarding attendance. She met with attendance counselors and court representatives on her listening tour. The listening tour consisted of twenty to twenty-five meetings. There were concerns regarding who would physically look for the students and bring them to the school. After the listening tour the attendance policy 5113 was developed. The attendance policy 5133 was matched to the State

attendance policy. If a student is absent one to four days, the teacher or power school clerk contacts the parent. Power school is a system of records for the district. The power school clerk is the school clerk. Teachers enter attendance in power school teacher program. A warning notice is mailed to the parent by the power school clerk. A legal notice is also sent to the parent by the legal representative. If a student is absent five to nine days, the SST notices the parent either verbally or by letter at least three times to schedule a meeting. The SST consists of a principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, a nurse, and two teachers. Members of the SST do not receive any additional monetary compensation. At this time no one from the SST goes out looking for students who are absent.

NPS has 400 security guards, twelve rapid response officers, and eleven safety officers. Safety officers have the same powers as police officers. Rapid response and safety officers address truancy. Rapid response officers patrol the area around the school. The security guards maintain the safety of the school. The security officers are mainly stationed at the high schools. A rapid response officer may see a student who is truant while patrolling, but is not tasked with looking for truants. School resource officers are also called safety officers. Security officers and rapid response officers do one component of the job of attendance counselors, but that is not there sole job function. There is no rapid response officer, security officer, or security guard whose sole responsibility is to look for truant students. Rapid response officers do not keep truancy records or maintain a daily log. Newark Police have on approximately twelve occasions picked up truant students and brought them to school during the 2013-2014 school year.

Sixty percent of the NPS high school students are absent more than ten times during the school year. There is a high rate of absenteeism in the district. NPS wanted to move away from a punitive discipline to a restorative approach.

## CONCLUSIONS OF LAW

One of the issues in this matter is whether NPS violated N.J.S.A. 18A:38-32 by abolishing the position of attendance counselor or did the creation of the SST comply with the statute. N.J.S.A. 18A:38-32 provides:

> For the purpose of enforcing the provisions of this article, the board of education of each school district and the board of education of each county vocational school shall appoint a suitable number of qualified persons to be designated as attendance officers, and shall fix their compensation; except that if a county attendance officer or officers are appointed for any county, any district board of education of such county may be exempt from the appointment of a local attendance officer if such exemption is approved by the county superintendent. Each board shall make rules not inconsistent with the provisions of this article and subject to the approval of the commissioner, for the government of the attendance officers.

The duties of an attendance officer are stated in N.J.S.A. 18A:38-29, which provides:

> The attendance officer shall examine into all violations of this article, shall warn any child violating any of the provisions of this article and the parent, guardian or other person having charge and control of the child of the consequences of the violation if persisted in, and shall notify such person in writing to cause the child to attend school within five days from the date on which notice is served, and regularly thereafter. The attendance officer shall have full police power to enforce the provisions of this article and may arrest without warrant any vagrant child or habitual truant or any child who is habitually incorrigible or who is vicious or immoral in conduct or illegally absent from school.

NPS created the SST after it abolished the position of attendance counselor. The SST is comprised of the following: a principal or vice principal, social worker, guidance counselor, parent coordinator; school resource officer, nurse, and two teachers. All of the members of SST are there voluntarily. They are not paid to be members of the SST. Instead of the attendance officer warning the child, parent, or guardian of persistent absences, the power school clerk mails an initial notice. The SST

sends a notice to the parent if a child is absent between five to nine days. The only people in the SST who have the authority to make an arrest are the security officers. However, the eleven security officers are stationed at the high schools.

N.J.S.A. 18A:38-28 provides:

> Any attendance officer, who shall find any child between six and 16 years of age, who is a truant from school, shall take the child and deliver him to the parent, guardian or other person having charge and control of the child, or to the teacher of the school which such child is lawfully required to attend.
>
> [Emphasis added.]

The testimony in this matter has shown that there is no one in the NPS who is looking for truant students since the attendance officers were laid off. The rapid response officers may find truant students, but that is incidental to performing their duties of patrolling the area of the school. There was no testimony as to how specifically the security officers are involved in locating truant students. I do not interpret the word "find" in the statue to mean that if an attendance officer, or in this case a rapid resource officer, happens upon a truant student in the course his other duties. I interpret it to mean that when an attendance officer is looking for truant students and finds one.

I therefore **CONCLUDE** that NPS violated N.J.S.A. 18A:38-28, N.J.S.A. 18A:38-29, and N.J.S.A. 18A:32-32 when it abolished the position of attendance counselor.

NPS argues that the petition of Newark Teachers Union was filed untimely. N.J.A.C. 6A:3-1.2(i) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order

> provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In this matter NPS has violated N.J.S.A. 18A:38-32 by abolishing the position of attendance counselor that is statutorily mandated. In the case of Bloomfield Education Association on Behalf of The Child Study Team v. Board of Education of the Township of Bloomfield, EDU 18705-13, Order (May 1, 2014), <http://njlaw.rutgers.edu/collections/oal/> a similar issue arose. In that matter the board laid off the child study team and contracted their positions to a third party. The Board filed a motion that the petition be dismissed as untimely in accordance with the requirements of N.J.A.C. 6A:3-1.3(i). In that case Judge Bass stated that:

> This case presents one of those rare circumstances when relaxation of the ninety-day rule is appropriate under N.J.A.C. 6A:3-1.16. This extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved beyond that of concern to the parties, Portee v. Board of Education of Newark, 94 N.J.A.R.2d (Edu) 381,384. Here the alleged actions of the Board in using Delta-t to provide child study team services will affect students and staff alike.

In this matter the abolition of the positions is a matter of significant public interest. The public is entitled to know whether the abolition of the position of attendance officer and replacing them with SST where there is no one whose specific duty is to go out and pick up truant students is consistent with law and regulation.

The matter of timeliness was first argued in NPS closing submissions dated December 7, 2015. This matter was filed at the OAL on December 17, 2013. NPS's Answer in the NTU matter was filed on December 12, 2013. It did not list the petition being untimely filed as an affirmative defense. During the predominant interest motion and oral argument there was no mention of the petition being untimely filed.

I **CONCLUDE** that this case presents one of those rare circumstances when relaxation of the ninety-day rule is appropriate under N.J.A.C. 6A:3-1.16.

An appointing authority may institute layoff actions for reasons of economy, efficiency, or other related reasons. N.J.A.C. 4A:8-1.1(a). On appeal from a layoff, the issue to be determined is limited to whether the appointing authority's action was motivated by good-faith considerations of economy or efficiency in effectuating the layoff.

The burden of proof is on the appellant to demonstrate a contrary or bad-faith motivation. N.J.S.A. 11A:8-4; N.J.A.C. 4A:2-1.4(c); N.J.A.C. 4A:8-2.6(c). Where it is shown that a layoff action was motivated by a bona fide desire or necessity to effect economy, the action taken is presumed to be in good faith. Greco v. Smith, 40 N.J. Super. 182, 189 (App. Div. 1956); Sieper v. Dep't of Civil Serv., 21 N.J. Super. 583, 586 (App. Div. 1952). Further,

> [t]he mere fact that the removal of an individual from the municipal payroll results in an economy is not the exclusive test, since such removal will always be manifested by a saving. The question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal. City of Newark v. Civil Service Commission, 112 N.J.L. 571, 574 (Sup. Ct. 1934), affirmed, 114 N.J.L. 185 (E. & A. 1935).
>
> [Greco, supra, 40 N.J. Super. at 190.]

Therefore, in proving that an appointing authority has acted in bad faith, the employee must show that the layoffs were not motivated by true considerations of economy and/or efficiency. It is not sufficient to meet the burden of proof for an employee to show that a layoff is uneconomical. Such evidence may assist the establishment of bad faith, but the employee must go further. He or she must show by sufficient proof that the layoffs resulted for reasons other than economy and efficiency. Amodio v. Civil Serv. Comm'n, 81 N.J. Super. 22 (App. Div. 1963); Chirichella v. Dep't of Civil Serv., 31 N.J. Super. 404 (App. Div. 1954); Prosecutors, Detectives and Investigators Ass'n of Essex Cty. v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30 (App. Div. 1974).

Evidence may indicate that a mixture of motives existed in connection with a layoff decision. If other motives besides economy and efficiency were involved, it makes no difference so long as the position involved was useless and its abolition was in the public interest. Pellet v. Dep't of Civil Serv., 10 N.J. Super. 52, 57 (App. Div. 1950).

It is also settled that the holder of a protected civil service position may be laid off in the interest of economy and his or her duties consolidated and assigned to others. Gianettino v. Civil Serv. Comm'n, 120 N.J.L. 531, 533 (Sup. Ct. 1938); Sieper, supra, 21 N.J. Super. at 583. It is a question of the bona fides of the action, and the burden is on the appellant to show that the action taken was in bad faith.

Other cases further define bad faith as "[g]enerally implying . . . design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." In re Afolo, CSV 4145-07, Initial Decision, (Mar. 31, 2008) (quoting Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541 (1997)), adopted, Merit Sys. Bd. (May 22, 2008), <http://njlaw.rutgers.edu/collections/oal/>. In trying to prove bad faith, the appellant has a very heavy burden to meet because bad faith is "not simply bad judgment or negligence," but the conscious doing of a wrong because of some dishonest purpose. Ibid.

Appellants other than Attendance Counselors

NPS has demonstrated that there was a 56.9 million dollar budget deficit. The majority of the budget gap comes from payments to charter schools. There was no evidence that NPS instituting charter schools solely to extinguish civil service jobs. There was substantial testimony regarding the attendance officer's duties and the SST. There was no testimony regarding any of the other positions where layoffs occurred. The notices were sent to petitioner in accordance with the civil service regulations. Petitioners have not established that the layoffs were done for reasons other than

economy and efficiency. Petitioners may believe that the layoffs are uneconomical and that other persons such as EWAP should have been laid off; however, they have not proved that NPS laid these workers off in bad faith.

Attendance Counselors

N.J.S.A. 18A:38-32 requires districts to appoint attendance officers. From the above discussion NPS violated this statue when it abolished the attendance counselors' position. Petitioners have shown that NPS by violating the above regulation acted in bad faith.

## ORDER

Based upon the foregoing, it is hereby **ORDERED** the layoff of the attendance counsellors is hereby **REVERSED**.

It is further **ORDERED** that the layoff of the seven clerk 1's, fourteen community aides school, twenty-five community aides school/teacher's aides, twenty keyboarding clerk 1's, five keyboarding clerk 2's, and nineteen teachers' aides is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF EDUCATION and the CIVIL SERVICE COMMISSION** for consideration in accordance with the procedures set forth in the Order of Consolidation and Predominant Interest.

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

In a manner consistent with the terms of said Order, this recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by

law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions" and with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2-10-16
DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 11 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## WITNESSES

For Appellants:

Abdul Rahman Saleem

For Respondents:

Nadiyah Sa'id

Nafisah Hunter

Valerie Wilson

Vanessa Rodriguez

Eric Ingold

## EXHIBITS

For Appellants:

A-1 Appellants' Demand for Answers to Interrogatories

A-2 Respondents' Answers to Appellants' Interrogatories

A-3 Respondents' Supplemental Answers to Appellants' Interrogatories

A-4 NPS 2014 Budget Hearing Document

A-5 April 12, 2013, District Layoff Plan

A-6 May 23, 2013, District Modified Layoff Plan

A-7 CSC List of Affected Layoffs

A-8 NPS Posting of Job Description – Specialist for Attendance Management

A-9 Job Description for Specialist for Attendance Management

A-10 NPS Job Description – Attendance Counselor

A-11 CSC Job Description – Attendance Counselor

A-12 CSC Job Description – Clerk 1

A-13 CSC Job Description – Keyboarding Clerk 1

A-14 CSC Job Description – Keyboarding Clerk 2

A-15 CSC Job Description – Teacher's Aide

A-16 June 4, 2013, email from Nadiyah Sa'id, re: Attendance Information Session

A-17 June 6, 2013, Attendance Listening Session

A-18 Attend Today Achieve Tomorrow – Principal Check List
A-19 Home Visitation Protocols
A-20 Attendance Feedback Session
A-21 October 15, 2013, Professional Development – Student Support Team
A-22 NPS Attendance Handbook
A-23 School Advisory Board Update
A-24 Testimony of Dr. Leonard Pugliese
A-25 Legal Notice to Parent to Send Child to School (Attendance Counselor)
A-26 Legal Notice to Parent to Send Child to School (SST Representative)
A-27 Student Support Teams

For Respondents:

R-1 Email Dated April 25, 2013, regarding Attendance Officers
R-2 Email Dated June 4, 2013, to Attendance Team
R-3 Summary of Attendance Listening Session dated June 6, 2013
R-4 Agenda for Meeting with Attendance Team
R-5 Protocols for Attendance Team
R-6 NPS File Code 5113 Attendance Policy
R-7 Resolution dated November 2013
R-8 Attendance Handbook
R-9 Power Point of Principal Training Regarding SST
R-10 Agenda for SST Training dated October 15, 2013
R-11 Home Visitation Protocols
R-12 Form 763 to Record Attendance
R-13 Legal Notice
R-14 Court Representative Summary
R-15 Letter to Civil Service Dated April 24, 2013
R-16 Email to Civil Service Dated May 23, 2013
R-17 Revised Letter to Civil Service Dated May 20, 2013
R-18 Letter from Civil Service Dated May 30, 2013
R-19 Confirmation of Layoffs
R-20 Budget
R-21 User Friendly Budget for NPS

R-22 Presentation at 2013 Budget Hearings

R-23 Budget for 2014-2015

183-16M

183-16

# State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

May 16, 2016

Bryant Lawrence Horsley, Jr., Esq.
General Counsel
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Geoffrey N. Stark, DAG
NJ Office of the Attorney General
Division of Law
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112

E.H.
1485 Bradley Avenue
Camden, NJ 08103

Re: *State-Operated School District of the City of Camden, Camden County v. C. Ann Volk, Executive County Superintendent, New Jersey State Department of Education, and E.H., on behalf of minor child, K.M.,*
*Agency Dkt. No. 371-12/14, OAL Dkt. No. EDU 6081-15*

Dear Parties:

I have reviewed the materials filed in connection with the State-Operated School District of the City of Camden's (District) Motion for Reconsideration of the Commissioner's decision, dated March 18, 2016, denying the District's motion for summary decision and remanding the matter to the Office of Administrative Law (OAL) for development of the factual record.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;

ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that the District has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. In its papers, the District argues that the Commissioner mistakenly found that the grant of summary decision in favor of the District was unsupported by the record. The District argues that the evidence that it submitted, and the facts that were deemed admitted by E.H.'s failure to file an answer, were sufficient to establish that E.H.'s home was fixed and regular. Further, the District asserts that the Commissioner erred by misapplying the summary decision standard and that it would be futile to call E.H. at a plenary hearing given her lack of participation in the proceedings. Although couched as a mistake, the District is merely expressing its disagreement with the Commissioner's March 18, 2016 decision, which does not equate to a mistake warranting reconsideration of the matter.

Accordingly, the Motion for Reconsideration is hereby DENIED.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

**Via Regular Mail**

184-16

OAL DKT. NO. EDU 5752-16
AGENCY DKT. NO. 110-4/16

| | | |
|---|---|---|
| LEGACY TREATMENT SERVICES - MARY A. DOBBINS SCHOOL, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

Dach

COMMISSIONER OF EDUCATION

Date of Decision: 5/16/16
Date of Mailing: 5/16/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 05752-16
AGENCY DKT. NO. 110-4/16

**LEGACY TREATMENT SERVICES-**
**MARY A. DOBBINS SCHOOL,**
Petitioner,
v.
**NEW JERSEY DEPARTMENT**
**OF EDUCATION,**
Respondent.

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**Vito Gagliardi**, Esq., for petitioner (Porzio, Bromberg & Newman, attorneys)

**Kyle Gruber**, Deputy Attorney General, for respondent (Robert Lougy, Acting Attorney General of New Jersey, attorney)

BEFORE **ROBERT BINGHAM II**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Legacy Treatment Services-Mary A. Dobbins School (Legacy) appeals the decision of respondent New Jersey Department of Education (DOE) denying Legacy's request to increase the tentative tuition rate for the 2016-2017 school year. On April 13, 2016, Legacy filed an amended petition of appeal with the Commissioner of

Education, along with an application for emergent relief. The entire matter was transmitted to the Office of Administrative Law, where it was filed on April 15, 2016, and scheduled for an emergent oral argument on April 29, 2016. The parties filed written briefs with proposed exhibits, and a telephone conference was held on April 27, 2016. On April 29, 2016, oral argument was heard and the record for petitioner's emergent relief application was closed.

The issue presented is whether Legacy is entitled to emergent relief granting it an increase in the tentative tuition rate for the 2016-17 school year because DOE acted in an arbitrary, capricious, or unreasonable manner in denying the request for an increase.

## FACTUAL DISCUSSION

Legacy is a certified private school for students with disabilities ("PSSD"). Respondent's Brief, at 3. As such, Legacy charges tuition fees to school districts that send disabled students to Legacy for education. Id. DOE decides the tuition rates for PSSDs, including Legacy, under procedures set forth in governing statutes and regulations. This matter arises from DOE's decision not to increase Legacy's tentative tuition rate for the 2016-17 school year. Petitioner's Brief, at 1.

By way of background, the DOE Office of School Finance ("OSF") annually sets a maximum tentative tuition rate for each PSSD based on audited financial statements of the prior year provided by the PSSD. Id; N.J.A.C. 6A:23A-18.2(i). These rates are generally established in December or January of the preceding year. Id. The DOE released the 2016-17 tentative tuition rates for PSSDs (including Legacy) in December 2015 based on 2014-15 audited financial statements. Id. at 3-4.

Once the maximum tentative tuition rates for PSSDs are published, the sending districts enter into contractual agreements establishing a tentative tuition rate, which cannot exceed the maximum rate set by the OSF. Id. at 4; citing N.J.A.C. 6A:23A-18.2(h). The tentative tuition rate cannot be changed during the school year. Id. The contract is written according to a "mandated tuition contract form prescribed by the

Commissioner and shall be executed prior to the enrollment of a student." Id. The PSSD must provide the OSF with audited financial statements by November for the prior school year ending on June 30. Id. The school must ensure that those financial statements "reflect the certified actual cost(s) per student [("CACPS")]." Id; quoting N.J.A.C. 6A: 23A-18.9(c). The actual final tuition rate charge by the PSSD must be less than or equal to the CACPS. Id; N.J.A.C. 6A: 23A-18.9(d).

After the OSF audit is complete, the PSSD either bills the sending school district for the difference between the approved final tuition rate and the tentative tuition rate or, if the final tuition rate is lower than the tentative tuition rate that was already paid, the PSSD issues a refund to the sending district. Id. at 4-5; N.J.A.C. 6A:23A-18.2(1).

Here, Legacy's expenses totaled $5,324,534 for the 2012-13 school year. Petitioner Certification of Debra Vincent, pg. 1, para. 5; Petitioner's Brief, at 2. During the 2013-14 school year, Legacy's expenses were $5,315,670. Petitioner Certification of Debra Vincent, pg. 2, para. 8.

The tentative tuition rate for the 2014-15 school year was $326.50 and Legacy received $6,759,203 in tuition from sending districts. Respondent's Brief, at 5. Legacy's total expenses for 2014-15 were $5,231,707, so Legacy had to refund $1,569,117 to the sending districts for that year. Id. Thus, Legacy's final tuition rate was $250.65. Id. But since 2006-07, Legacy's tentative tuition rate had not exceeded the final tuition rate by more than $5.00 in any year, until the 2014-15 school year. Petitioner's Exhibit A, Comparison of Tentative and Final Tuition Rates.

The 2014-15 school year tuition-rate disparity occurred when a merger between Union Association of the Children's Home and the Lester A. Drenk Behavioral Health Center created Legacy Treatment Services. Petitioner's Brief, at 2. The merger resulted in Legacy's average enrollment jumping from approximately 95 students in September to 113 students by June 2015. Id. at 3. Tuition from these additional students increased Legacy's revenue for the 2014-15 year. Id. However, because many of the students arrived in the last few months of the school year, Legacy did not expend the additional revenue by the end of the school year. Id.

The student enrollment returned to approximately 91 for the 2015-16 school year. Id. But the tentative tuition rate for the 2016-17 year was based on the expenses at the end of the 2014-15 year, which totaled $5,231,707. Id. Legacy claims that the 2014-15 figure is too low because it does not take into account the fact that Legacy received unexpended revenues at the end of the school year from the additional students, Id. at 4, and it did not include the salaries required to fill open positions with full-time teachers. Id. at 3.

The DOE calculated Legacy's 2016-17 tentative tuition rate to be $262.82 based on "the school's actual cost per pupil in 2014-2015, indexed by four percent, plus the permitted surcharge or public school restricted working capital fund." Petitioner's Exhibit E, Denial Letter; Respondent's Brief, at 6; N.J.A.C. 6A:23A-18.2(i).[1] Legacy ended 2014-15 with $829,000 in its working capital fund. Respondent's Brief, at 6. Legacy projects its costs for the 2016-17 school year at $6,587,454, so the tentative tuition rate of $262.82 would leave it with a $1,289,003 shortfall. Petitioner Certification of Debra Vincent, pg. 6, para. 42.

On February 5, 2016, Legacy filed an application requesting a higher tentative tuition rate ($320.20) for the 2016-17 school year. On February 25, 2016, the DOE denied Legacy's request, stating that Legacy had not demonstrated a hardship necessitating an increased tentative tuition rate. Respondent's Brief, at 6. This appeal and request for emergent relief followed.

## LEGAL ANALYSIS AND CONCLUSION

According to N.J.A.C. 6A:3-1.6, an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;

[1] The final 2014-15 tuition rate was $250.65.

> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b); Crowe v. DeGoia, 90 N.J. 126 (1982).]

1. Will Legacy suffer irreparable harm if the tentative tuition rate is not increased?

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioners. Crowe, supra, 90 N.J. at 132-332. Harm is irreparable when it cannot be addressed with monetary damages. Id. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

In assessing irreparable harm, the impact on the public interest should be considered. Parks v. Commerce Bank, N.A., 377 N.J. Super. 378, 387 (App. Div. 2005). "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Crowe, supra, 90 N.J. at 133. The threatened loss of an enterprise constitutes irreparable harm sufficient to justify the issuance of a preliminary injunction. Beilowitz v. GMC, 233 F. Supp. 2d 631, 644 (D.N.J. 2002).

The prospect of future harm cannot be purely speculative. Peregoy v. Peregoy, 358 N.J. Super. 179, 203-204 (App. Div. 2003). "Concerns that 'may' lead to irreparable harm are not enough." Id. at 203. In Bd. of Educ. of the Borough of Englewood Cliffs v. Bd. of Educ. of the City of Englewood, EDU 1086-86, State Bd. of Educ., Decision on Motions (June 3, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>, the Englewood Board sought $6 million from the Commissioner of Education to cover a budgetary shortfall. Bd. of Educ. of the Borough of Englewood Cliffs v. Bd. of Educ. of the City of Englewood, EDU 1086-86, State Bd. of Educ., Decision on Motions (June 3, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. The Englewood Board argued that without the funding it would be left without top administrators, numerous programs would fail, 318 students would be "dispossessed of their education," and the first

graduating class would be "denied the opportunity to complete their program." Id. In denying the emergency relief, the State held that Englewood "has failed to demonstrate that it will suffer irreparable harm if it is not afforded the relief it seeks." Id. The State Board held that the "scenario presented" by Englewood was "speculative" and that nothing showed that Englewood would be irreparably harmed without emergency funding. Id.

Here, Legacy claims that it will suffer irreparable harm if the tentative tuition rate is not increased because it will "cease to exist" if the rate of $262.82 takes effect. Petitioner's Brief, at 6. It argues that this tuition rate will result in a $1,300,000 shortfall, which will prevent Legacy from meeting its operational costs. Id.

However, under N.J.A.C. 6A:23A-18.2(i), the 2016-17 tentative tuition rate was based on the final actual cost per student in the 2014-15 school year, which was $250.65. While Legacy claims that $262.82 is insufficient because it will incur more than $6,000,000 in costs for the 2016-17 school year, in its projected expenses, Legacy appears to substantially align with the 2015-16 budget. And the final actual cost per student for the 2015-16 school year is not yet available.[2] As discussed above, Legacy's expenses for 2012-13 were $5,324,532; in 2013-14 they were $5,315,669; and in 2014-15 they were $5,231,707. The tentative tuition rate of $262.82 would produce about $5,300,000 in gross tuition. Despite the fact that the tentative rate is the same as it was in 2007, it is only speculative rather than certain that Legacy would suffer irreparable harm if the tuition rate is not increased.

As for immediacy, Legacy urges that binding contracts with the sending districts for the tentative tuition rate must be finalized "now, in the Spring." Without an increased rate, it is forced into an imminent contractual term that will result in its demise sometime during the 2016-17 school year, as the shortfall would render it unable to pay its operational costs. As stated above, the contract "shall be executed prior to the

[2] It is noteworthy that an increase in Legacy's projected expenses from the 2015-16 school year to the 2016-17 school year totaled $132,162, solely in the area of salary, pension, and benefits for teachers and other professional staff (R-B at 1.). Yet student enrollment had returned to an "average" level in the 2015-16 school year.

enrollment of a student." N.J.A.C. 6A:23A-18.2(h). What is more, Legacy had $829,000 in its working capital fund, as of the end of the 2014-15 school year. Further, N.J.A.C. 6A:23A-18-2(h)(3)(i)(1) states that "[a] sending district board of education shall pay the approved private school for students with disabilities no later than the first of each month prior to the services being rendered." N.J.A.C. 6A:23A-18-2(h)(3)(i)(1). And Legacy does not even begin payments for the 2016-17 year until July 1, 2016, at the earliest. Therefore, Legacy can presumably use its working capital fund to operate in July and August 2016, and sending districts will begin payments in or about September or October 2016. Though no consolation to Legacy under its own forecast, it must be noted that Legacy would be reimbursed for any negative difference between the final tuition rate and the tentative tuition rate, because under N.J.A.C. 6A:23A-18-2(m):

> [if] the tentative tuition rate for the school year established by written contractual agreement pursuant to (h) above is less than the final tuition rate charged for the school year, the [PSSD] may charge each sending district board of education all or part of the difference owed, but the same final tuition rate shall be charged to each sending district board of education. The sending district board of education shall pay the difference on a mutually agreed upon date during the second school year following the year for which the actual cost per student is certified.
>
> [N.J.A.C. 6A:23A-18-2(m).]

So, the harm is not irreparable unless Legacy actually ceases to exist. On this record, it is uncertain when, not to mention whether, Legacy would have to cease operations. Legacy has not sufficiently provided clear proof that its enterprise is actually or imminently facing nonexistence by the DOE not increasing the tentative tuition rate now. Therefore, it has not satisfied the first prong of the test for emergent relief.

2. Is the legal right underlying Legacy's claim is settled?

Legacy claims that the legal right underlying its claim to an increased tentative tuition rate is well settled because N.J.A.C. 6A:23A-18.2(j) allows for these rates to be increased when need is demonstrated. "The Commissioner may approve a higher

tentative tuition rate for any year in which the PSSD can prove to the satisfaction of the Commissioner that the maximum tentative tuition rate for the year is not adequate and would cause an undue financial hardship on the private school." Id.

Although Legacy has a right to request a tentative tuition rate increase, it does not have a legal right to an automatically increased tentative tuition rate under N.J.A.C. 6A:23A-18.2(j). This regulation allows for the Commissioner to exercise discretion as to whether the sending school districts must pay a higher tuition rate to begin a school year. As discussed in the following section, an agency's determination will only be overturned if it was arbitrary, capricious, or unreasonable. See Pineland Learning Ctr. v. New Jersey Dep't of Educ., Div. of Admin. And Fin., EDU 138-14, Comm'r (March 24, 2014); Matter of Visiting Nurse Ass'n of Sussex Cnty, Inc., 302 N.J. Super. 85, 94 (App. Div. 1997). There appears to be little precedent for what constitutes an arbitrary, capricious, or unreasonable decision to deny a PSSD's request for an increased tentative tuition rate for financial hardship. Therefore, the legal right underlying Legacy's claim to a tuition rate increase is not well settled and Legacy has failed to satisfy the second prong required for emergent relief.

3. Is Legacy likely to prevail on the merits of its underlying claim that the DOE acted in an arbitrary, capricious, or unreasonable manner when it denied Legacy's request for an increased tentative tuition rate?

Legacy claims that the DOE's denial of its request to increase the tentative tuition rate for the 2016-17 school year was arbitrary, capricious, or unreasonable because the DOE did not give any basis for its decision in the denial and no school has been granted a tentative tuition rate increase in years, thus evidencing a blanket policy to deny these requests. Petitioner's Brief, at 7-8. Legacy also argues that it is likely to succeed on the merits of its claim because the DOE has depressed the tentative tuition rates for PSSDs by imposing a spending growth limitation of four percent rather than five percent as provided in N.J.A.C. 6A:23A-18.2(i)(1); which states:

> The maximum tentative tuition rate per student shall equal the product of the audited actual cost per student for the school year prior to the current school year inflated by twice the spending growth limitation of 2.5 percent *and any*

> school year prior to the current school year inflated by twice the spending growth limitation of 2.5 percent *and any applicable change to this percentage identified in N.J.S.A. 18A:7F-5.d or the CPI, whichever is greater.*
>
> [N.J.A.C. 6A:23A-18.2(i)(1), emphasis added. ]

A petitioner bears the burden of demonstrating that the DOE's determination to restrict its tuition rates was arbitrary, capricious or unreasonable. Titusville Acad., Inc. v. N.J. Dep't of Educ., EWR 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007) <http://njlaw.rutgers.edu/collections/oal/html/initial/edu00651-06_1.html>; See Pineland Learning Ctr. v. New Jersey Dep't of Educ., Div. of Admin. and Fin., EDU 138-14, Comm'r (March 24, 2014).

When determining whether an agency acted in an arbitrary, capricious, or unreasonable manner, the court must examine:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Lipman v. Rutgers-State University of New Jersey, 329 N.J. Super. 433, 441 (App. Div. 2000).]

Under N.J.A.C. 6A:23A-18.2(j), "[t]he Commissioner may approve a higher tentative tuition rate for any year in which the PSSD can prove to the satisfaction of the Commissioner that the maximum tentative tuition rate for the year is not adequate and would cause an undue financial hardship on the private school." N.J.A.C. 6A:23A-18.2(j).

Here, the DOE based its decision for the 2016-17 tentative tuition rate on the actual spending for the 2014-15 school year. The DOE considers each application for a tentative tuition rate increase individually on its own merits. Respondent's Sadler-

Williams Certification, pg. 4, para. 20. When considering Legacy's request to increase the tentative tuition rate, the DOE reviewed Legacy's actual spending for the 2014-15 school year, its actual expenditures for the 2012-13 and 2013-14 school years, and Legacy's estimated spending for the 2015-16 and 2016-17 school years. Id. at pg. 3-4, para. 11 and 14-16.[3]

The 2014-15 expenses, along with the 2012-13 and the 2013-14 school years expenses showed that Legacy's expenses were typically about $5,300,000. The DOE also observed that Legacy had $829,334 in working capital at the end of the 2014-15 school year. In its claim of financial hardship, Legacy projected that it would require over $6,500,000 to operate its school for the 2016-17 school year. However, the DOE determined that Legacy did not submit sufficient evidence showing that it would have $6,500,000 in expenses during the 2016-17 school year. The DOE rejected Legacy's request for an increase to the tentative tuition rate based on Legacy's actual expenses in 2014-15, which were in line with its expenses for previous school years.

Legacy argues that the fact that no PSSD's request for an increase to the tentative tuition rate has been granted in over six years shows that the DOE has a "rubber stamp" denial process and does not analyze each request on its own merits. However, this circumstantial evidence is insufficient to rebut the Sadler-Williams Certification, and show that the DOE acted in an arbitrary, capricious, or unreasonable manner. There may be a variety of reasons tentative tuition rate increases may be denied and there is no evidence submitted about how many requests are received, why they are denied, or the consequences of the denials. So, Legacy has not shown that the DOE actually acted in an arbitrary, capricious, or unreasonable manner by denying its request for an increased tentative tuition rate due to a blanket policy of denying such requests.

[3] As referenced above, it is noteworthy that Legacy's twelve-month budget comparison for school years 2015-16 and 2016-17 (R-B) indicates that the only area of increase in expenditures was salaries, pensions, and benefits for special education instruction and professional staff, in the amount of $132,268, but student enrollment had returned to its "typical average" in 2015 after an influx of students and need for increased staff at the end of 2014-15.

Legacy also asserts that the DOE has depressed tuition rates by imposing a spending growth limitation below the five percent required by N.J.A.C. 6A:23A-18.2(i)(1). However, this regulation does allow for the spending growth limitation of five percent to be changed under certain circumstances. To justify the applied limitation of four percent, DOE cites N.J.S.A. 18A:7F-5.d and N.J.S.A. 18A:7F-38, but does not specifically describe its methodology in applying the four percent spending growth limitation. Legacy argues that the first statute does not authorize DOE to impose a four -percent index statewide, and the relevance of the latter is similarly unclear. And, even if those statutes did provide authority for a four-percent limitation, they lack relevance because DOE's denial letter, dated February 25, 2016, clearly indicates its reliance only upon the single regulation, "N.J.A.C. 6A:23A-18.2(i)" [sic]. "There is no question that the statutes respondent stumbled upon in preparation for oral argument today were not the basis for the DOE's denial of Legacy's tuition rate increase in February." Petitioner's Supplemental Brief, at 5. According to Legacy, any belated change of authority by DOE runs afoul of the formal rulemaking process, in violation of Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984) and N.J.S.A. 52:14B-2.

First, it must be noted that the pertinent regulation, N.J.A.C. 6A:23A-18.2(i)(1), specifically references N.J.S.A. 18A:7F-5.d, which in turn cites to N.J.S.A. 18A:7F-38. Second, without development of evidence on the record at a plenary hearing regarding DOE's methodology and its calculation of the four-percent limitation, including application of the statutes cited, it is unclear whether DOE appropriately applied the four-percent spending growth limitation.[4] Therefore, Legacy may succeed in its claim that the reduction of the spending growth limitation from five percent to four percent was arbitrary, capricious, or unreasonable. However, despite a possibility that Legacy may ultimately prevail on this claim, Legacy has not quite met the high burden required for this element for emergent relief, the *likelihood* of success in showing the four percent limitation was arbitrary, capricious, or unreasonable.

[4] The DOE contends that the one-percent differential is of no significant consequence, given Legacy's projections.

4. When the equities and interests of the parties are balanced, will Legacy suffer greater harm than the DOE if the requested relief is not granted?

Legacy claims that it will suffer a greater harm if emergent relief is not granted because it will be forced to close and its students' educations will be threatened. Petitioner's Brief, at 9. The DOE claims that Legacy has not shown any good cause for why it estimates an approximately $1,300,000 budget increase for the 2016-17 school year. DOE also asserts that evaluating budgets for tentative tuition rates based on projections rather than actual past tuition rates would result in awarding high rates to all PSSDs with little evidence of necessity. Respondent's Brief, at 18-19. Also, the DOE argues that awarding higher tentative tuition rates would burden the sending school districts who are the source of the funding and should not be required to pay higher tuition rates than necessary. Id.

If the tentative tuition rate ends up being less than the final tuition rate charged, the PSSD may charge the sending school districts for the difference. N.J.A.C. 6A:23A-18-2(m). The sending school district must pay the difference during the second school year after the cost is certified. Id.

Here, if the tentative tuition rate is less than Legacy's final tuition rate, Legacy will be reimbursed for the difference. While Legacy claims that it will not be able to remain open long enough to receive the reimbursement, it has not produced evidence of when it expects to become insolvent based on its projections. Legacy's own projections show that it will need a higher tuition rate, but after considering Legacy's past expenses, the DOE determined that the expenses for the 2016-17 school year will be lower than Legacy's projections. As long as Legacy remains open, it will not suffer irreparable harm and the students' education will not be threatened.

If the DOE is forced to increase tentative tuition rates based on each PSSD's projections, it will be forcing sending school districts to pay higher tuition rates than may be necessary. This would be a large burden to put on school districts that are undoubtedly constrained by their own budgetary concerns. The DOE will likely suffer a greater harm than Legacy, so long as Legacy is not forced to close, because Legacy

can be reimbursed if its final tuition rate exceeds its tentative tuition rate. If the DOE has to base its tentative tuition rates on projections, then it will be forced to approve higher tuition rates than may be necessary. However, if Legacy can show conclusively that it will be forced to close and that its students' right to an education would be threatened without a rate increase, the burden on the DOE would be outweighed by the harm to Legacy. Thus, the balancing of the interests depends on the likelihood that Legacy will be forced to close without a tentative tuition rate increase for the 2016-17 school year.

Under N.J.A.C. 6A:3-1.6(b) and Crowe, all four criteria for emergent relief must be sustained. Based upon all of the above, I **CONCLUDE** that petitioner has not met all four of the applicable criteria for emergent relief, because Legacy has not shown that: (1) it will suffer immediate irreparable harm; (2) the legal right underlying its claim is well-settled, (3) it will be successful on the merits by proving DOE acted arbitrarily, capriciously, or unreasonably; and (4) the balance of hardships weighs in its favor. I therefore **CONCLUDE** that emergent relief in this matter must be denied.

## ORDER

Therefore, it is hereby **ORDERED** that petitioner's request for emergent relief is hereby **DENIED**.

This Order disposes of only the issues raised in petitioner's application for emergent relief.

The matter will be scheduled for a telephone prehearing in the near future regarding the plenary hearing. Notices will be sent to the parties under separate cover.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 2, 2016
DATE

**ROBERT BINGHAM II**, ALJ

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## APPENDIX

## LIST OF EXHIBITS

**For Petitioner:**

P-A Mary A. Dobbins School, Chart Comparison of Tentative and Final Tuition Rates, 2006-2007 through 2016-2017 (1 page)

P-B Average Student Enrollment Chart for 2014-2015 and 2015-2016 School Years (1 page)

P-C Mary A. Dobbins School of Legacy Treatment Service, Inc., Statement of Expenditures by Line Item for the Fiscal Years Ended June 30, 2014 through June 30, 2017 (5 pages)

P-D Mary A. Dobbins School Legacy Treatment Services, Inc., Burlington County New Jersey Report of Audit for the Fiscal Year Ended June 30, 2015 (63 pages)

P-E Denial letter, dated February 25, 2016, addressed to Mr. Roy Leitstein, Executive Director from Michael Minlin, Director (1 page)

**For Respondent:**

R-A February 5, 2016, letter to Ms. Elise Sadler-Williams from Betty H. Garrison, Chief Financial Officer (2 pages)

R-B Private Schools for Students with Disabilities, Request for a Higher Tentative Per Diem Tuition Rate, 12 Month Budget Comparison, Current 2015-2016 Budget and Projected 2016-2017 Budget (30 pages)

185-16

OAL DKT. NO. EDU 05044-16
AGENCY DKT. NO. 100-4/16

| | | |
|---|---|---|
| J.L., on behalf of minor child, T.D., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON SUPPLEMENTAL |
| BOARD OF TRUSTEES OF THE NORTH STAR ACADEMY CHARTER SCHOOL, ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

This matter comes to the Commissioner as a Supplemental Order on a Motion for Emergent Relief. The record of this matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.* There is no provision in *N.J.A.C.* 1:1-18.4 for parties to file exceptions in emergent matters, so the exceptions filed by the North Star Academy Charter School Board of Trustees (Board) on May 6, 2016 will not be considered by the Commissioner.

By decision dated May 3, 2016, the Commissioner granted emergent relief to petitioner, reversing the continued suspension of T.D. from March 22, 2016 to May 20, 2016 and directing the Board to permit T.D. to return to school. It appears from the ALJ's Order that, following the Commissioner's decision, the Board sought to return T.D. to a different campus in the North Star district rather than the North Star West Side Park Middle School, which is the school she previously attended. Upon holding a telephone status conference on May 5, 2016 at the request of petitioner, the ALJ issued a Supplemental Order on the Motion for Emergent Relief, in which he ordered that the Board return T.D. to the West Side Park Middle School campus of the North Star Academy.

* The Commissioner was not provided with a sound recording of the May 5, 2016 telephone conference at the Office of Administrative Law.

The issue of which campus T.D. would attend following her suspension was not addressed in the petition of appeal, in the briefs and certifications submitted, or at oral argument on the Motion for Emergent Relief. This issue has only arisen following the issuance of the Commissioner's May 3, 2016 decision.

Upon review, the Commissioner finds that the ALJ does not have jurisdiction to issue a Supplemental Order on a Motion for Emergent Relief since the Commissioner has already issued a final decision on the emergent matter, and the issue raised in the supplemental order is not properly before the ALJ. Instead, when a petitioner wishes to allege additional causes of action or demands for relief once the matter has already been transmitted to the Office of Administrative Law (OAL), the petitioner may make a motion to amend the petition with the ALJ. *N.J.A.C.* 1:1-6.2; *N.J.A.C.* 6A:3-1.7(b). Should a party seek relief on an emergency basis, the party may file a motion for emergent relief with the Commissioner. *N.J.A.C.* 1:1-12.6(b); *N.J.A.C.* 6A:3-1.6. Accordingly, should petitioner wish to seek additional relief in this matter – specifically, that her daughter be sent to the West Side Park Middle School campus – she may make a motion to amend her petition with the OAL, and file a new motion for emergent relief with the Commissioner. Until such procedures are properly followed, the issue of whether the Board acted in an arbitrary, capricious or unreasonable manner when it sent T.D. to a different middle school campus is not before the ALJ or the Commissioner.

Accordingly, the recommended Order of the OAL is rejected, for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/17/16
Date of Mailing: 5/17/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**SUPPLEMENTAL ORDER ON MOTION FOR EMERGENT RELIEF**

OAL DKT. NO. EDU 05044-16
AGY REF NO. 100 -4/16

**J.L., ON BEHALF OF HER MINOR CHILD T.D.,**
Petitioner

v.

**BOARD OF TRUSTEES OF THE NORTH STAR ACADEMY CHARTER SCHOOL, ESSEX COUNTY,**
Respondent.

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**Shira Baron**, Esq., Education Law Center, appearing for Petitioner

**Cherie L. Adams**, Esq., Adams, Guitierrez & Lattiboudere, LLC, appearing for Respondent

BEFORE **THOMAS R. BETANCOURT**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a Verified Petition and Motion for Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on

April 1, 2016. In support of the Motion for Emergent Relief petitioners also filed an Affidavit of petitioner J.L. and a brief in support of the motion.

Said motion seeks order authorizing the immediate reinstatement of petitioner, T.D., to North Star Academy; and, directing respondent to assess any academic curriculum and home instruction missed by T.D. during 2015 and 2016, and to provide same to T.D. in the form of supplemental tutoring and summer programs.

Respondent filed its brief in opposition to the Motion for Emergent Relief, together with Exhibits 1 through 8 and the certification of Jason Russell, Associate Chief Operating Officer, on April 20, 2016.

Because of the issues presented in the Verified Petition the matter was docketed by both the Office Special Education (as Docket No. 2016-24244E) and the Bureau of Controversies and Disputes (as Docket No. 100-4/16).

DOE requested that the OAL docket and review the matter as a special education (EDS) case and issue a final decision pursuant to N.J.A.C. 6A:14-2.7. The OAL issued a docket number of EDS 05098-16.

The Motion for Emergent Relief, while touching upon special education issues, is not a special education motion. Accordingly, the issues raised in the Verified Petition regarding special education issues will not be addressed in the within Order.

The undersigned issued an Order, dated April 22, 2016, reversing the suspension of T.D., and ordering Respondent permit the immediate return of T.D. to North Star Academy. The Order of April 22, 2016, was adopted as modified by the Commissioner of DOE by Order dated May 3, 2016.

A telephone status conference was conducted on May 5, 2016, at the request of Petitioner's counsel, wherein the undersigned was advised that Respondent has not

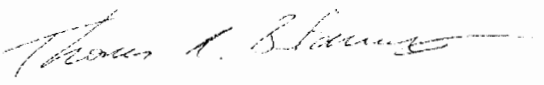
returned T.D. to school, but wishes to return her to a different school within the North Star district. It was unknown prior to the issuance of the April 22, 2016 Order that there were more than one school campus. The Order of April 22, 2016, did not specifically address which school campus T.D. was to return to, as it was unknown at the time the Order was issued that there was another campus. T.D. was suspended from the North Star West Side Park Middle School.

## ORDER

It is hereby **ORDERED** that the continued suspension of T.D. from March 22, 2016 to May 20, 2016 is **REVERSED** and

It is further **ORDERED** that Respondent permit the immediate return of T.D. to **North Star Academy at the West Side Park Middle School**; and,

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



May 5, 2016

DATE

**THOMAS R. BETANCOURT,** ALJ

db

186-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

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In the Matter of the Tenure Arbitration Hearing of:

**Sergio Rivera, State Operated School District of the City of Camden**

---

Before: Thomas D. Hartigan, Arbitrator

Agency Docket No. AR – 289-9/15
Issue: Holiday Pay

Appearances:

For the District: Josseph G. Antinori, Esq.
Brown & Connery, LLP

For Respondent: Barbara E. Riefberg, Esq.
Shimberg & Friel PC

## AWARD

The parties have entered into a Settlement Agreement (copy enclosed) in resolution of the above referenced matter. I have reviewed the Settlement Agreement and found it to be in compliance with N.J.A.C. 6A:3-5.6. As indicated in Item 3 of the Agreement, page two, the District will "take all necessary actions with the Commissioner of Education or her designee to withdraw the Tenure Charges.

The Settlement Agreement came about after two (2) days of hearing at which the Respondent was present and at which the nature of the charges were fully presented and known to him. Both parties have freely entered into this Agreement and both have signed the Agreement. As noted on page six (6) of the Agreement, Mr. Rivera acknowledged his understanding of the agreement which had been negotiated by his

attorney with his knowledge and consent. Both parties have acknowledged, page one of the Agreement, and I find that the settlement is in the public interest.

Thomas D. Hartigan, Arbitrator
May 12, 2016

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Sergio Rivera ("Rivera") and the Camden City School District (the "District")(collectively, the "Parties").

**WHEREAS,** Rivera is a teacher of English as a Second Language employed by the District; and

**WHEREAS,** the District on September 17, 2015 (the "Filing Date") certified tenure charges against Rivera to the Commissioner of Education (the "Tenure Charges") with the Tenure Charge proceeding bearing the agency reference number 289-9/15; and

**WHEREAS,** in accordance with New Jersey Law, the District placed Rivera on a suspension without pay as of the Filing Date; and

**WHEREAS,** Rivera, after the Filing Date, filed for and began receiving unemployment insurance benefits while on suspension without pay (the "Unemployment Benefits"); and

**WHEREAS,** Rivera and the District appeared before the arbitrator Thomas D. Hartigan, on January 13 and 14, 2016 for a hearing on the Tenure Charges; and

**WHEREAS,** the Parties mutually desire to resolve this matter and believe this resolution is in the public interest;

**NOW, THEREFORE, IT IS HEREBY AGREED** by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment and Consideration:

   (a) Rivera shall provide the District with an irrevocable letter of resignation through its counsel, Brown & Connery, LLP, in the form attached to this Agreement as "Exhibit A" with a resignation date effective June 30, 2016 (the "Resignation Letter").

   (b) In consideration for Rivera's Resignation Letter and release of claims in accordance with Sections 4 and 5, the District shall pay Rivera his salary for the current 2015-2016 school year (the "Current School Year") less: (i) any amount that Rivera has already been paid for the Current School Year and (ii) any amount that Rivera has received in unemployment benefits ("Settlement Payment").

   (c) The District shall pay the Settlement Payment by way of regular payroll checks issued to Rivera by the District in the normal course of the

District's payroll operations and with any normal and required withholdings from pay as had been withheld from Rivera's paychecks before the Filing Date of the Tenure Charges.

(d) Rivera shall remain on the District's health care benefits program for the remainder of the Current School Year.

(e) Rivera will not report back to work for the remainder of the Current School Year.

(f) In connection with any inquiries by prospective employer of Rivera, the District shall limit any information provided to (1) Rivera's former job position; (2) dates of employment and (3) salary at the time of termination of employment

(g) The Settlement Payment shall be reported on W2 Statements issued in the normal course by the District to its employees. Rivera assumes sole responsibility for all applicable state, federal and local taxes required to be paid with respect to the Settlement Payment. In addition, Rivera agrees that if any taxing authority seeks or deems due and owing from the District any taxes, interest, penalties or other amounts with respect to the Settlement Payment, he will indemnify and hold harmless the District for any sums it may be required to pay, and he will reimburse the District for any attorney's fees and costs it incurs in defending against such claims.

(h) The Settlement Payment shall be the total amount borne by the District under this Agreement. The District shall have no obligation to make any other payment to Rivera and/or any reimbursement for accumulated unused sick leave.

3. Dismissal of Tenure Charges: The District shall take all necessary actions with the Commissioner of Education or her designee to withdraw the Tenure Charges.

4. General Release: Rivera releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Rivera has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Rivera asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against

Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Rivera is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

5. Covenant Not to Sue: Rivera warrants he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Rivera agrees that he will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Rivera's behalf, Rivera agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Rivera agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, Rivera agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

6. Claims Not Released: Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Rivera is not waiving: (a) claims that were filed or could be filed under any state workers' compensation law; or (b) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Rivera represents that he is not aware of any present basis for such claims. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, Rivera agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 5, above.

7. Older Workers Benefit Protection Act: The releases in section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Rivera specifically acknowledges that:

(a) He has been advised to consult with an attorney of his choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that he understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which he is not otherwise entitled and is adequate and sufficient to support his promises, covenants and releases as set forth in this Release;

(d) He has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period he will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) He has been advised that during the **seven (7) day** period following his execution of the Settlement Agreement and the Release, he may revoke his acceptance of this Agreement by delivering written notice to counsel for the District (as identified below), and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
**Brown & Connery, LLP**
360 Haddon Ave.
Westmont, NJ 08108

8. Not Eligible for Rehire: Rivera acknowledges and agrees that his employment with the District will, in accordance with this Agreement, be irrevocably severed at some point and that he is ineligible for re-hire as an employee of the District. Rivera agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Rivera's employment, the District shall have no obligation to consider or review his application for employment.

9. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

10. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

11. No Contingencies: The effectiveness of this agreement shall not be contingent on any event not articulated herein, including but not limited to any applications Rivera may file with the Teachers' Pension and Annuity Fund for retirement. Rivera understands the District has no control over the approval or denial of any such applications and he cannot revoke this Agreement based upon same.

12. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

13. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to

this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

14. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

15. Individuals Bound: This Settlement Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

16. Breach: Rivera understands that if he breaches any provision of this Agreement, the District will file an action to enforce this Agreement.

17. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Sergio Rivera:

Sergio Rivera
216 N. 36th Street
Pennsauken, NJ 08110

With a copy to:

Barbara E. Riefberg, Esquire
Shimberg & Friel, PC
20 Brace Road, Suite 350
Cherry Hill, NJ 08034

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue

Westmont, New Jersey 0810

18. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

**BY SIGNING THIS AGREEMENT, SERGIO RIVERA ACKNOWLEDGES:**

**A. HE HAS READ IT;**

**B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;**

**C. HE AGREES WITH EVERYTHING IN IT;**

**D. HIS ATTORNEY NEGOTIATED IT WITH HIS KNOWLEDGE AND CONSENT;**

**E. HE HAS CONSULTED WITH HIS ATTORNEY ABOUT IT; AND**

**F. HE SIGNS IT KNOWINGLY AND VOLUNTARILY.**

**IN WITNESS WHEREOF,** and intending to be legally bound, the Parties hereby execute this Agreement.

Sergio D. Rivera

**Sergio Rivera**

**Date:** 4/18/2016

**Paymon Rouhanifard**
**State District Superintendent**
**Camden City School District**

**Date:** 5/6/16

# EXHIBIT "A"

~~January~~ 18, 2016
April

State Superintendent Paymon Rouhanifard
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard:

I, Sergio Rivera, am hereby submitting this irrevocable letter of resignation from my position as a Teacher of English as a Second Language with the Camden City School District. This irrevocable letter of resignation from my position will become effective on June 30, 2016.

Sincerely,

Sergio D. Rivera

Sergio Rivera

187-16

187-16L

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

May 19, 2016

J[redacted]
[redacted]
Burlington, New Jersey 08016

Christopher B. Parton, Esq.
Kenney, Gross, Kovats & Parton
The Courts of Red Bank
130 Maple Avenue, Building 8
Red Bank, New Jersey 07701

Re: *Board of Education of the Township of Hamilton, Mercer County v. J.B., on behalf of minor child, M.G., Agency Dkt. No. 73-3/16*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter, and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On March 3, 2016, the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1, seeking an order assessing tuition and claiming that minor child, M.G., was not entitled to attend school in the district from April 17, 2015 through June 19, 2015, in accordance with to *N.J.S.A.* 18A:38-1 *et seq*. A copy of the Petition was served upon respondent on March 1, 2016, via certified and regular mail, as was an acknowledgment of filing and notice – dated March 4, 2016 – that an Answer to the Petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because J.B. failed to respond to the initial notice, a second notice was sent on March 28, 2016, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days – each count in the Petition would be deemed admitted and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). J.B. failed to respond to the second notice. A third and final notice was sent to E.B. – via certified and regular mail – on April 11, 2016, again clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis.





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To date, no Answer has been filed on behalf of J.B. Accordingly, petitioner's claim that M.G. was not entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that J.B. reimburse the Board $3,422.40 in tuition costs for M.G.'s ineligible attendance in the district from April 17, 2015 through June 19, 2015.

IT IS SO ORDERED.*

Sincerely,

David C. Hespe
Commissioner of Education

c: County Superintendent
State Law Library

DCH/MKD/BON

VIA REGULAR MAIL

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

189-16

| | | |
|---|---|---|
| TREVOR CARTER-HARRIS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, ANNA ADAMS, MICHELLE HOWE, ZATITTI MOODY AND JUAN GRILES, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

Petitioner contended that was recruited and hired in the fall of 2014 by the respondent school district (District) to serve as an assistant varsity basketball coach. Petitioner asserted that he was promised $6,000 for the coaching assignment, which was to be paid at the close of the season. Additionally, petitioner claimed that he was independently and solely responsible for coaching the junior varsity basketball team during the same time period. Petitioner held no teaching certificate at the time he began to coach in Paterson; however, he began to complete the steps needed to obtain a county substitute certificate. Petitioner claims that, through no fault of his own, the certificate was not issued until April 20, 2015 – which was after the end of the bastketball season. The District maintained that petitioner could not be compensated for his work because he lacked the teaching credential or substitute certificate necessary to be employed as a coach, and further contended that petitioner made the decision to stay with the basketball program on a voluntary basis despite his lack of the required certificate.

The ALJ found, *inter alia*, that: the Commissioner's jurisdiction is defined by statute and limited to controversies and disputes arising under the school laws, *N.J.S.A.* 18A:6-9; the Commissioner has no jurisdiction over contractual claims by non-tenured school employees, as these claims do not require an interpretation of the school laws; petitioner's claims in the instant matter are contractual in nature; the only school law issue even tangentially raised herein is the propriety of the District retaining a coach who was not properly credentialed; fundamentally, however, the dispute here is not whether petitioner should have coached, but rather whether he should have been paid for his services; petitioner's claims are viable, but they fall outside of the Commissioner's jurisdiction; petitioner's claims should be filed in Superior Court. Accordingly, the ALJ dismissed the petition for lack of jurisdiction.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter. The petition was dismissed.

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

May 20, 2016

OAL DKT. NO. EDU 3163-16
AGENCY DKT. NO. 6-1/16

| | | |
|---|---|---|
| TREVOR CARTER-HARRIS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, ANNA ADAMS, MICHELLE HOWE, ZATITTI MOODY AND JUAN GRILES, | : | DECISION |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons stated in the Initial Decision – that the petition of appeal must be dismissed for lack of jurisdiction. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/16
Date of Mailing: 5/23/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 03163-16
AGENCY DKT. NO. 6-1/16

**TREVOR CARTER-HARRIS,**
Petitioner,
v.
**STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, ET ALS.,**
Respondent.

---

**Trevor Carter-Harris**, pro se

**Nathaniel M. Davis**, Esq., for respondent

Record Closed: April 15, 2016 Decided: April 19, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Trevor Carter-Harris, contends that the respondent, State Operated School District of the City of Paterson (the District), failed to compensate him for services rendered as an athletic coach during the 2014-2015 school year. The District replies that it had no obligation to compensate Carter-Harris because he was not properly credentialed, and he had agreed to perform his duties on a volunteer basis.

Carter-Harris filed his appeal with the Commissioner on January 13, 2016. An answer was filed on behalf of the District on February 1, 2016, and the contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on March 1, 2016. Upon reviewing the pleadings, I corresponded with the parties via letter dated March 8, 2016, and questioned the Commissioner's jurisdiction to review petitioner's claims. I asked the parties to simultaneously reply to my jurisdictional concerns on or before April 8, 2016. Carter-Harris submitted a timely reply. Counsel for the District did not reply, and I closed the record on April 15, 2016.

The controversy presented by the pleadings is as follows:

Carter-Harris contends that he was promised $6,000 to serve as an assistant varsity basketball coach when he was recruited and hired in the fall of 2014. In addition to his duties with the varsity squad, Carter-Harris contends that he was "independently and solely responsible" for coaching the junior varsity basketball team. He was to be paid at the close of the season. Carter-Harris held no teaching certificates, but he began to complete the steps needed to obtain a county substitute certificate. He alleges that, through no fault of his own, the certificate was not obtained until April 20, 2015, after the performance of his duties. As a result, the District refused to compensate him. On August 18, 2015, Carter-Harris corresponded with the Superintendent of Schools to plead his case. He urged that he had performed an excellent job coaching Paterson students.

In an undated reply, Anna Adams, the Director of Health and Physical Education, agrees that Carter-Harris did a fine job coaching Paterson students, but explains that Carter-Harris could not be compensated because he never submitted the requisite substitute's certification. She advises him that his status was reviewed in December 2014, and again in January 2015. Carter-Harris remained ineligible for compensation because he was uncertificated, but Adams noted that he decided to stay with the program on a volunteer basis "pending [his] certification['s] arrival." She advises further that "[u]nfortunately, the said documents did not arrive until after the end of the season. Please understand that all coaching positions must be approved by the Board prior to the start of the season."

Upon receiving my correspondence questioning the Commissioner's jurisdiction, Carter-Harris replied via letter dated March 31, 2016, in which he contended further that he was never provided with or informed about District guidelines for hiring, pointing out that a school district must promulgate such guidelines under N.J.A.C. 6A:32-4.1. He attached school district policies and guidelines that cover athletic coaches, including volunteer coaches, but urged that these documents were never provided to him. Carter-Harris strenuously reiterated that it was his understanding that he would be paid for his services as a coach during the 2014-2015 school year, notwithstanding the fact that he did not obtain a substitute's certificate until after his services were rendered.

## ANALYSIS AND CONCLUSIONS OF LAW

The Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that where a controversy does not arise under the school laws, it is outside the jurisdiction of the Commissioner, even if the dispute pertains to school personnel. Bd. of Educ. of East Brunswick Twp. v. Twp. Council of East Brunswick, 48 N.J. 94, 102 (1966). It is well established that contractual claims by non-tenured school employees do not invoke the Commissioner's jurisdiction, as such claims do not require an interpretation of the school laws. Picogna v. Board of Education of Cherry Hill, 249 N.J. Super. 322, 335 (App. Div. 1991).

The Commissioner has consistently declined to exercise jurisdiction over contractual disputes. In Demikoff v. Harrington Park Board of Education, 97 N.J.A.R.2d (EDU) 16, the claims of a non-tenured school business administrator, whose employment was terminated pursuant to a contractual sixty-day-notice provision, were dismissed for lack of jurisdiction. The Commissioner, quoting the Initial Decision, held that "'the gist of the petition does not sufficiently implicate education law or statutory entitlement under education law to warrant or permit exercise of the Commissioner's dispute resolution jurisdiction over what are fundamentally contractual matters more properly cognizable in [a] judicial forum.'" Demikoff, supra, 97 N.J.A.R.2d (EDU) at 18; see also Paladino v. Bd. of Educ. of Lacey, 1989 S.L.D. 3063, 3065; Fanego v. State-Operated Sch. Dist. of Jersey City, EDU 10968-97, Initial Decision (April 27, 1999),

adopted, Comm'r (June 14, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; Larsen v. Piscataway Bd. of Educ., OAL Dkt. No. 1445-81 (State Board, October 6, 1982).

I **CONCLUDE** that Carter-Harris's claims sound in contract and equity, and that accordingly, the Commissioner of Education is without jurisdiction. Had counsel for the District deigned to reply to my March 8, 2016, letter, I would like to think he would have argued that the Commissioner has jurisdiction; and should use his authority to rule that the District has no obligation to compensate Carter-Harris, because the law did not permit him to work as a coach without an appropriate educational certification. Indeed, N.J.A.C. 6A:9B-5.16(b) provides that "[s]chool districts may employ any holder of either a New Jersey teaching certificate or a substitute credential pursuant to N.J.A.C. 6A:9B-7 to work in the interscholastic athletic program provided the position has been advertised..." Since it is uncontroverted that Carter-Harris was not certificated during the time he served as an athletic coach, unless the District retained him to volunteer under the immediate supervision of a head or assistant coach, it would have retained his services in contravention of law.[1]

The propriety of retaining an uncertificated coach is the only school law issue even tangentially raised by the pleadings. But fundamentally, this is not a dispute about whether Carter-Harris should have coached; rather, it is a dispute about whether he should be paid for his services. In the end, this case is simply a claim for payment for services rendered, no more, no less. And the District's possible violation of the school laws does not necessarily defeat Carter-Harris's entitlement to compensation for services all agree he ably performed. Carter-Harris provided a valuable service to the District, and with the expectation that he would be paid. As such, the District was arguably unjustly enriched by his services. Moreover, he based this expectation of payment on representations allegedly made by school personnel. As such, Carter-Harris had arguably entered into an implied contract for his services. Carter-Harris's claims thus are viable, but they fall outside the Commissioner's jurisdiction. Carter-

[1] It is noteworthy that Carter-Harris contends that he coached Junior Varsity basketball without supervision.

Harris's claims sound in equitable principles; do not implicate the school laws; and thus are more properly brought in a judicial forum.

Accordingly, I **CONCLUDE** that Carter-Harris's petition of appeal does not raise a case or controversy arising under the school laws, but rather raises claims that fall outside the Commissioner's jurisdiction and are cognizable in Superior Court.

## ORDER

It is hereby **ORDERED** that the petition of appeal be dismissed for lack of jurisdiction.

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

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

April 19, 2016

DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: April 19, 2016

Date Mailed to Parties: APR 21 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

188-16

AGENCY DKT. NO. 193-8/13

| | | |
|---|---|---|
| I.J., on behalf of minor child, Q.J., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | ORDER |
| RESPONDENT. | : | |
| | : | |

On May 2, 2014, a final agency decision was rendered in this matter, wherein the Commissioner found I.J. liable for tuition in the amount of Nineteen Thousand Six Hundred Nineteen Dollars and Seventy Six Cents ($19,619.76), representing tuition for a period of ineligible attendance by her son, Q.J., in the Board's school district between September 5, 2012 and December 20, 2013, plus the additional period of January 2, 2014 through March 5, 2014.* The Board subsequently notified the Commissioner that I.J. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. In response to the Board's request, I.J. asserts that because her son received a poor quality education in the Board's school district, the amount of tuition owed should be reduced to $3,000. As the assessment of tuition has been fully and fairly adjudicated, I.J. can no longer challenge the amount of monies owed. I.J. has offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

* I.J. appealed the Commissioner's May 2, 2014 decision to the Appellate Division of the Superior Court. By decision dated January 26, 2016, the Appellate Division affirmed the Commissioner's decision and assessment of tuition.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Irene Johnson is now subject to entry of a judgment by the court in the amount of $19,619.76, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/16

Date of Mailing: 5/23/16

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

May 23, 2016

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

*Re: Request for Docketing of Judgment*

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the May 20, 2016 Order of the Commissioner of Education finding that Irene Johnson is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *I.J., on behalf of minor child, Q.J. v. Board of Education of the Township of Hamilton, Mercer County.*[1] By copy of this letter, I am advising Ms. Johnson, as well as counsel for the Hamilton Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Irene Johnson (with copy of Order)
Christopher B. Parton, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Johnson's initials, her full name is included within the body of the Commissioner's Order.

191-16

**COMMISSIONER OF EDUCATION, State of New Jersey**

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IN THE MATTER OF THE PROCEEDING BETWEEN:

Board of Education, Englewood School District

hereinafter,
"Board or Petitioner"

and

Tenured Teacher James Taylor

hereinafter,
"Teacher or Employee"

---

Petition: Dismissal of Tenured Teacher J. Taylor,
By, Englewood Board of Education

Agency Docket No: 295-9/15

# AWARD AND OPINION

| | |
|---|---|
| Hearings held, Englewood, NJ | December 11, 2015 & March 31, 2016 |
| Briefs received; | April 13, 2016 |
| Date of Award: | May 20, 2016 |

**Arbitrator Jay David Goldstein**

## APPEARANCES

| | |
|---|---|
| For, Englewood Board of Education | For, James Taylor, Tenured Teacher |
| **Mark A Tabakin, Esq.,** | **Sanford R Oxfeld, Esq.,** |
| Weiner Lesniak, LLP | Oxfeld Cohen, PC |

## INTRODUCTION

The underlying dispute over this dismissal action arose from an incident occurring on March 25, 2015 between the Tenured Teacher [Mr. Taylor] and a student [identified herein as, "B.L."] who attended the same school. Described in greater detail below the incident is alleged by the "Board" to have been the culminating factor in a series of preceding disciplinary events and/or corrective actions taken with this Teacher. Some disciplinary history and further proceedings are summarized here but presented in greater detail under the Background, Facts, Party Positions, below this section.

**2012-2013;** it was during this, "... *academic year, James Taylor ("Taylor") was employed by the Englewood Board of Education ("Board" or "District") as a tenured teacher of Physical Education/Health. This matter stems from tenure charges ... filed against him for Unbecoming Conduct, Incompetence, Insubordination and Other Just Cause pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq.* [Board Brief]

**March 25, 2015;** is the undisputed date of the incident which gave rise to the charges brought by the "Board" against the, "Teacher". The incident involved Teacher /Taylor and a School District student, "B.L." [Hereinafter, the, "Student"]. [Board Brief and Teacher Brief]

**March 26, 2015**; "...*Taylor was served with a "Rice Notice" from Interim Superintendent M. Roth.*" Also that date, "... *Interim Superintendent M. Roth authored a letter to Taylor requesting a written statement about what occurred on March 25, 2015.*" [Board Brief; citing Exhibits 6 and 7]

**March 27, 2015**; is the date of a, "*Memo from Principal Elbert to Interim Superintendent M. Roth describing the security video of the March 25, 2015 incident involving Taylor and B.L.* [Board Brief, referencing Exhibit B-1and B-2; the Memo and a video, of the March 25th Incident]

**March 30, 2015;** is the date of, "...*the statement from Taylor to Superintendent of Schools Roth setting forth what occurred during the class period in question, i.e., what occurred during his 4th period class on March 25th* [Teacher's Brief, citing Teacher Exhibit #1]

**March 30, 2015**; "*...Taylor authored an email to Interim Superintendent M. Roth setting forth Taylor's written statement as to the March 25, 2015 incident with B.L.*" [Board Brief]

The Teacher's Brief acknowledges the same date, but with the perspective, "*...the Taylor statement is dated... less than one week after the event, when what occurred was still fresh in Taylor's memory*". [Teacher Brief]

**July 29, 2015**; *Principal Peter Elbert ("Principal Elbert") executed Sworn Tenure Charges of Unbecoming Conduct, Incompetence and Insubordination against Taylor and a Sworn Statement of Evidence in Support of Charges.* [Underlining added, Board Brief]

**August 4, 2015**; "*...Board served the tenure charges and statement of evidence on Taylor.*" [Board Brief]

**August 17, 2015**; "*...Taylor filed with the Board his opposition to the tenure charges*" [Board Brief]

**September 21, 2015**; "*the Board certified the tenure charges to the Commissioner of Education.* [Board Brief]

**September 17, 2015**; "*...the Board determined that there was probable cause to credit the evidence in support of the tenure charges, that said charges were sufficient, if credited, to warrant Taylor's dismissal and/or reduction in salary, and voted to certify the charges to the Commissioner of Education and suspend Taylor without pay for 120 days or until final determination of the tenure charges*"

[Board Brief]

**September 21, 2015**; "*...the Board certified the tenure charges to the Commissioner of Education*"

[Board Brief]

**December 3, 2015;** pre-Hearing Conference held [Newark, NJ] with parties Counsel, and Arbitrator

**December 11, 2015**; first Hearing occurs as scheduled. The 'Board' presents its case-in-chief. Thereafter, discovery issues delay proceeding further that day and the matter is continued, generally.

**January 18 -22 -28, 2016**; 'Stipulation' (1- 8) [Joint Exhibit #2] is drafted by the Parties jointly, ostensibly intending to end discovery and other evidentiary issues. When Arbitrator seeks to clarify certain inconsistencies, several emails result in the Parties disagreeing on the meaning intended.

**March 24, 2016;** second set of 'Stipulations' are contained in a "MEMO", jointly executed by and between parties' counsel. Pursuant to its terms also admitted to the underlying record of this matter. The parties agree that this document will guide the next, 'Final" Hearing. [Joint Ex. #1]

**March 31, 2016;** "*2nd and Final Hearing*" takes place consistent with prior scheduling, 'Stipulations' and, is also conducted by agreement between the parties' Counsel and the Arbitrator, within the terms of Joint Ex. 1; [7 Stipulations].

As a result of two hearings, each side had opportunity to present written exhibits, sworn testimony, cross-examination and rebuttal. The Tenured Teacher was present during both hearings, given opportunity, but did not testify. Each Party agreed to a written closing and the terms of submission.

**April 3, 2016;** transcribed record of hearing is received.

**April 13-19, 2016;** by agreed to schedule, the Parties file their closing submissions electronically with the Arbitrator; thereafter mailing same with cited materials, to one another and the Arbitrator. After a Pre-Hearing Conference and two Hearings the record was declared closed upon receipt of the respective closing submissions / briefs. Both sides had been well represented. The representatives acknowledged the stated issue(s) to be properly before the undersigned Neutral.

**April 21-22, 2016;** an unsolicited and unscheduled 'Reply Brief ' is forwarded to the Arbitrator by one side only. The opposing party responded to that act: " *I will not be filing a reply to his initial submission as I do not believe anything other than initial submissions was either agreed upon or in fact contemplated when we spent a great deal of time going over the briefing schedule.*"

**ISSUE;** while the Parties did not stipulate to a legal issue *per se* they tacitly acknowledged the following questions required answering by their joint participation in these proceedings:

"Did the Board have just cause to discharge Tenured Teacher James Taylor?

"Whether there is sufficient, credible evidence to sustain the tenure charges against Taylor and ultimately, to warrant his dismissal" [Board Brief] If not, what shall be the remedy?

**May 20, 2016;** decision rendered; filed with the NJ COMMISSIONER OF EDUCATION.

## BACKGROUND, FACTS and PARTY POSITIONS

By way of summary background the Board of Education maintains that, "*21. Taylor's employment with the Board is replete with instances of aggressive interactions with children, for which he was disciplined. Neither Taylor nor the Englewood Teacher's Association contested any of the previous disciplinary actions taken. Not only were Taylor's salary increments withheld for the 2011-2012 academic year, but he was required to complete a corrective action plan and attend professional development seminars on how to deal with "difficult students.*" [Board Brief]

More to the point of its argument and evidence the Board continues by citing the specific charge against the Tenured Teacher and rationale for its ultimate position, "*Here, Taylor is charged with unbecoming conduct for his aggressive behavior toward student, B.L., and failure to control that aggression. His pattern of aggression and unprofessional behavior makes him unfit to teach children and warrants his dismissal.*" [Board Brief]

On the opposing side, the Tenured Teacher's view does not fully address the Board's position as it ignores certain elements in the Teacher's record [i.e., "... *instances of aggressive interactions, ...salary increments withheld... he was required to complete a corrective action plan and attend professional development seminars on how to deal with "difficult students*"]

Yet it does acknowledge the just cause standard. Moreover, there is evidence presented, i.e., the Tenured Teacher's 'legal position' is cited in its Brief as, "*Commissioner decisions..., as well as more recent decisions from tenure arbitrators...*"; for the proposition that, "*The concept of just cause is found twice in the tenure statutes. The first place is N.J.S.A 18A:6-10,* [ Teacher Brief]

The closing Brief for the Teacher proceeds to cite that statute, "*This statute reads in pertinent part: No person shall be dismissed or reduced in compensation*
*(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or . . .*
*...except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges...*" [Tenured Teacher Brief]

Somewhat painstakingly, the 'Teacher's argument proceeds further with the previously referred to legal position:
"*That standard was reiterated with the 2012 amendment to the tenure statute which also provided for the first time that arbitrators, not the Commissioner of Education, determine tenure cases. N.J.S.A 18A:6-17.2(d) reads:*

Also, it speaks to the burden of proof:

*The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.* [Teacher Brief]

Moreover, it cites from what is ostensibly the first arbitration decision under the [prior cited] Statute: "*Arbitrator Joseph Licata's decision in the Buglovsky/Randolph Board of Education case (a copy of which is attached hereto). It was the first arbitration award made under the new tenure statute, which determination has been uniformly followed consistently thereafter.* [Teacher Brief]

Finally, it maintains what is perceived to be the essence of its argument, citing from the above referenced decision, "*The arbitrator therein held: In the State of New Jersey, tenured teachers shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause". N.J.S.A 18A:6-10. The burden of proof in a discharge case rests with the employer to prove, by a preponderance of the credible evidence, that the factual allegations are true, and that the penalty imposed is just. Elkouri & Elkouri, How Arbitration Works, 5th Ed, pages 930, et seq. "Preponderance" may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State vs Lewis, 67 NJ 47 (1975).* [Teacher Brief]

**In summary** of the **Employer's Position**; it was submitted that, "*As specified in Count One of the Tenure Charges, between February of 2009 and March 25, 2015, Taylor engaged in a pattern of unprofessional and unbecoming conduct that reflects upon his inability and **unfitness** to serve as a public school teacher and ultimately warrants his dismissal.*
[Emphasis added; Board Brief]

In its Brief, the Board argues the following points:

*"The culminating event leading to the instant charge occurred on March 25, 2015, when Taylor escalated a dispute with a student from a verbal disagreement to a physical altercation. Instead of seeking assistance from security, staff or school administration, Taylor **initiated physical contact** with the student by "bumping" and pushing him with his torso and "mushing" the student in the head with his hand.*

**In summary** of the **Teacher's Position** it argues that, "*...it is respectfully submitted that the tenure charges against Taylor should be dismissed in their entirety. Taylor should be reinstated to his position as a tenured teaching staff member with no penalties and should be given back-pay and all other*

*emoluments of employment for the 120 days suspension which he served. Any reference to this matter should be purged from Taylor's record.* [Emphasis added; Teacher Brief]

## FINDINGS AND OPINION

A careful review of all evidence presented including all documents, hand written and transcribed notes of testimony occurred. They take into account the positions taken and arguments advanced by both parties. Relevant portions of the statutory sections by which the Parties mutually acknowledged being guided were cited herein by each side and are deemed relevant without further recitation. Those Statues impose a, "just cause" standard for discharge, also granting School Districts the right to issue reasonable rules, orders and regulations, which are not conflicting. There has been no challenge to those statutory standards for discipline.

### Analysis; Overview

If the surrounding facts/ interpretation of the March 25, 2015 'incident' were, standing alone, to be the sole determinative factor for whether there was a 'just cause' dismissal here, then Teacher's defense to it might have provided some pause for consideration. Yet, the defense to the incident flies in the face of some additional, very disturbing factors. While the Teacher's denial, generally, is based loosely upon several common theories of typical workplace violence [attempting to define who was the initiator, aggressor and/or instigator of the 'Incident'] such theories do not work [or, are misplaced] here in a school environment.

While persuasive that in a day and age of needing a police presence in our schools, this Arbitrator is aware that Teachers' face much different challenges than in prior generations. That said, this is neither a political forum nor a sociological experiment. Clear Rules are in place for how teachers in this school system should be guided when confronted with troublesome students.

Moreover clear evidence was presented that this Tenured Teacher had been the recipient of retraining and rehabilitative efforts due to his prior misplaced theories about handling difficult situations involving troubled or difficult students.

Yet this Tenured Teacher was caught on a video of the March 25, 2015 'incident' as the clear aggressor, if not, i.e., the initiator and /or instigator, of a physical and /or emotional confrontation with a student. Whether or not the video clearly and absolutely portrays the entirety of both the words and deeds of the confrontation, it is clear enough that the Teacher did not back down nor, take any other action to diffuse the situation from escalating. Instead, the only clear interpretation of the events portrayed in the video demonstrates this Teachers aggressive and unwarranted behavior toward a student.

Moreover as stated above, this Teacher possessed a clear predilection toward similar behavior in past. Corrective actions if not discipline per se were in this Teacher's background, all connected to similar aggressive behavior. Thus, progressive discipline was achieved.

Therefore and notwithstanding the Teacher's defenses [as documented but not testified to] surrounding his actions on March 25, 2015, any attempts to dissect the events of that day are simply deemed to be a futile attempt to avoid the more critical and underlying question about this Teacher's suitability for continued employment within this School District.

Beyond the above the following analysis leads to the decision below.

**Burden of Proof**

The Board's case-in-chief was brought by Petitioner in a relatively seamless manner. Its case is deemed irrefutable by the evidence presented and clearly supported the burden of proof imposed by the relevant statutes. While processing of the charges appeared somewhat micro-

managed, it was controlled with careful handling and afforded proper and appropriate regard for the rights of Tenured Teacher James Taylor.

The Teacher's case did not reply with specificity to the charges, "*...unbecoming conduct for...aggressive behavior toward student, B.L., and failure to control that aggression. His pattern of aggression and unprofessional behavior makes him unfit to teach children and warrants his dismissal.*" [citing, the Board Brief]. Instead of defending his actions within appropriate guidelines that the Teacher was taught in rehabilitative programs ["*...he was required to complete a corrective action plan and attend professional development seminars on* ***how to deal with "difficult students***"] clear evidence in the 'video' supports, at minimum, unbecoming conduct for aggressive behavior. While the Teacher's evidence attempts to characterize what is viewable as the Teacher's attempt to properly control the Student's [B. L.] aggression, the opposite is plainly true.

The Teachers evidence flies in the face of clear and convincing evidence to the contrary of his account of a verbal dispute between Student [B.L.] and himself. The Teacher's credibility could not be determined from testimony which did not occur, and could only be tested by viewing the video, which clearly showed the Teacher escalating the dispute ["*...when Taylor escalated a dispute with a student from a verbal disagreement to a physical altercation. Instead of seeking assistance from security, staff or school administration, Taylor* ***initiated physical contact*** *with the student by "bumping" and pushing him with his torso.*"; Board Brief]

Even if we were to credit Teacher's version in part, a reasonable inquiry might be whether there was any reason for him not to have sought the assistance of other professionals to alleviate an already inflamed situation. While a difficult question, it was not within the purview of the neutral to answer why this Teacher, already on notice of prior disciplinary concerns would

not have sought the external assistance required in this March 25, 2015 incident. Regardless, the burden of proof was met by the Petitioner and not refuted by the Teacher in his defense.

Thus the just cause standard was met in that a 'just cause' dismissal convincingly occurred under the evidence in this case. The overriding principle here is that reasonableness must be found in the enforcement of the behaviors expected of a teacher, i.e., there was a good faith showing that just cause was properly enforced.

**Mitigating vs Aggravating Circumstance**

The School Board raised the basic premise of the charge against Teacher 'Taylor' ["*...using physical force against (the Student)"and, even acknowledged that, "A teacher may use reasonable and necessary physical force against a student under certain circumstances:*"

Following this train of thought the Board explored the circumstances under which physical force was permissible. It cited both statute and case law to support this: "*(1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property[.]", In re Tenure Hearing of Craft, 2012 N.J. Super. Unpub. LEXIS 1600, *7-8 (App. Div. July 5, 2012) (citing N.J.S.A. 18A:6-1)*

However, none of the above [underlined] potentially mitigating factors were found in the record below.

Instead, the Board returned to the instant matter by maintaining that aggravating factors were present, *"...Taylor has engaged in a sustained pattern of unbecoming and aggressive conduct toward children. See Bock, supra. The culminating event was the March 25, 2015, incident which occurred after many years of Taylor being warned about his inappropriate conduct and resulting consequences. Instead of immediately walking away from the incident or obtaining assistance from the teacher in the adjoining gym or security or staff or administration, Taylor continued to aggressively engage with the student and further escalated the situation to physical violence. (See Exhibits B-1 and B-2). Even if the Arbitrator believes that B.L. was an instigator, Taylor was the teacher and was obligated*

*to walk away, not to further engage and never to place his hands upon a child. There is absolutely no excuse for Taylor to have continued the encounter with B.L. to the point of physical violence.* [Board Brief, Pg. 24]

It is highly persuasive that the aggravating factors described were present in this record. *"Moreover, there are no mitigating circumstances present to excuse Taylor's conduct. Unlike in Kearney, or even Craft, Taylor's reaction on March 25th was not a reflexive, defensive or unintentional action. Taylor showed a complete lack of judgment and control, acted with pure aggression and failed to use any skills he learned from the seminar[1] or seek assistance from security, staff or administration. As a result, Taylor's conduct completely disrupted the provision of educational services to students, compromised the integrity of the instructional process, detrimentally impacted the educational environment and blatantly disregarded the health, safety and welfare of the students whose safety he was entrusted to protect. Furthermore, Taylor's past record of aggressive conduct with students, including an increment withholding and fitness for duty issues, should be taken into consideration because it establishes the likelihood that his behavior will reoccur.* [Board Brief, Pg. 24-25]

Thus on balance here, the Board has pointed to this Tenured Teacher's numerous prior disciplinary events and admonishment short of discipline, along with follow-up opportunities for rehabilitating his behaviors. Pointed reference is made to this rehabilitative history, ostensibly done to help achieve some degree of normality in the Teachers classroom or other similar setting. The aggravating factors considered here were that this Teacher did not back off or away from an emotional or physical confrontation. He is observed on the video touching and/or pushing Student [B.L.], neither retreating nor calling for other professional assistance and thus demonstrating poor judgement.

Thus there were no factors in mitigation to excuse this Teacher's conduct. Moreover, based on the clear evidence discussed above his behavior was deemed to include aggravating factors.

In **summation of** the above and after careful consideration of all evidence and the arguments in support thereof, it is conclusive that this Tenured Teacher was dismissed from his employment with the Board for just and sufficient cause.

Accordingly, the Decision follows.

---

## DECISION

Just cause required that the elements of fair and progressive discipline had to be applied before the final step of dismissal could be imposed in this matter. This included a full and fair investigation of the charges, including careful consideration of any mitigating and/or aggravating circumstances. The evidence is clear as detailed hereunder that all of the above elements were present in this case and thus the burden of proof was met by Petitioner.

Moreover, no adequate defenses were raised by the Tenured Teacher to either circumvent or refute the rationale for discipline, the charges or the penalty of dismissal.

Taking all manner of evidence and argument by both parties into deliberation, it is the considered opinion of the undersigned neutral that Petitioner Englewood School District had the absolute right to have charged Tenured Teacher James Taylor with the offenses stated hereunder and, to have caused his dismissal thereafter. In view of the above, the penalty of his dismissal is upheld.

No other remedies apply.

*Jay D. Goldstein,*
Jay D. Goldstein, Arbitrator

Dated: 20 May 2016
Jenkintown, PA

193-16

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

- - - - - - - - - - - - - - - - - - - - - - - -

**IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE**

**DOE DOCKET NO.24-2/16**

between

**TRENTON BOARD OF EDUCATION,**

Petitioner

-and-

**CHARAI BOWMAN,**

Respondent

**OPINION**

**AND**

**AWARD**

- - - - - - - - - - - - - - - - - - - - - - - -

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATE(S) OF HEARING: April 7 and 8, 2016

DATE OF AWARD: May 23, 2016

APPEARANCES:

For the Petitioner:
Adams, Gutierrez & Lattiboudere
(Adam Herman, of counsel and on the brief)
(Kimberly G. Williams, on the brief)

For the Respondent:
Mellk O'Neill
(Edward A. Cridge, of counsel)

Witnesses:
Elizabeth DeJesus, Asst. Superintendent for Special Education
Lissa S. Johnson, Asst. Superintendent for Talent Acquisition & Development
Ann Sciarrotta, Trenton Educational Secretaries Association Vice-President
Stephanie Gregg, Senior Secretary Department of Special Education
Charai Bowman, Senior Secretary, Department of Special Education

## BACKGROUND OF THE CASE

On December 17, 2015, Charai Bowman ("Bowman" or "Respondent") was served with tenure charges. Bowman did not file a response to the charges. On February 3, the Commissioner of Education certified the tenure charges and on February 16, Respondent filed an Answer with the Department of Education essentially denying all allegations. Pursuant to N.J.A.C. 6A:11-6.3, I was appointed on February 29, 2016 as the arbitrator to hear and decide the tenure charges filed by the Trenton Board of Education against employee Charai Bowman. Arbitration hearings were conducted on April 7 and 8, 2016 at which time the parties each presented witnesses and documentary evidence. Witnesses were sequestered during the hearing. The parties filed letter briefs by May 11, 2016, and the record closed on that date. N.J.A.C. 6A:11-6.3 provides that the decision in this matter shall be issued within forty-five days of the beginning of the hearing, and that the decision shall be final and binding.

## STATUTOTRY AND REGULATORY CONSIDERATIONS

> **N.J.S.A. 18A:6-10: Dismissal and reduction in compensation of persons under tenure in public school system.** No person shall be dismissed or reduced in compensation,
>
> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or
>
> (b) If he is or shall be under tenure of office, position or employment during good behavior and

efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

* * *

**18A:6-16 Proceedings before commissioner; written response; determination**

* * *

. . . If, however, [the Commissioner of Education] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, . . .

**18A:6-17.1 Panel of arbitrators**

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the

procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S.A. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S.A. 2A:24-7 through N.J.S.A. 2A:24-10.

## POSITIONS OF THE PARTIES

### Petitioner Trenton Board of Education

The Board alleges that during the 2015-2016 school year, Respondent Charai Bowman failed to fulfill her responsibilities as a senior secretary for the District, committed insubordination, engaged in excessive tardiness, and accepted a substitute teaching assignment in the Trenton Schools while simultaneously accepting payment for her secretarial job. It alleges that Bowman is guilty of conduct unbecoming a tenured employee, neglect of duty, and other just cause sufficient to warrant her dismissal from employment by the District.

### Respondent Charai Bowman

Bowman's representative, the Trenton Educational Secretaries Association, argues that the Board has failed to demonstrate that Bowman is guilty of the offenses charged by a preponderance of the evidence. With regard to the

allegation that Bowman neglected her filing responsibilities, it alleges that there was a tremendous backlog of filing well before the 2015-2016 school year. It further contends that she was not insubordinate but merely asked questions in response to a directive. It asserts that the Board has significantly "inflated" her tardiness record, and the Board's time and attendance policies were lax. Finally, it denies that Bowman performed a teaching assignment for "Source 4 Teachers" while on duty as a District secretary. It maintains that the tenure charges should be dismissed.

**STATEMENT OF CHARGES**

On December 17, 2015, the Board brought the following charges against Charai Bowman by an affidavit of Elizabeth DeJesus, Assistant Superintendent of Special Education for the City of Trenton Public Schools:

**CHARGE 1:**

Ms. Bowman is guilty of conduct unbecoming a tenured employee by way of the following:

a. At all relevant times, Ms. Bowman has been employed by the District as a tenured senior secretary.

b. During the 2015-2016 school year, Ms. Bowman was employed as a senior secretary at the District's Systems, Data Management & Accountability Department.

c. Ms. Bowman's position requires her to work Monday through Friday, between the hours of 8:30 a.m. and 4:30 p.m. As a senior secretary, Ms. Bowman is expected to provide secretarial services during those times.

d. On Thursday, September 17, 2015 at approximately 8:30 a.m., Ms. Bowman reported to work and signed in at the Systems, Data Management & Accountability Department.

e. Although Ms. Bowman left the Systems, Data Management & Accountability Department after 11:30, she failed to sign out.

f. Ms. Bowman did not return to the Systems, Data Management & Accountability Department after 11:30 a.m. on September 17, 2015.

g. Ms. Bowman did not advise her supervisor that she was leaving for the day.

h. Ms. Bowman did not perform any of her secretarial duties after 11:30 a.m. on September 17, 2015.

i. Even though Ms. Bowman did not perform any of her secretarial duties after 11:30 a.m. on September 17, 2015, Ms. Bowman was paid for a full day, and accepted compensation from the District, for performing her secretarial duties.

j. Ms. Bowman's inappropriate and unprofessional conduct of falsifying time sheets and theft of time violates law and District policy.

k. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

l. Ms. Bowman's actions demonstrate that she is not fit to serve as a senior secretary.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming sufficient to warrant dismissal from employment.

**CHARGE 2:**

Ms. Bowman is guilty of conduct unbecoming by way of the following:

a. The District repeats the allegations set forth in charge number one and makes the same a part hereof by reference thereto.

b. Even though Ms. Bowman is employed as a senior secretary and was expected to perform secretarial duties

in the Systems, Data Management & Accountability Department on September 17, 2015, she nevertheless accepted a substitute teaching assignment through an entity called Source-4-Teachers to work at the Dunn Middle School from 11:30 a.m. to 2:55 p.m.

c. In addition to receiving her full secretarial compensation from the District for September 17, 2015, Ms. Bowman was also compensated by Source-4-Teachers for her duties as a substitute teacher on that day.

d. Ms. Bowman abandoned her District secretarial duties on September 17, 2015 in order to receive additional compensation as a substitute teacher.

e. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

f. Ms. Bowman's actions demonstrate that she is not fit to serve as a senior secretary.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming sufficient to warrant dismissal from employment.

**CHARGE 3:**

Ms. Bowman is guilty of neglect of duty by way of the following:

a. The district repeats the allegations set forth in charge number one and two and makes the same a part hereof by reference thereto.

b. Ms. Bowman failed to perform her secretarial duties after 11:30 a.m. on September 17, 2015.

c. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

d. Ms. Bowman's actions demonstrate that she is not fit to serve as a senior secretary.

Ms. Bowman's willful and intentional misconduct as described above constitutes neglect of duty sufficient to warrant dismissal from employment.

**CHARGE 4:**

Ms. Bowman is guilty of conduct unbecoming a tenured employee by way of the following:

a. The district repeats the allegations set forth in charge number one through three and makes the same a part hereof by reference thereto.

b. On October 19, 2015, Ms. Bowman was scheduled to report to work as a senior secretary at the District's Systems, Data Management & Accountability Department.

c. On October 19, 2015, Ms. Bowman did not report to work, but instead, used a vacation day in order to accept a teaching assignment from Source-4-Teachers to work as a substitute teacher at the Martin Luther King Elementary School.

d. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

e. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

f. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming a tenured support staff member sufficient to warrant dismissal from employment.

**CHARGE 5:**

Ms. Bowman is guilty of conduct unbecoming a tenured employee by way of the following:

a. The District repeats the allegations set forth in charge number one through four and makes the same a part hereof by reference thereto.

b. On October 29, 2015, Ms. Bowman was scheduled to report to work as a senior secretary at the District's Systems, Data Management & Accountability Department.

c. At approximately 8:30 a.m., Ms. Bowman reported to work in the Systems, Data Management & Accountability Department and signed in.

d. Although Ms. Bowman left the systems, Data Management & Accountability Department sometime before 11:30, she failed to sign out.

e. Ms. Bowman did not return to the Systems, Data Management & Accountability Department after 11:30 a.m. on October 29, 2015.

f. Ms. Bowman did not advise her supervisor that she was leaving for the day.

g. Ms. Bowman did not perform any of her secretarial duties after 11:30 a.m. on October 29, 2015.

h. Even though Ms. Bowman did not perform any of her secretarial duties after 11:30 a.m. on October 29, 2015, Ms. Bowman was paid for a full day, and accepted compensation from the District, for performing her secretarial duties.

i. Ms. Bowman's inappropriate and unprofessional conduct violated Board policy.

j. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

k. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming a tenured support staff member sufficient to warrant dismissal from employment.

**CHARGE 6:**

Ms. Bowman is guilty of neglect of duty by way of the following:

a. The district repeats the allegations set forth in charge number one through five and makes the same a part hereof by reference thereto.

b. Ms. Bowman failed to perform her secretarial duties after 11:30 a.m. on October 29, 2015.

c. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

d. Ms. Bowman's actions demonstrate that she is not fit to serve as a senior secretary.

Ms. Bowman's willful and intentional misconduct as described above constitutes neglect of duty sufficient to warrant dismissal from employment.

**CHARGE 7:**

Ms. Bowman is guilty of conduct unbecoming a tenured employee by way of the following:

a. The District repeats the allegations set forth in charge number one through six and makes the same a part hereof by reference thereto.

b. On October 30, 2015, Ms. Bowman took an extended lunch break without permission.

c. Ms. Bowman's inappropriate and unprofessional conduct violated Board policy.

d. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

e. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming a tenured support staff member sufficient to warrant dismissal from employment.

**CHARGE 8:**

Ms. Bowman is guilty of conduct unbecoming a tenured employee by way of the following:

a. The District repeats the allegations set forth in charge number one through seven and makes the same a part hereof by reference thereto.

b. During the 2015-2016 school year, Ms. Bowman has been excessively tardy when reporting to work and has frequently left work early without obtaining approval.

c. During the period of July 8, 2015 through October 29, 2015 alone, there have been at least eight (8) recorded occasions on which Ms. Bowman reported to work late.

d. On July 8, 2015, Ms. Bowman arrived late to work and failed to record the time of her arrival.

e. On July 10, 2015, Ms. Bowman arrived a half hour late to work.

f. On July 24, 2015, Ms. Bowman arrived a half hour late to work.

g. On August 7, 2015, Ms. Bowman arrived fifteen minutes late to work.

h. On September 1, 2015, Ms. Bowman arrived forty minutes late to work.

i. On September 28, 2015, Ms. Bowman arrived twenty-five minutes late to work.

j. On October 9, 2015, Ms. Bowman arrived an hour late to work.

k. On October 23, 2015, Ms. Bowman arrived an hour late to work.

l. Ms. Bowman has frequently left work before the end of her scheduled shift without requesting or obtaining approval to leave early.

m. On September 4, 2015, Ms. Bowman took her lunch at 2:10 p.m. and then went home at 3:10 p.m. without obtaining approval to leave early.

n. On October 29, 2015, Ms. Bowman left the grounds at 11:40 a.m. without notice and without obtaining approval to leave early.

o. Ms. Bowman's inappropriate and unprofessional conduct violated law and District Board policy.

p. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

q. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming a tenured

support staff member sufficient to warrant dismissal from employment.

**CHARGE 9:**

Ms. Bowman is guilty of conduct unbecoming and neglect of duty by way of the following:

a. The District repeats the allegations set forth in charge number one through eight and makes the same a part hereof by reference thereto.

b. As a senior secretary in the Systems, Data Management & Accountability Department, Ms. Bowman was expected to perform secretarial duties, which includes filing.

c. For the past year, Ms. Bowman has neglected to properly file pupil records and instead created "dummy files".

d. Instead of placing the pupil records in the appropriate pupil file, Ms. Bowman simply placed the pupil records in boxes.

e. Even after Ms. Bowman was instructed to properly file the pupil records, Ms. Bowman failed to follow proper protocol.

f. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

g. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

h. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming a tenured support staff member sufficient to warrant dismissal from employment.

**CHARGE 10:**

Ms. Bowman is guilty of conduct unbecoming, insubordination and neglect of duty by way of the following:

a. The District repeats the allegations set forth in charge number one through nine and makes the same a part hereof by reference thereto.

b. As a senior secretary in the Systems, Data Management & Accountability Department, Ms. Bowman was expected to perform secretarial duties, including shredding documents which have been approved for shredding.

c. Pursuant to an arrangement with Ms. Bowman's union representative, it was agreed that Ms. Bowman would shred documents which have been approved for shredding.

d. On November 19, 2015 at approximately 10:00 a.m., Ms. Bowman was directed by Elizabeth DeJesus, ("Ms. DeJesus"), her superior, to shred two boxes of documents in Ms. DeJesus's office, which she had approved for shredding.

e. Ms. Bowman refused to shred the two boxes of documents as directed by Ms. DeJesus.

f. Ms. Bowman stated to Ms. DeJesus that she would only shred one box of documents and advised Ms. DeJesus to ask another secretary to shred the other box of documents.

g. After refusing to fully perform the task as directed, Ms. Bowman grabbed one box of documents and told Ms. DeJesus, who was standing by the door to her office, to "get out of the way".

h. Ms. Bowman then walked toward Ms. DeJesus and abruptly brushed passed her with the box of documents.

i. Ms. Bowman then left the office and did not return until 2:30 p.m.

j. Upon Ms. Bowman's return to the office four and a half hours later, she only briefly remained in the office before leaving again.

k. Ms. Bowman's inappropriate and unprofessional conduct violated law and District policy.

l. Ms. Bowman's actions were sufficiently flagrant and egregious to warrant termination.

m. Ms. Bowman's actions demonstrate that she is not fit to serve as a support staff member.

Ms. Bowman's willful and intentional misconduct as described above constitutes conduct unbecoming, neglect of duty and insubordination of a tenured support staff member sufficient to warrant dismissal from employment.

**CHARGE 11:**

Ms. Bowman is guilty of conduct unbecoming and other just cause by way of the following:

a. The District repeats the allegations set forth in charge number one through ten and makes the same a part hereof by reference thereto.

b. All of the foregoing charges, counts and the facts alleged in the tenure charges are incorporated by reference as if fully set forth herein. The acts of misconduct described above, jointly and severally, demonstrate a series of ongoing infractions over an extended period of time, despite prior warning, constituting a pattern of conduct unbecoming, neglect of duty and/or other just cause warranting her dismissal.

The foregoing misconduct by Ms. Bowman constitutes conduct unbecoming, neglect of duty and/or other just cause warranting her dismissal.

## FINDINGS OF FACT

Elizabeth DeJesus has been with the Trenton Board of Education since 2001; first, as a Special Education supervisor and Special Education teacher. She has been the Assistant Superintendent for Special Education since July, 2015. Her responsibilities include assuring that the students' Individualized Education Plans (IEPs) are implemented with fidelity and are in compliance with the New Jersey Special Education Code.

The Department is responsible for insuring that students with disabilities receive the education and related services that they are entitled to under federal and State laws. The Department must be compliant with State and federal regulations including the maintenance of a complete file for each educationally-classified student. The State audits the District's Department of Special Education every three years. The most recent audit occurred in the Spring of 2016.

DeJesus supervises the Special Education Department, including the Child Study Teams (CSTs), support staff, speech and occupational learning disability specialists, and a social worker. The Department has six senior secretaries whom she also supervises and two administrative secretaries; each senior secretary is assigned to three Child Study teams. The senior secretary's main responsibility is to support the CSTs. They type student IEP's and correspondence; coordinate meetings between the CST members and parents; and prepare for mailing any paperwork that needs to be distributed to parents.

The senior secretaries are also responsible for the maintenance of the individual students' files to include the IEP's, all student evaluations such as psychological, learning, social, and/or neurological evaluations. The secretaries also handle telephone calls from parents and the schools and others. They are also required to shred duplicate copies of documents as needed. Student files which are "aged out" (students 25 or

older), remain with the Department and are archived in a warehouse to ensure that prior students' requests for copies of their transcripts, IEPs and evaluations are met.

Senior secretaries play an integral role in ensuring that classified students' files are legally compliant and contain all up-to-date documents. This task encompasses maintaining the files in an organized sequence; specifically, one section of the permanent file should include a log of file access; another section includes the evaluations; another section for correspondence; and another section for the student's IEPs.

Charai Bowman has been employed by the Trenton Board of Education since 2001. During the 2015-2016 school year, Charai Bowman was employed as a tenured senior secretary in the District's Department of Special Education and Services. Her position required her to work Monday through Friday, between the hours of 8:30 a.m. and 4:40 p.m. DeJesus was her immediate supervisor.

Soon after DeJesus was appointed as Assistant Superintendent in July 2015, she learned that there was a significant backlog of duplicate files that required shredding (T-24). Over the summer she also learned that there were approximately 60 file boxes of inactive files that needed to be labeled and logged so that they could be sent to the District's archives.

By September, DeJesus was getting complaints from members of the CST that Bowman could not be counted on to properly file

documents or to even schedule parental meetings (T-102-103). It was also brought to DeJesus' attention by the other senior secretaries that the Department's file room had approximately twenty copy paper boxes of paperwork lined up on the floor. As she reviewed the content of the boxes, she learned that they contained various documents which were not in any sequential or alphabetical order that she could understand. DeJesus testified that these records should have been in the student's individual permanent files. These documents included IEPs, evaluations, parental notices, et cetera. DeJesus was informed that the boxes contained Bowman's unfiled student records (T-5; T-26).

Around the very end of September, 2015, DeJesus discovered that Bowman had been creating "dummy files" by placing each new student document in a manila folder and writing the student's name on it, and placing the folders in the boxes. It was brought to DeJesus' attention that this practice had been going on for at least a year.

In addition, DeJesus started to receive complaints from the CSTs that they were afraid to give documents to Bowman because they knew they would not be able to later locate them in the student files. One CST member who went out on medical leave and who had completed ten IEPs, gave her files to DeJesus rather than have Bowman file them because she wanted to be sure they would not be lost (T-28-29). DeJesus testified that the dummy files created a

major problem because now the student's permanent files were not in compliance; nor, did they have updated IEPs or evaluations.

DeJesus met with Bowman to inquire about the dummy files. DeJesus asked Bowman about why she had created dummy files instead of filing the documents into the student's records. Bowman responded that she believed it would be a more efficient way of doing the filing. DeJesus noted that in some cases there were multiple dummy files for the same student. Bowman acknowledged that she had been creating dummy files and placed them in boxes instead of filing required materials in students' individual permanent files. Bowman testified that when DeJesus questioned her as to why she had created the dummy file system, she responded,

> I told her that it was easier and smarter to do it that way instead of constantly taking paper and going back to the same, you know, as I found the same name. I told her it was easier.

Bowman testified that she started creating the "dummy files" in 2013 when Alexa Ingram was the Assistant Superintendent. Bowman stated that by the time DeJesus arrived in July of 2015, she had created nine to ten boxes with dummy files. According to Bowman's testimony, DeJesus initially told her the method made sense. However, Bowman acknowledged that DeJesus put her on notice that she would have get her dummy files incorporated into the permanent files, and Bowman agreed. But Bowman testified that DeJesus did not give her a completion deadline at that time. I

infer that this was the first conversation the two had about the files. (T-128 through 133) DeJesus told Bowman that she wanted the documents removed from the dummy files and placed in the students' permanent files and that the boxes should be cleared from the floor.

DeJesus stated that she was a bit surprised that Bowman really did not know how to file the files. She provided Bowman with a tutorial that had a sample file with all of the different pockets and the identification of what belonged in each pocket. DeJesus then demonstrated the filing to Bowman. DeJesus also asked the Special Education Coordinator to come over and assist with the tutorial (T-30). Bowman responded, "This is really, really hard." (T-31)

By late October, DeJesus had discovered that of lot of Bowman's boxes of filing were no longer on the file room floor. She learned from the senior secretaries that Bowman had placed handfuls of her dummy files in random order throughout the file cabinets -- but not in the students' permanent files.

DeJesus met with Bowman and TESA representative Elizabeth Gill, in the file room on October 30, 2015. They discussed the importance of filing properly and timely. DeJesus wanted to make it clear to Bowman that this was a very serious matter which required immediate action; and she also wanted to discuss Bowman's lateness when arriving to work. (T-34)

DeJesus challenged Bowman as to why she moved the dummy files into random spaces in the file cabinets. Bowman replied that she was not trying to hide the files, but had moved the dummy files to the cabinet so that she could file them correctly at a later time; in the meantime, Bowman reasoned that she was following DeJesus' directive to get them off of the floor. Bowman also acknowledged that she thought this would give her more time to complete the job. DeJesus stated to Bowman that her process was not best practice and she should cease immediately. She gave Bowman a student file checklist and one week to correct the problem by removing the dummy files from the file cabinets (T-36).

DeJesus' followed this meeting with a letter to Bowman, dated November 1, 2015 (P-17). The letter stated that DeJesus and Bowman had agreed upon the following four-prong approach during the October 30, 2015 meeting:

- All dummy files will be removed by the end of next week from the student files.
- All dummy files will be reviewed and pertinent information will be inserted into the student's permanent files as per the Student File Check List. This task should be completed by the end of the month. (underlining in original)
- Duplicate student information will be set aside for shredding.
- I [DeJesus] will review all materials before shredding can commence.

DeJesus concluded her letter to Bowman by stating that it was Bowman's professional responsibility to adhere to her contract and

the duties of her position; moreover, Bowman also had a legal responsibility to maintain the integrity of their files and to adhere to the District's policies and regulations (P-17).

By the first week in December, DeJesus realized that while Bowman had done some of the filing, she had not completed the elimination of the dummy files and the filing of documents into students' permanent files (T-39). DeJesus was still receiving complaints from the CSTs that they were still unable to locate documents in students' files. DeJesus explained that despite the agreed-upon action plan, multiple meetings, and memorandum, Bowman failed to rectify the "dummy" file issue. Instead, after Bowman left the District in December, a substitute secretary and the other senior secretaries "pitched in" to ensure all of Bowman's files were in order and in compliance.

Bowman testified that in the October 30 meeting, she told DeJesus it was a lot of work to get done by the end of November because she would have to go through all the records one by one. DeJesus originally told her to dedicate one hour after lunch every day to clean up the filing backlog; however, when Bowman told her it was not enough time, DeJesus extended the daily time period Bowman was to dedicate to the filing. Bowman stated that she continued to work on the records. (T-26-27)

On December 7, 2015, DeJesus held another meeting with Bowman along with her Union representatives Ann Sciarrotta, Pat Vogt and Elizabeth Gill. DeJesus asked Bowman for an explanation of why

the filing project had not been completed by the agreed-upon deadline. Bowman responded,

> I told her, I said, well, Miss Liz, I was out sick. I had documents, I was sick, so -- I was out sick. And I said, I wasn't here. So I wasn't at work every day (T-145).

Bowman also told DeJesus that the task was virtually impossible to complete in that time frame (T-146).

On December 10, 2015, DeJesus sent a memo (P-18) to Bowman concerning that meeting. DeJesus's memo recited that they had all previously agreed that all dummy student files would be filed in the appropriate student records in the file room by the end of November. She indicated that a substantial number of dummy files still had not been filed; and as a result, it continued to be difficult to locate student files. DeJesus stressed that it was imperative that all student files are in compliance with the New Jersey Administrative Code for Special Education. (P-18) Bowman wrote a rebuttal letter to DeJesus on December 15, 2015 but did not address the filing issue.

* * *

Ann Sciarrotta was employed by the Trenton Board of Education since July, 1967 until March 1, 2013. Since 2000, Sciarrotta has been the Vice-President of TESA. According to Sciarrotta, at one time there were previously 14 CSTs and 14 secretaries, or one secretary per Child Study Team.

Sciarrotta stated that the filing situation in Special Services goes back several years. Sciarrotta testified that in 2010, she also visited the file room on several occasions and saw numerous boxes all over the room with papers just thrown in the boxes (T-9).

In 2012, the District abolished all of the CST senior secretaries' positions, which resulted in a complete disarray of the CST files; the CST's were left to prepare, type and file all of their own paperwork with no secretarial support. The CSTs could not perform the work they were hired to do and keep up with the administrative duties previously performed by the secretaries.

Sciarrotta testified that in 2012, TESA filed an unfair labor practice with PERC regarding the secretaries doing the file work left over from the abolishment of the senior secretaries. A settlement at PERC was reached on January 9, 2013, in which seven of the CST secretary positions would be restored to service the Child Study Teams;[1] and any of the filing which pre-dated their return would be performed on an overtime basis. Alexa Ingram, who was the Assistant Superintendent at that time, tried to arrange for the overtime but it never occurred.

The District decided to move all of the files from all of the CSTs offices and place them in the Special Education records room,

[1] At that time, the CST's were scattered through the school district. Sometime thereafter, Special Services was moved to the Board headquarters on South Clinton Avenue.

on the second floor of its headquarters building. Prior to school year 2013-14, there were two secretaries assigned to the Special Education records room. However, these two positions were abolished on July 1, 2013. Thereafter the CST filing work was transferred to the CST senior secretaries. In 2014, the file work showed up on the senior secretaries' desks. During the 2014-2015 school year, upon her visit to the file room, Sciarrotta stated that there were two secretaries surrounded by numerous boxes all around the entire room (T-10).

Sciarrotta explained that all the senior secretaries had a responsibility with the boxes; to go through the boxes, see what was in them, and place the contents into the permanent files.

Sciarrotta visited the file room around September of 2015 and noticed that many of the boxes had been removed from the file room. She stated there was another instance where she had visited the other side of the building and in an outer office along the front side of the building there were probably 80 to 100 boxes stacked three to four feet high, with several rows down on that side which took up at least a quarter of that side of the building. I infer that this was the 60 boxes of inactive files that were ready to be sent to the archives.

Two to three times a week in 2015, Sciarrotta testified that she visited the Special Education records room and personally reviewed the contents of maybe four to five boxes that were near to where she was standing; knowing that some of the documents were

confidential student records. She stated that the files were just sitting there open with no lids and she proceeded to take pictures of the boxes. (T-19) No photographs were introduced into evidence.

**The "Insubordination Incident"**

DeJesus sent Bowman a memo (P-18) on December 10, 2015, re: "Misfiling of Student Files, Coding of Absences and Documentation of a November 19th Incident". DeJesus informed Bowman that she had discussed with her an incident that occurred on November 19, 2015, at approximately 10:00 AM in her office. According to DeJesus, she approached Bowman's desk area to inform her that she had her permission to shred a box of duplicate documents which Bowman had placed in her office. Bowman proceeded to walk to DeJesus' office where DeJesus informed Bowman that there was another box of materials that required shredding in the file room. Bowman responded by telling DeJesus that she would only shred the box in DeJesus' office and that she should ask the other secretaries to shred the other box. DeJesus informed Bowman that she was giving Bowman a directive and her refusal would constitute "insubordination". At that point of the conversation DeJesus was standing by the door; Bowman proceeded to grab the box in her office and told DeJesus, "Get out of the way." DeJesus informed Bowman that she was being extremely disrespectful and unprofessional. Bowman, in turn, informed DeJesus that she was not being disrespectful, and then she walked towards DeJesus and

squeezed by her, which made DeJesus feel very uncomfortable. DeJesus requested that Bowman's behavior stop immediately. (P-18)

Bowman responded to the Assistant Superintendent's memo on December 15, 2015 (R-5). The Respondent explained that DeJesus told her to shred the other box in the file room too; in which Bowman responded, "Whose box is that!" DeJesus responded that "It did not matter . . . just shred it". Bowman stated that she would shred DeJesus' box of documents. DeJesus replied, "No! You will not! . . . You shred the other box too." And then you can grieve it later." Bowman stated that she got up from her desk to retrieve the box from her office and DeJesus began to follow her. As they were in DeJesus' office she started pointing and shaking her finger towards Bowman stating, "You will shred the other box, it doesn't make any difference whose box it is." Bowman explained that DeJesus then mentioned that, "It's not fair to give any other secretary, another secretary['s] work load." Bowman told DeJesus to not talk to her in that manner, she wasn't a child. Bowman picked up the box and DeJesus moved towards the door and stood there. Bowman said, "Excuse me! Excuse me!" DeJesus did not move according to Bowman, so she had to squeeze pass her. Bowman denied that she told DeJesus to get out of her way; and that she (DeJesus) was the one who was not acting in a professional manner. (R-5)

Bowman testified that she refused DeJesus' directive to take the second box of files; and instead took one of her boxes to

shred and continued to work until the end of the day or 4:30 p.m. (T-39-40; T-152). Bowman testified that she did not like the way DeJesus spoke to her on November 19, and agreed that she could have shredded the box, but chose to decline the supervisor's directive. (T-153-154)

**Substitute Teaching Assignments**

Lissa Johnson, Assistant Superintendent for the Office of Talent Acquisition and Development, had been employed by the District since July, 2015. Her office has the responsibility for all of the recruitment and firing of employees within the District; and all benefits, pensions and retirements. Moreover, her office is responsible for talent development under Achieve NJ and all the evaluations for employees, as well as teachers and administrators. (T-13)

Johnson testified that the Department has a District Policy #4230, Outside Activities for its support staff, which states in relative part (P-21),

> The Board of Education recognizes that support staff members enjoy a private life outside their job responsibilities in the school district. The Board believes that school employees exert a continuing influence away from the school district. **Accordingly, the Board reserves the right to determine if activities outside the support staff member's job responsibilities interfere with their performance and the discharge of the support staff member's responsibilities to this district.**
>
> All support staff members are advised to be governed in their activities outside the school by the following guidelines:

> 1. Support staff members shall not devote time during their work day to an outside private enterprise, business, or business organization. **They shall not solicit or accept customers for a private enterprise, business, and/or business organization on school grounds during their work day without the express permission of the Superintendent; (emphasis mine)**

The accompanying Board Regulation provides that:

> A full time employee may engage in outside employment only when such employment does not: **constitute a conflict of interest, occur at a time when the employee has assigned district duties,** or diminish the employee's efficiency in performing assigned district duties. **A full-time employee who engages in employment outside the district shall report that employment to the Superintendent. (emphasis mine)**

Johnson testified that she first learned that Bowman had accepted a substitute teaching position with Source 4 Teachers[2] when DeJesus came to discuss it with her. (T-17) Bowman testified that she did not notify the Superintendent when she was officially hired in 2014 for Source 4 Teachers (T-63).

Johnson testified that there is a process by which a teacher would advise of his or her absence, thus, triggering the need for a substitute teacher. Substitutes on the Source 4 Teachers list can access the system and select the absence that they would like to cover for the following day or in the future. (T-16)

Johnson testified that she had the opportunity to see Source 4 Teachers' documents reflecting that Bowman had accepted

[2] Source 4 Teachers is a private company that the District has contracted with for the current year to provide substitute teacher services.

substitute teaching assignments from them, which included assignments in the Trenton school district. Exhibits P-1, P-2 and P-3, Substitute History by Date and Available Subs, report that Bowman accepted and filled two substitute teaching positions in the 2015-2016 school year as follows:

- 9/17/2015 - Bilingual Science Teacher, Trenton - Dunn Middle School (11:30 AM - 2:55 PM)

- 10/19/2016 - Elementary Teacher Gr-3, Trenton - Martin L. King Elementary (8:30 AM - 3:15 PM

Bowman testified that she received a call about 6:30 a.m. or so from Source 4 Teachers on the morning of September 17, 2015. She was asked (via automated system) if she would like to substitute as a bilingual-science teacher at the Trenton's Dunn Middle School on September 17; and, she thought she would take a vacation day in order to substitute for that day. She testified that she accepted the substitute position but then thought better of her decision since she did not know how to speak Spanish. She decided to not accept the position and disconnected the call. (T-10)

Bowman stated that she reported to work on September 17, 2015 at 8:30 and signed in her arrival time and initialed. She basically started the process of shredding, reviewing overtime work boxes, answering the phone, taking messages, and Xeroxing. Bowman stated that she left work at 4:30 p.m. that day. (T-14)

However, Source 4 Teachers issued Bowman a check for the substitute teaching assignment on September 17. Bowman cashed the check. Johnson stated that Bowman was paid by both Source 4 Teachers and by the Trenton School District for that day. Bowman accepted the position; however, she never reported to the Dunn Middle School that day. Johnson testified that upon receiving an invoice from Source 4 Teachers, that included a teaching assignment for Bowman on September 17, Johnson checked with Source 4 Teachers. She was advised that Bowman had not signed in to the Dunn Middle School as having taught there that day. Upon further review, Source 4 Teachers credited the District's account for any payment made to Bowman that day. (T-30)

In January, 2016 -- after tenure charges were filed against Bowman -- Bowman contacted Brandon Murphy from Source 4 Teachers and asked him where they got the information that she worked September 17, 2015. Brandon pulled the Dunn Middle School sign-in card and scanned it to see if Bowman did or did not sign in for that day. Murphy saw that she did not work the day in question and told Bowman that he would contact his supervisor to have her pay straightened out.

Bowman testified that she contacted Source 4 Teachers again and informed them that the correction was never made to her pay; she told them that they were to have deducted one-half a day's pay from her (T-32). Respondent's exhibit R-6, is an email from

Elisheva Lane from Source 4 Teachers stating that she had made the change to finance but apparently they had not credited it yet.

On October 19, 2015, Bowman took a vacation day and she substituted at the Martin L. King Middle School through Source 4 Teachers. On that morning, she called Donna Covell Brenna, the administrative secretary that took their attendance, to request a vacation day and Brenna acknowledged her with, "OK, I'll put you down as a vacation day." She stated that she was not aware that she had to obtain approval from DeJesus to use a vacation day.

Lissa Johnson testified that she received weekly invoices from Source 4 Teachers for all the absences for which they provided substitutes; she validated the invoices prior to approving the bills and the invoices for payment. Bowman was paid by the Trenton Board of Educations for the substitute teaching assignment on October 19, 2015, along with her senior secretary pay for that day. Bowman had recorded a vacation day on the office sign-in sheet for that day. Johnson believed that the incident was a conflict of interest because the Board was paying Bowman twice for the same day, yet her daily secretary job was not fulfilled that day. (T-22)

**Absences/Tardiness/Leaving Early**

The District's Regulation 4211 (R-2), Support Staff Attendance, provides as follows:

A. Reporting Intended Absence

1. A support staff member who anticipates absence from work will call the immediate supervisor two hours prior to commencement of work shift, whenever possible.

2. The following information will be given by the caller:

   a. The employee's name, job title, assigned school, and shift (if applicable);

   b. The day and date of the intended absence; and

   c. The reason for the absence.

* * *

D. Staff Attendance Patterns-Tardiness

**It is the expectation and goal of the Trenton Board of Education that all Trenton School District employees shall report on time to their assigned duties whenever scheduled to work in order to effectuate the continuous delivery of the education services (for which the Board has contracted).** A prerequisite for the efficient performance of a staff person's assigned duties is regular and punctual attendance.

**Therefore, any employee who is tardy, in reporting to work according to the schedule of the school or department to which he/she is assigned without approval, two times in a school year shall have a conference with his/her immediate supervisor regarding such tardiness. On the third time an employee is tardy in a school year without approval, he/she shall receive from his/her immediate supervisor a written communication indicating (setting forth) the dates of the tardies (tardiness) and a notification that continuation of such tardiness shall result in disciplinary action. This written communication shall be copied to the teaching staff's personnel file.**

Once an employee is tardy the fourth time without approval the employee's salary shall be deducted at fifteen minute intervals for every fifteen minutes or less that an employee is tardy. For example, an employee shall be docked fifteen minutes for being late between one through fifteen minutes, docked thirty minutes for being late between sixteen through thirty

minutes, docked forty-five minutes for being late between thirty-one through forty-five minutes, docked one hour for being late between forty-six minutes through one hour, etc. Similar deductions shall be made for each additional incidents of tardiness, in any given year. Approval of tardiness must be in writing and state the reason. All tardiness must be recorded. . .

E. Record of Attendance

1. A record shall be kept of the attendance of each support staff member, including administrators. Any absence, for part or all of a school day, shall be recorded along with the reason for the absence. An employee's attendance record shall be part of the employee's personnel file.

2. The record will distinguish paid leave, such as sick leave, unpaid leave, such as excessive sick or personal leave. The employee's attendance record will include notation of verification of an absence where such verification is required by Policy No. 4432.

The Trenton Board of Education's District Policy for support staff #4211 (P-19) on Attendance, provides as follows:

Employee attendance is an important factor in the successful operation of any school district and in the maintenance of the continuity of the educational program. The Board of Education is vitally and continually interested in the attendance of each employee and considers satisfactory attendance an important criterion of satisfactory job performance.

The privilege of district employment imposes on each employee the responsibility to be on the job on time every scheduled working day. This responsibility requires that the employee maintain good health standards, take intelligent precautions against accidents both on and off the job, and manage personal affairs in order to satisfy district attendance requirements.

The Board is required by the high cost of absences a disrupted work schedules to give continuing attention to the maintenance of regular attendance by employees.

**Chronic absenteeism and tardiness are subject to discipline and may be cause for dismissal.**

The Superintendent shall develop regulations to implement this policy.

District Policy #4215, Code of Ethics for support staff, states in relative part, that employees will,

Report to work as scheduled;

Complete thoroughly their assigned tasks;

Commit themselves to providing the best possible services for pupils;

Keep the trust under which confidential information may be given;

Adhere to all the conditions of a contract;

Protect and care for district property.

The current expired agreement between the Trenton Board of Education and Trenton Educational Secretaries Association (TESA), covering the period July 1, 2009 through June 30, 2012, Articles 13 and 14, provide in relative part, as follows:

**Article 14**
**Vacations and Holidays**

A. Vacations may be taken during any time of the year at times approved by the immediate supervisor.

Bowman had previously been advised that she was required to submit requests for vacation leave in advance. On August 28, 2008, Bowman was advised in writing by the then Director of Special Services, that she had been failing to seek and

obtain advanced approval for vacation leave. This apparently continued to be the policy of the department as DeJesus' December 10 memo to Bowman recited that "Vacation days require prior approval and should not be used at will".

* * *

On November 1, 2015, DeJesus sent Bowman a letter, re: "Excessive Lateness, Attendance Falsification and Misfiling of Student Files" (P-18). This memo recited the substance of the October 30 meeting with Bowman and her Union representative Elizabeth Gill. During the meeting they discussed the importance of coming to work on time and taking the allotted time for lunch as per the contract. DeJesus informed Bowman that she had been averaging 2-3 late arrivals per week, along with taking extended lunch breaks.

During the meeting DeJesus pointed out that between the period of July 8, 2015 through October 29, 2015 alone, there have been at least eight recorded occasions on which Bowman reported to work late: July 8, 2015; July 10, 2015; July 24, 2015; August 7, 2015; September 1, 2015; September 28, 2015; October 9, 2015; and October 23, 2015. DeJesus informed Bowman of her work schedule, lunch schedule and her two breaks. Moreover, DeJesus explained to Bowman that the meeting served as her "final" verbal warning and hereafter, she would be docked for arriving to work late/or taking extended lunch breaks. (P-17)

Furthermore, DeJesus informed Bowman that on October 29, 2015, Bowman left work at 11:30 AM and she did not sign-out, nor, did she inform Brenna, administrative secretary, that she was taking a half-day. She was informed that she would be docked for that time immediately.

DeJesus emphasized to Bowman that District Policy #4211 states that chronic absenteeism and tardiness are subject to discipline and may be cause for dismissal. The regulation for Policy 4211 states that you must report all absences. Bowman's failure to adhere to this policy would lead to the following progressive discipline:

> Daily Salary (Annual Salary/260-261)/8 hours (Daily Work Hours) X (Amount 15 Minute Interval Tardy) = Deduction.

Bowman testified that the District had asked her questions about her arriving late for work or not late for work. Upon her review of her daily attendance records she testified that she was not late on July 8, 2015 and did not know who wrote "late" next to her name on the sign-in sheet. On July 24, 2015, Bowman testified that DeJesus assigned ESY overtime for that day at the P.J. Hill School; her sign-in sheet was annotated with her arrival at 9:00 a.m. Bowman stated that she was not aware of who signed in for her since her start time for that day was 9:00 a.m. at the P.J. Hill School. (T-46-47)

Bowman stated that she reported to work at 8:30 a.m. for her job as a senior secretary on September 17, 2015. She testified

that she left work at 4:30 p.m. that day and could not think of any idea why DeJesus could not find her. She explained that she could have been in the basement, the file room, or at the Xerox machine on the second floor. (T-14-15)

Bowman testified that on days where she knew she would be late to work she would always contact Brenna to let her know. She testified that contacting her was the office procedure when you were going to be late. (T-49)

On October 9, 2015, the sign-in sheet depicted Bowman arrived late at 9:30 AM. Bowman testified that she was not late that day; she stated that she initialed her departing time for that day on the sheet, however, the sign-in time of 9:30 was not her writing. (T-52) On October 23, 2015, Bowman's attendance record indicated that she was late and arrived at 9:30 a.m. and departed at 2:00 p.m. due to back issues. She denied being late for that day and testified that she did not depart work at 2:00 p.m. as reflected on the sign-in sheet, but closer to 3:00 p.m. (T-53; T-93) On October 29, 2015, Bowman signed in at 8:30 a.m. and signed-out at 11:45 a.m. with a question mark (?); however, she denied leaving early that day. (T-55)

Bowman stated in her November 3 rebuttal letter that on October 29, 2015, she did leave the building mid-day to locate Ms. Grady regarding a coaching position. Bowman explained that she had a deadline and had to reach Grady; she attempted to call her, but to no prevail; she left the Board of Education building to

find Grady and returned around 12:45 p.m. She then took a lunch hour from 1:00 p.m. to 2:00 p.m.; after returning she proceeded back into the basement to shred documents. She admitted that she had failed to sign out at the end of the day. Bowman told DeJesus that if tardiness was to be addressed she felt that everyone should be monitored as her co-workers were also frequently late. (R-41; P-17)

Bowman testified that she was at work on October 30, 2015 when around 11:00 a.m., her co-workers were organizing a lunch with a Halloween theme. Bowman stated that the party raised some concern with her because of her religious beliefs that Halloween was a pagan holiday. Bowman stated that the majority of the Special Services Department employees participated in the luncheon; which lasted more than an hour and a half. (R-4; P-17)

Bowman testified that she decided to see DeJesus to tell her that she did not believe in Halloween and she would leave the office. However, Bowman was unable to locate DeJesus and left the office around 12:30 p.m. She did not return until approximately 2:10 p.m. Bowman acknowledged that she did not get permission to take an extended lunch break on that day and that she was paid for an entire day (T-116). Upon Bowman's return, she went to the basement to shred documents and to the Xerox to do the report cards and finished work for the day. (T-57-58)

Stephanie Greg, a senior secretary and co-worker of Bowman in 2015, was called to testify on Bowman's behalf. She testified

that every month there would be a birthday celebration at work. Greg testified that there is never a party theme for the birthdays; she could not recollect if there were any form of decorations at the October 30 birthday party. (T-11) Bowman testified that she did not participate in these monthly celebrations (T-111). She stated that she really did not socialize with the vast majority of the co-workers in the Trenton Board of Education; she stated that she was more of a loner (sic).

Trenton Public Schools Daily Attendance Records, Petitioner's exhibits P-6 through P-16, reflect the daily sign-in sheets for Bowman for numerous days in 2015. Bowman's co-worker's names were redacted on the exhibits; however, the times for her co-worker's arrival and departure were not redacted but were blank on some days throughout the exhibits. Bowman addressed her attendance and reporting absences as [being in compliance] with Article 13, Leave Policies and Article 14, Vacation and Holidays.[3]

**Past Disciplinary/Evaluative Records**

Several of Bowman's past disciplinary and evaluative records[4] (P-22 through P35) are depicted below in summary detail:

- April 15, 2014, 2013-14 Annual Appraisal of Classified Employees: Overall "Average" rating; "Below Average" rating for ability to work

[3] No written District or Board policy on requesting approval of vacation days in advance was submitted. However, it is evident from the record that as far back as 2008, Bowman was put notice that this was the Department's policy.

[4] I admitted Bowman's past disciplinary and evaluative records over the objections of Bowman's counsel. These documents were admitted because they are relevant to the issue of whether Bowman had previously been warned about inappropriate conduct which was identified in the tenure charges herein.

harmoniously with others; and attendance /infrequently tardy.

- February 26, 2009, Official Reprimand for errors and lateness within legal timeframes for IEPs.
- December 18, 2008, Written Warning from Director of Special Education/Support Services for lateness; recommendation of withholding of 2009-10 salary increment.
- October 8, 2008, Annual Evaluation was "Below Average"
- September 5, 2008, Continued pattern of lateness and a refusal or unwillingness to conform to professional standards; Director of Special Education/Support Services to coordinate with Assistant Superintendent for Human Resources for further action.
- April 29, 2008, Annual Appraisal of Classified Employees, Recommendation for Re-employment: With Reservation due to repeated issues of unexcused lateness and early departures; lack of problem-solving abilities.
- August 28, 2008, Directed by Director of Special Education/Support Services to: 1. Arrive to work on time; 2. Submit and receive authorization, in advance, for vacation days; 3. Report to an administrator [for] leaving work before your contractual time.
- July 1, 2004, Entire increment withheld for 2004-05 school year.
- June 7, 2004, Assistant Director of Human Resources memo: Attendance needs much improvement.

## ANALYSIS

N.J.S.A. 18A:6-10 provides that a tenured employee may only be removed from his or her position because of inefficiency, incapacity, unbecoming conduct, or other just cause. The parties acknowledge that the Board bears the burden of demonstrating

unbecoming conduct by a preponderance of the competent, credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Even where a board of education demonstrates unbecoming conduct, the next question is whether the conduct warrants the employee's removal. The determination of the penalty includes consideration of several factors: [1] the nature and gravity of the offense(s); [2] the impact on the staff member's career; [3] any extenuating or aggravating circumstances; [4] and the harm or injurious effect the conduct may have had on the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 401, 422 (App. Div. 1967).

Sometimes the conduct in a single incident is so egregious, it standing alone would warrant removal. More often, the unbecoming conduct charge is based upon a series of infractions or pattern of conduct. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd. o.b. 1341 N.J.L. 326 (1944). In such cases, one would expect to find that the principles of progressive discipline have been applied especially if the present conduct is similar in nature to that for which the employee has previously been disciplined. Further, in analyzing whether the employee's conduct, assuming the board has met its burden of proof, is sufficient to justify termination, one would consider whether the employer had a clear work rule or policy, whether the rules were known to the employee, whether the employee had previously been warned that his/her conduct was unacceptable to

the employer, and whether the employees was warned that repeated infractions might result to more serious discipline.

**Failure to File Student Records**

Bowman's responsibilities included filing student records into the student's individual permanent file folders. Such records included IEP's, evaluations, reports and correspondence. Senior secretaries in the Special Services office each maintain a file basket on their desks. Documents are put into the basket for filing by the members of the CSTs to which the senior secretary is assigned.

The record shows that there was a backlog of filing in the file room starting in 2013. It appears from the record that this backlog consisted mainly of inactive records waiting to be archived at the District's warehouse. This was initially caused by District's decision to eliminate all 14 secretaries assigned to the Child Study Teams, leaving the teams to do their own filing. Although 7 of the CST secretaries were rehired, it appears from the record that two file clerks assigned to the Special Services file room were relieved of that assignment. Former Assistant Superintendent Ingram agreed to clear the backlog through the use of overtime, but that plan never materialized. She then assigned each of the senior secretaries a set of the boxes of the backlogged filing and directed them to complete the task.

By the time DeJesus was appointed in July 2015, Bowman's filing was accumulating in 10-20 copy paper boxes lining the floor of the file room. When DeJesus asked the senior secretaries about the boxes, she was told that the boxes contained Bowman's unfiled documents. Bowman acknowledged that she had started her "dummy file" system two years before this. Whether the collection of Bowman's 10-20 boxes in the file room consisted of documents she was given for filing during that period or whether it also included the backlogged filing, cannot be determined from the record. The record also does not indicate whether the other senior secretaries had their filing up to date or not. However, I infer that Bowman was the only senior secretary to have a significant backlog of filing -- if this were not the case, the other senior secretaries would not have been so willing to complain to DeJesus about Bowman's failure to file. In addition, Bowman did not claim that she received disparate treatment over the directive to clean up her filing backlog.

In any event, DeJesus met with Bowman for the first time in either September or early October about her filing and her use of the dummy files. DeJesus emphasized the importance of maintaining the records in the students' permanent files and she went through a tutorial on the proper protocol for document organization in the file. Bowman understood DeJesus' directions as a result of this meeting to include

the need to eliminate the dummy files and get them off the floor. While TESA characterizes this directive as evidence that DeJesus wanted to put a "clean face" on the problem by eliminating the boxes, I do not ascribe that theory to the directive. Rather, it is evident to me that DeJesus did not merely want to make the boxes of unfiled documents disappear, but rather, she wanted the documents to be filed in the students' permanent records.

After this initial meeting with DeJesus, Bowman began to "make the boxes of files disappear" by inserting handfuls of dummy files randomly throughout the file cabinets. Apparently DeJesus believed that by doing so Bowman was trying to hide the problem. When she challenged Bowman as to why she had placed the dummy files in the cabinets, Bowman denied attempting to hide the files, but suggested that she was merely placing the files inside the cabinets to be corrected filed at a later time. She also reasoned that this would give her more time to complete the task.

By the end of October, when it did not seem to DeJesus that Bowman had made much progress on accomplishing the task, she met with her again, along with Bowman's union representative. An action plan was developed at that time, which Bowman did not contest.[5] If, as Bowman later claimed,

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[5]At the arbitration hearing, Bowman was careful to distinguish her reply to DeJesus' action plan. Bowman testified that she responded to DeJesus's plan by

it was an impossibility to complete the task within the timeframe set up by DeJesus, she could have taken alternative action. She should have either so advised DeJesus at the October 30 meeting that the time period being set was unrealistic; or at the least, she could have written a rebuttal to the action plan; or she could have notified DeJesus at any time in October that the plan was proving unworkable and requested more time. She chose none of these options.

By early December, DeJesus met again with Bowman and her Union representatives about Bowman's filing backlog. By this point, some of the filing had been done, but there was still a backlog. According to DeJesus, CST's were still concerned that the documents of students assigned to them were getting lost. Bowman's "excuses" for her failure to complete the task included that she was out sick and that the task was "really hard."

The problem here is not limited to Bowman's last six weeks of her employment before she was put out on tenure charges; the real focus is her failure to file her CST's documents over the last two years. While she thought that creating the dummy files would simplify the filing process, the reality is that she created

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stating that she "would try" to complete the task by the end of the month, she denied that she told her she agreed to perform as per the plan. If Bowman believed that it was not possible to complete the action plan, she and her union representative should have promptly so advised DeJesus.

dummy files instead of actually filing anything in the students' permanent files.

The maintenance of the records is critical, especially because these are records of students with learning disabilities or other handicaps. The mission of the Department of Special Education and Services is to insure that these students get the best education that can be achieved and that their disabilities are adequately addressed. The mission is not just the Board's policy -- it's a statutory mission. Bowman's failure to properly maintain the files put those classified students with incomplete files at risk of being disenfranchised from getting the proper educational protocols. Without a complete file, the child study team cannot fulfill its responsibilities to the students to get them the most appropriate help for their needs. It also put the District at risk of being found in violation of the State Board of Education's requirements for file compliance.

Bowman's excuses for having failed to complete the filing are an indication of the real problem here. The real problem is that this is an employee who is way behind on her work, and yet is chronically coming in late, taking long lunch hours, leaving work early, and taking time off to attend to personal business and accept substitute teaching assignments. I find that Bowman is guilty of count #9 of the tenure charges and engaged in conduct unbecoming an employee

and neglect of duty by her failure to perform her assigned duties.

**Insubordination Incident**

It is undisputed that on November 19, 2015, Bowman committed insubordination towards Assistant Superintendent DeJesus. DeJesus gave Bowman a directive to shred two boxes of documents. Bowman acknowledged that the first box was "her documents" but questioned why she should "have to" shred the other box, which she believed was someone else's job. Bowman directly refused to shred the second box even after DeJesus made it clear that she was giving her an order and she expected Bowman to comply. This latter statement put Bowman on notice that her continued refusal to shred the second box would be viewed as a direct act of insubordination. The message was clear: comply with the directive (and grieve if you believe it to be "unfair"), or face discipline. Still, Bowman did not shred the second box of documents.

Insubordination is a serious offense in the workplace. It undermines the supervisor's authority and causes a loss of respect for the supervisor in the workplace. If left unchecked, this may lead to workplace anarchy.

By this act of insubordination, Bowman violated Board's Code of Ethics policy for support staff, which provides in relevant part, that employees must:

Complete thoroughly their assigned tasks;

> Commit themselves to providing the best possible services for pupils;

Further, it is an axiom of every work place setting that employees must obey all lawful directives of their supervisors whether they agree with the fairness of those directives, or not. Insubordination is never a tolerable offense in the work place. Rather, employees are to obey the adage "work now; grieve later". Clearly, Bowman's conduct in refusing to follow DeJesus' directive amounts to insubordination and conduct unbecoming an employee.

I find that the Board has proven Charge #10 against Bowman and that she is guilty of insubordination, conduct unbecoming an employee and neglect of duty.

**Substitute Teaching Assignments**

Source 4 Teachers is a private vendor contracted by the Trenton School District, and other surrounding districts, to place daily substitute teachers in its classrooms to cover the absences of its regular teachers. The record establishes that in 2014, Bowman was approved by Source 4 Teachers to be placed on its list of qualified substitute teachers. It is unclear whether the District administration knew of this fact prior to 2015, when it received an invoice from Source 4 Teachers which included Bowman's name as having fulfilled a substitute assignment at Dunn Middle School. In any event,

the Board's policy regarding outside activities provides that:

> **. . .the Board reserves the right to determine if activities outside the support staff member's job responsibilities interfere with their performance and the discharge of the support staff member's responsibilities to this district.**
>
> All support staff members . . . **shall not solicit or accept customers for a private enterprise, business, and/or business organization on school grounds during their work day without the express permission of the Superintendent; (emphasis mine)**

The accompanying Board Regulation provides that:

> A full time employee may engage in outside employment only when such employment does not: **constitute a conflict of interest, occur at a time when the employee has assigned district duties,** or diminish the employee's efficiency in performing assigned district duties. **A full-time employee who engages in employment outside the district shall report that employment to the Superintendent. (emphasis mine)**

Pursuant to this policy and regulation, Bowman was obligated to report her employment with Source 4 Teachers as soon as she was appointed to the substitute list.

Bowman acknowledged that she had not informed the Superintendent of her retention by Source 4 Teachers. If she had, the Superintendent (or his/her designee) would have then had an opportunity to inform Bowman that the Board would view her acceptance of teaching assignments in the Trenton School District as presenting a conflict of interest. Therefore, I find that Bowman's failure to advise the Superintendent that

she was hired by Source 4 Teachers was in violation of District Policy and constituted conduct unbecoming an employee.

On September 17, 2015, Bowman accepted a teaching assignment from Source 4 Teachers to teach a half-day class at Dunn Middle School.[6] She testified that her intention was to call in to the Special Services Department and report herself as taking a vacation day. According to Bowman's testimony, she then reconsidered the assignment and decided she had to decline it because she is non bilingually qualified. She testified that she notified Source 4 Teachers that she was declining the assignment. She then reported to her regular job at 8:30. What happened next is controverted. Bowman testified that she signed in and worked her regular hours that day until 4:30. However, the log does not show that she signed out at 4:30 or any other time. DeJesus testified that Bowman "disappeared" at about 11:30 a.m., and that she "could not find" her for the rest of the day. Bowman contends that she spent the afternoon of September 17 shredding paper in the basement, and left at her regular quitting time. Sometime prior to November, 2015, Source 4 Teachers issued Bowman a check for the September 17 half-day teaching assignment. Bowman accepted and cashed the check.[i]

[6] This acceptance was accomplished electronically on the vendor's website.

On November 17, Lissa Johnson processed an invoice from Source 4 Teachers (P-1), which included Bowman's serving as substitute at the Dunn Middle School on September 17. After Bowman was served with the tenure charges on December 17, 2015, she then contacted Source 4 Teachers and arranged to return the amount of the payment.

On October 19, Bowman accepted another teaching assignment from Source 4 Teachers and taught at Trenton's M.L.K. Elementary School. To do this, she notified the Special Services Department that she would be taking a vacation day that day.

The Board maintains that by accepting payment for the substitute teaching assignment on September 17 and simultaneously accepting salary from her regular secretarial job with the district, Bowman was "double-dipping" the District. It contends that this violated its Outside Employment Policy, its Ethics Policy, and amounted to conduct unbecoming an employee.

The Board argues that on October 19, Bowman again double-dipped by accepting payment from both the substitute teaching assignment and being in paid status from her secretarial job. It contends that this created a conflict of interest and violated the public trust. Further, it maintains that Board Policy dictates that employee must submit an advance request for vacation time off.

TESA argues that Bowman never actually worked the substitute job on September 17 and that her acceptance of payment was merely an oversight. With regard to the substitute teaching job on October 19, TESA maintains that since Bowman was on a vacation day that day, she was entitled to do whatever she wanted on her vacation time, including working for another employer. It contends that Bowman engaged in no wrongdoing on either date and that the charges #1 through #4 should be dismissed.

The conflicting evidence concerning Bowman's whereabouts after 11:30 a.m. on September 17 require me to make credibility resolutions. I do not find Bowman's assertions that she was at work all day to be credible. I find it implausible that she would accept a teaching assignment and then renege on it and just go to work for the day. Additionally, I find it illogical that DeJesus would not be able to locate Bowman for a five-and-one half hour period that day. She testified that Bowman was not at her desk, not in the hub, not in the filing room, and not in the basement. Five hours plus is a long time for someone to be at work and not be noticed. Moreover, contrary to her customary and usual habit, she did not sign out that day, although she was aware that employee sign in and sign out was expected. While Source 4 Teachers confirmed to Johnson that Bowman had not signed in to substitute teach at Dunn Middle School on

September 17, there is no way for me to determine whether she actually engaged in the teaching job that day or not. I credit DeJesus's account that Bowman was not at work after 11:30 a.m. The point is that she was not at work that afternoon. More importantly, Bowman accepted payment for the teaching assignment without another thought until she was served with tenure charges.

I find that Bowman accepted payment for both her regular secretarial job and for the substitute teaching job for September 17, thus, engaging in conduct unbecoming an employee and violating the Board's ethics policies.

In addition, I find that Bowman violated the Board's policies and rules by not submitting an advance request for a vacation day for October 19. TESA's contract states in Article 14 that secretaries are given a vacation allowance annually but vacation approval is at the discretion of the employee's supervisor.

Further, Bowman had previously been warned about her failure to submit advance requests for vacation leave. Once an employee is warned that conduct is unacceptable to the employer, the employee is certainly expected to modify her behavior in the future and comply with the employer's expectation. I therefore find that Bowman's acceptance of both the substitute teaching assignments from Source 4 Teachers on September 17 and October 19 amounted to conduct

unbecoming an employee, violation of Board policies concerning required notice to the Superintendent concerning outside activities, and violation of the Board's ethics policies. I find Bowman guilty of charges #1, 2, 3, and 4.

**Chronic Tardiness/Leaving Early**

The record demonstrates that between July 1 and November 1, the Department's attendance logs show eight tardiness occasions by Bowman. In addition, she left early on several occasions, some of which were without permission. Further, she took an extended lunch period and/or left work in the middle of the day on two occasions during that period.

The Union argues that the Employer's attendance control policies are lax and inconsistently applied. For example, DeJesus could not say with certainty whether her department's policies required employees to sign-in and sign-out with just their initials or whether the sign-in time was also required. The log shows that some employees included only their initials while others also included the time. There was apparently no rule or enforcement about employees not signing-in/out at all. These lax procedures make it difficult to enforce its time and attendance policies.

Unfortunately, Bowman's disciplinary record shows that she has a long history of repeatedly being warned about her issues with punctuality and taking unauthorized time off.

Had the Department followed the attendance policies as set forth in Board Policy 421, it would have engaged in progressive discipline including written warnings, the docking of pay, and formal discipline prior to the latest round of time infractions.

However, all of Bowman's time away from the job after July 1, 2015, resulted in a meeting between DeJesus, Bowman and Bowman's union representative on October 30 and a follow-up memorandum on November 1, 2015. In the November 1 memorandum, DeJesus noted her tardiness patterns and the fact that she had left early on October 29, without permission and took an extended lunch on October 30. DeJesus' memo continues,

> I informed you [on October 30] that this was your final verbal warning and henceforth, you will be docked for arriving to work late and/or taking extended lunch breaks. . . You will be docked accordingly [for the time taken after 11:30 on October 29]. (P-17)

TESA argues that once the Employer engaged in this form of discipline -- a written warning, any additional discipline for the same events would amount to "double jeopardy". I agree. The record does not show that Bowman was tardy or took time off from work at any time after the November 1 written warning. The purpose of a written warning is to put the employee on notice that the conduct engaged in is unacceptable to the Employer and that future infractions will lead to additional discipline. Here, there were no further infractions that would trigger additional discipline. Once

an Employer decides to implement one level of discipline, it cannot double back and re-discipline the employee for the same set of infractions.

I therefore find that Bowman is not guilty of conduct unbecoming an employee or neglect of duty for her tardiness between July 1 and November 1, 2015. Charge #5, 6, 7, and 8 are dismissed.

**Disciplinary Record**

I note that Bowman's record shows that she has been sporadically warned about her failure to perform the duties of her job, as well as her absence record. In 2008, an employee improvement plan was developed by the then Assistant Director of Special Services to assist her with resolving performance issues. Her evaluation cautioned that she was not meeting performance expectations. In 2009, she was reprimanded again, in writing, concerning IEP revisions that were two months late and contained many errors. Her record of past discipline is remote in time to the contemporaneous events herein, and therefore not particularly relevant to the issue of whether she should be terminated from her position.

However, I find based upon the totality of circumstances of the events of 2015, including the seriousness of her failure to file student records, her insubordination, and her acceptance of payment for a substitute teaching assignment while simultaneously accepting pay for her District's

secretarial job results in the conclusion that her conduct is sufficiently egregious to warrant termination.

**AWARD**

I conclude that Charai Bowman is guilty of conduct unbecoming an employee, neglect of duty, and other sufficient cause to warrant her termination. I find that she is guilty of charges #1, 2, 3, 4, 9, and 10 as set forth in the tenure charges filed by the Board and certified by the Commissioner of Education on February 3, 2016. The remaining charges are dismissed. Her tenure as a senior secretary with the Trenton School District is revoked and she is terminated immediately.

Susan W Osborn

Susan Wood Osborn
Arbitrator

DATED: May 23, 2016
Trenton, New Jersey

State of New Jersey )
County of Mercer )

On this 23rd day of May, 2016, before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Pamela Sutton-Browning

PAMELA JEAN SUTTON-BROWNING
ID # 2424173
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires August 20, 2017

194-16

**STATE OF NEW JERSEY**
**COMMISSIONER DEPARTMENT OF EDUCATION**

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE OF | ) | |
| | ) | |
| Heather Grey | ) | |
| | ) | |
| and | ) | Docket Number 254-9/15 |
| | ) | |
| School District of the Township of Lower Cape May County, New Jersey | ) | |
| | ) | |

## OPINION AND AWARD

| | | |
|---|---|---|
| Before: | | Alan A. Symonette, Esq.<br>Impartial Arbitrator |
| Appearances: | Heather Grey | Ned P. Rogovoy, Esq. |
| | Lower Township<br>Cape May County, | John B. Comegno, II, Esq.<br>R. Taylor Ruilova, Esq. |
| Dates of Hearing | | November 24, 2015<br>December 7, 2015<br>January 13, 2016<br>January 14, 2016 |

Statement of the Decision: Based upon the evidence presented I must find that the School District has established a sufficient basis for the charges set forth herein. The charges are sustained.

## INTRODUCTION

This matter was brought to arbitration before the undersigned arbitrator pursuant to P.L. 2012, Chapter 26 of Title 18a *N.J.S.A.* These involve certain charges filed on September 10, 2015 against the Respondent Ms. Heather Grey by the School District of the Township of Lower Cape May County, New Jersey. The charges seek to remove Ms. Grey from her position as a school bus driver for the School District. The Statement of Tenure Charges is set forth herein as follows:[1]

### STATEMENT OF TENURE CHARGES

#### ***INTRODUCTION***

Ms. Grey, a bus driver employed by the Board, has engaged in a pattern of dangerous, reckless, unlawful and unbecoming conduct sufficient to support tenure charges brought against her. Specifically, Ms. Grey's conduct includes, but is not limited to: (1) improper use and false reporting of sick/medical leave; (2) repeatedly failing to comply with Board Policy and applicable law regarding use of a cellular telephone while operating a school bus; (3) repeatedly failing to safely operate a school bus; (4) failing to comply with Board policy regarding mandatory child safety school bus inspection procedures; (5) repeatedly causing damage to private property while operating a school bus; (6) failure to comply with procedure to maintain updated bus routes, maps and seating charts; and (7) general failure to comply with administrative directives.

As a result, the Board seeks to terminate Ms. Grey.

#### ***BACKGROUND***

1. Ms. Grey began her employment with the Board as a bus driver as of September 1, 2006.
2. As a bus driver, Ms. Grey is a member of the Lower Township Elementary Education Association ("LTEEA"), which is party to a collectively negotiated agreement with the Board (the "CNA").
3. Pursuant to the terms of the CAN, as of September 2009, Ms. Grey became a tenured employee of the Board.

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[1] References to paragraphs in the Statement of Evidence at the end of each specification have been excluded from the text.

***CHARGE ONE***
***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***
***IMPROPER USE AND FALSE REPORTING OF SICK/MEDICAL LEAVE***

4. Without providing any advance notice, in the afternoon of October 3, 2014, Ms. Grey produced to the Board's Transportation Department Secretary a handwritten note written on a prescription sheet blank from Burton Waisbren, Jr., M.D. ("Dr. Waisbren"), which indicated the patient as Heather Grey and "NO WORK 10/3/14 – 10/17/14," but provided no further detail.
5. Prior to submitting the note, Ms. Grey worked a full day on October 1, 2014 and half days on October 2, 2014 and October 3, 2014.
6. Based upon the note, Ms. Grey indicated that she was unable to appear for work for the time period specified.
7. After she was informed by the Transportation Department Secretary of Ms. Grey's doctor's note, on October 3, 2014, the Transportation Supervisor sent Ms. Grey a text message asking Ms. Grey to call her.
8. Ms. Grey responded in a text message indicating that she could not talk because "[t]hings are Crazy here. I have a lot going on Dr. didn't think I should be driving until we got everything situated."
9. Ms. Grey further indicated she would call the Supervisor back shortly, but no such call was ever received.
10. Out of concern for Ms. Grey's wellbeing, on October 6, 2014, the Transportation Supervisor inquired with some of her co-workers as to how she was, but received no responses.
11. The Transportation Supervisor then contacted the central Administration, informed them of the situation and expressed her concern regarding Ms. Grey's wellbeing.
12. On October 6, 2014, after receiving no further communication from Ms. Grey or information on her wellbeing, the Transportation Supervisor went to Ms. Grey's home at 8:20 AM and 11:20 AM to attempt to see if she was okay, but she received no responses at the door on either occasion.
13. At 8:20 AM, Ms. Grey's vehicle was not observed at her residence, but it was observed there at 11:20 AM.
14. Given the lack of specificity in the Dr. Waisbren note, on October 6, 2014, the Administration contacted Dr. Waisbren's office to attempt to obtain further information regarding the requested leave and to confirm that Dr. Waisbren had supplied the note.

15. On October 6, 2014, Betsy Young, the Office Manager for Dr. Waisbren, responded via email, attaching a copy of the same handwritten prescription sheet note from Dr. Waisbren, along with another handwritten note signed by Ms. Young which read "I checked with Dr. Waisbren and he did write this note for Heather Grey. She was seen here in the office by Dr. Waisbren on 10/1/14 and he did put her out of work from 10/3/14 until 10/17/14."
16. The response that Dr. Waisbren had seen Ms. Grey on October 1, 2014 but did not put her out of work until October 3, 2014, couples with the fact that Ms. Grey had reported to work on October 1, 2014 through October 3, 2014, appeared confusing to the Administration.
17. Accordingly, on that same day, the Administration responded to Ms. Young and asked for further clarification given that Ms. Young's note indicated that Dr. Waisbren saw Ms. Grey on October 1, 2014, but did not explain why she would be unable to work until two (2) days later.
18. Ms. Young responded later that day and indicated that Dr. Waisbren saw Ms. Grey on October 1, 2014 and wrote the note on that day excusing her from work beginning on October 3, 2014, but that his notes did not indicate anything about her ability to work on October 1, 2014 or October 2, 2014.
19. In response, the Administration wrote back to Ms. Young and specifically indicated that they were not inquiring as to what Ms. Grey was being treated for, but requested confirmation that her illness is severe enough that she would be unable to work for two (2) weeks.
20. The final communication from Ms. Young was a response on the evening of October 6, 2014 which stated "I asked Dr. Waisbren the question you relayed and he said that he is not at liberty to discuss this any further."
21. On October 7, 2014, the Transportation Supervisor telephoned Ms. Grey at 9:50 AM and left a message, but received no response.
22. At 10:05 AM on October 7, 2014, the Transportation Supervisor sent Ms. Grey a text message indicating that she was coming over to her home, but received no response.
23. When the Transportation Supervisor arrived at Ms. Grey's home, her vehicle was observed at the residence, but there was no response at the door.
24. On October 8, 2014 at 10:00 AM, the Transportation Supervisor went to Ms. Grey's home, but no response was received at the door and Ms. Grey's vehicle was observed at the residence.

25. Despite her numerous attempts to contact her, the Transportation Supervisor received no further contact from Ms. Grey from October 3, 2014 until October 20, 2014.
26. Ms. Grey did not appear for work from October 3, 2014 to October 17, 2014, and she recorded her absence as the use of paid sick days.
27. On or about October 17, 2014, the Administration was informed by the Lower Township Police (the "LTPD") regarding an incident that took place at Ms. Grey's home.
28. The LTPD were dispatched to the location on October 14, 2014 in connection with a report that a dog had been hit by a car.
29. Upon further investigation, the LTPD was informed that the dog belonged to Ms. Grey, but that it was being watched for her by a friend who was "pet-sitting" because Ms. Grey was away in Florida.
30. After receiving the information that Ms. Grey was apparently in Florida during the time when she was supposed to be out of work on medical leave and unable to work, the Administration began an investigation in the matter.
31. As part of that investigation, the Administration received information from other employees that Ms. Grey was apparently travelling to Florida on vacation with another Board transportation employee.
32. On November 3, 2014, a meeting was held with Ms. Grey, an LTEEA representative, the Transportation Supervisor and the Superintendent at which time the information received regarding Ms. Grey's apparent trip to Florida during her purported medical leave was presented to her.
33. Ms. Grey responded that she was at home during that time period, and denied being in Florida.
34. On or about November 12, 2014, Ms. Grey produced a second handwritten note from Dr. Waisbren on a prescription sheet, dated November 12, 2014, which noted "THIS PATIENT WAS OUT OF WORK, AT MY DIRECTION FROM 10/3 – 10/17 –PLEASE SEE MY EARLIER NOTE."
35. Thereafter, by letter to the Superintendent dated November 18, 2014, Ms. Grey explained she was under the care of Dr. Waisbren for the period in question in October, 2014, and that he had ordered her to stay out of work as she was unable to perform her duties.
36. In that letter, Ms. Grey also stated "I was at home for most of this absence."
37. Attached to the November 18, 2014 letter was a two (2) sentence letter from Dr. Waisbren which stated:

This letter is confirmation that had ordered Heather Grey to remain out of work from 10/3/14 to 10/17/14 as she was unable to perform her work duties during that period

Please see all previous documentation.

38. After receiving Ms. Grey's letter and upon further consideration, a second meeting was held on December 22, 2014 with Ms. Grey, who was also accompanied by James Jameson, the local New Jersey Education Association ("NJEA") UniServ representative.
39. At that meeting, Ms. Grey ultimately admitted that she went to Florida during part of the time period during which she took paid sick leave in October, 2014.
40. Given the fact that the Administration had confirmed Ms. Grey admittedly travelled to Florida during the period in which she claimed she was unable to work, the Administration sought to dock her pay for the eight (8) days during which she was out on the suspect leave.
41. Following the subsequent discussions with NJEA representative Jameson who was seeking a lesser penalty for Ms. Grey, the Administration agreed to only dock her for four (4) days of the paid leave, provided she entered into a "Last Chance Agreement" (the "Agreement") provided by the Board.
42. The Agreement provided that although the Board could have sought to pursue far more severe consequences, including terminating Ms. Grey's employment as a result of the falsely reported leave, the Board agreed to the lesser penalty of docking Ms. Grey for four (4) days of pay from the period of her medical leave.
43. The Agreement further provided that in exchange for the Board agreeing to forego any action to terminate her employment, Ms. Grey accepted the docking of her pay and further agreed that her continued employment was conditional upon her good standing with the Board and that she would not engage in any other breach of the Board's expectations of her employment.
44. The Agreement was provided for review to NJEA representative Jameson.
45. 45. The Administration did not receive a response from the NJEA until a month later at which time, a revised version with minor language changes was submitted.
46. 46. The Administration responded and indicated that they would accept the minor language changes.
47. 47. However, the NJEA then submitted another version of the Agreement which was further revised to remove some of the language in the original version, including that Ms. Grey had

admitted to travelling to Florida or had improperly taken paid sick leave.

48. The Administration responded that the second revised version of the Agreement was not acceptable and that if a signed version of the initially accepted Agreement was not received that day, the Agreement would be withdrawn and the Board would seek other disciplinary sanctions.
49. Neither Ms. Grey nor the NJEA representative produced a copy of the signed Agreement.
50. Despite the fact that Ms. Grey never signed the Agreement, she was ultimately only docked for four (4) days of pay, which was spread out over four (4) pay cycles.
51. Ms. Grey filed no objection to the docking of the four (4) days' pay.

## ***CHARGE TWO***
## ***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

## ***REPEATED FAILURE TO COMPLY WITH BOARD POLICY AND APPLICABLE LAW REGARDING USE OF CELLULAR TELEPHONE WHILE OPERATING SCHOOL BUS***

52. On December 12, 2002, N.J.S.A. 39:3B-25 was enacted making it unlawful for the driver of a school bus to use a cellular or other wireless telephone while operating a school bus. This law has remained in effect during the entire term of Ms. Grey's employment as a bus driver.
53. In that regard, Board Policy 8630 "Bus Driver Responsibility" further provides in pertinent part as follows:

    A school bus driver, during the driver's work schedule, may only use a cellular or other wireless telephone, for school related business. The driver is prohibited from using a cellular or other wireless telephone, while operating a school bus. A cellular, or other wireless telephone may only be used for school related business by the school bus driver while operating the school bus, when the school bus is parked in a safe area off a highway or in an emergency situation.

54. Bus drivers were regularly reminded of the prohibitions on use of cellular telephones during the driver's work schedule. For example, a memorandum dated August 28, 2012 which was provided to all drivers, including Ms. Grey, stated as follows:

Please be advised that **no bus driver** is allowed to use their cell phone for either conversation or texting, **while operating the bus.** This jeopardizes the safety of children and staff and is in violation of law.

**Anyone caught violating this procedure will face disciplinary action.** (Emphasis in original)

55. Another memorandum to all bus drivers and aides dated September 3, 2013, which Ms. Grey received, reviewed procedures and expectations for bus drivers, including the following statement:

**NO ONE** is to use their cell phones while driving their bus, this includes texting. If you have an emergency please pull your bus over to a safe spot. **THERE WILL BE NO EXCEPTIONS**...Please remember the safety of your students. Remember the public is watching, also the video system records everything. (Emphasis in original)

56. On October 23, 2012, the Transportation Department received a telephone call from a concerned parent of a student who reported that Ms. Grey was texting on her cellular telephone and speeding while operating a school bus on Suzanne Avenue in Lower Township while children were present on the bus.
57. That same day, Ms. Grey met with the Transportation Supervisor, was informed of the issue and presented with a write-up regarding the incident. That write-up was accompanied by copies of memoranda previously distributed by the Transportation Department to all Board bus drivers.
58. Ms. Grey signed the acknowledgement portion of the October 23, 2013 write-up without providing any comments on the write-up form.
59. On April 2, 2014, Ms. Grey was observed by a LTPD Officer talking on a cellular telephone while driving a school bus.
60. The LTPD Officer issued a written Warning to Ms. Grey in connection with the incident.
61. That same day, Ms. Grey met with the Transportation Supervisor, discussed the violation and was presented with a write-up regarding the incident. That write-up was accompanied by copies of memoranda previously distributed by the Transportation Department to all Board bus drivers.
62. On April 2, 2014, Ms. Grey signed the acknowledgement portion of the April 2, 2014 write-up form.
63. In the employee comments section of the April 2, 2014 write-up form, Ms. Grey admitted that she was talking on a cellular

telephone while she was driving a school bus on school property.

64. Given that this was a second reported incident of Ms. Grey violating applicable law and Board Policy regarding the use of a cellular telephone while operating a school bus, a formal Official Reprimand dated April 4, 2014 regarding the incident was also provided to her and placed in her personnel file.
65. In addition to the Official Reprimand, a meeting was held with Ms. Grey, accompanied by LTEEA representation, and the Board's Business Administrator on April 9, 2014 to further discuss the incidents and the additional disciplinary sanctions that would result if she continued to violate applicable law and Board Policy regarding the use of cellular telephones.
66. Following reports in March 2015 of certain Board bus drivers not complying with mandatory requirements for child safety checks on school buses, the Transportation Department conducted a review of the video footage from the video cameras located on all Board school buses to attempt to determine any violations by bus drivers.
67. All Board school buses are equipped with a dual camera system, with one (1) camera at the back of the bus directed forward showing the student passenger compartment, and a second camera mounted above the driver to observe the driver's conduct.
68. The school bus camera systems also automatically record and note on the video footage certain information, including the speed of the bus in real time.
69. All bus drivers, including Ms. Grey, were aware of the school bus video camera systems, as well as the use and purpose of those systems.
70. The use and purpose of the school bus video camera systems was further memorialized in Board Policy and Regulation 8690 "Monitoring Devices on School Vehicles."
71. On the March 17, 2015 video footage from Ms. Grey's school bus, Ms. Grey was observed using her cellular phone to both send text messages and make a telephone call while students were present on the school bus.
72. On the March 27, 2015 video footage from Ms. Grey's school bus, Ms. Grey was observed, among other improper activities, to use her cellular phone to send text messages while students were present on the school bus.
73. On or about March 30, 2015, Ms. Grey was made aware that she was observed on video footage using her cellular telephone while operating the school bus.
74. Despite being made aware that she had been recently observed via the video system on her school bus, on the May 1, 2015

video footage from Ms. Grey's school bus, Ms. Grey was again observed using her cellular telephone to send text messages while students were on the school bus.

75. However, upon information and belief, because she was aware that school bus video footage was being monitored, Ms. Grey attempted to conceal her use of her cellular phone by placing her purse in her lap and using the phone inside her purse.

## ***CHARGE THREE***
## ***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

## ***REPEATEDLY FAILING TO SAFELY OPERATE A SCHOOL BUS***

76. On October 1, 2014, the Transportation Department received a call from a citizen who reported that the bus being operated by Ms. Grey, while students were on board, was tailgating him while travelling on Bayshore Road. The citizen further reported that he sped up his vehicle to 55 miles per hour, but that Ms. Grey continued to tailgate him despite his increased speed.
77. On October 1, 2014, the Transportation Supervisor met with Ms. Grey, discussed the incident and provided her with a write-up advising her to maintain a safe following distance from vehicles in front of her bus.
78. Ms. Grey refused to sign the acknowledgement portion of the write-up form, but did provide comments in the employee comment section indicating that she did not believe she was tailgating anyone.
79. On the May 20, 2015 video footage from Ms. Grey's bus, she was observed not correctly wearing her seat belt and removing the seat belt while the bus was still moving.
80. On the May 21, 2015 video footage from Ms. Grey's bus, Ms. Grey was observed to engage in the following behavior while operating the school bus:

- Permitting a student to walk from the back of the bus to the front while the bus was moving:

- Using a broom to sweep the bus with the entry door open and travelling in excess of 45 miles per hour;

- Removing both hands from the steering wheel to telescope the broom handle while travelling in excess of 40 miles per hour;

- Removing both hands from the steering wheel to access her purse while travelling in excess of 20 miles per hour.

- Removing hands from the steering wheel to reach down and open a container of wipes while travelling in excess of 40 miles per hour; and

- Removing one hand from the steering wheel to wipe down an area while travelling in excess of 40 miles per hour.

81. On the June 1, 2015 video footage from Ms. Grey's bus, Ms. Grey was observed to be filling out her daily bus condition report while the bus was moving.
82. On June 4, 2015, the Transportation Supervisor met with Ms. Grey, discussed the recent series of incidents observed on video footage from May and June 2015 and provided her with a write-up indicating that it is a safety concern for Ms. Grey to operate a school bus in such a manner.
83. Ms. Grey signed the acknowledgement portion of the June 4, 2015 write-up and added the explanations of some of the incidents, including the following:

    - As to the May 20, 2015 seat belt violation: "due to time restrictions, I remove just prior to entering my spot"

    - As to the May 21, 2015 incidents of sweeping/cleaning her bus while it was moving: "wasp-trying to swat it away"

84. On the June 4, 2015 write-up form, Ms. Grey also added general comments, including the following: "Feel like this is harassment in order to remove me from my position. (camera is directed at me not student) Also, most of this wouldn't even be an issue if the camera was fixed like we discussed last school year."

***CHARGE FOUR***
***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

***FAILURE TO COMPLY WITH BOARD POLICY REGARDING CHILD SAFETY SCHOOL BUS INSPECTION***

85. In order to ensure that no students are left on school buses, the Board has a long-standing mandatory procedure whereby all bus drivers are required to physically check that no students remain on the bus.
86. As part of that procedure, each school bus is equipped electronic safety system which requires that a button located at the rear of each bus be pressed by the driver when the school bus is parked, thus ensuring that all bus drivers get up and physically check the bus. If the button is not depressed within approximately sixty (60) seconds, an alarm sounds.
87. All Board bus drivers receive training regarding the requirements of the physical checks of school buses and the operation of the bus safety system.
88. For example, on January 20, 2011, Ms. Grey attended the "New Child Alert System/How to properly check all seats" in-service training.
89. Following that training, Ms. Grey signed an acknowledgement form which stated that "I understand how the system works and the proper procedure to check all seats. I understand this is my sole responsibility as the bus driver."
90. In addition, all Board bus drivers are regularly reminded regarding their obligations to physically check the buses and of their operation of the bus safety system. For example, a written memoranda dated October 29, 2013 issued to all Board bus drivers, including Ms. Grey, provided as follows:

> While we all understand that driving a bus is a difficult job, it also important and critical that it be done safely.
>
> When you arrive at any school and the students have disembarked the bus, you must physically check that no student is remaining on the bus. This is your responsibility and you cannot delegate this to anyone else. Follow all the safety procedures is important and crucial. They are there for a reason. Checking your bus for any students at the end of your run must be done as well. Failure to follow this procedure can and shall lead to the termination of your employment. Please follow all the procedures and review then with your supervisor.

91. As noted above, following reports in March 2015 of certain drivers not complying with mandatory requirements for child safety checks on school buses, the Transportation Department conducted a review of a video footage from the video cameras located on all District school buses to attempt to determine any violations by bus drivers.

92. On the March 27, 2015 video footage from Ms. Grey' school bus, Ms. Grey was observed to not follow the required procedure to disengage, but rather had a student press the button at the rear of the bus so that she did not have to walk through the bus to do it herself.

## ***CHARGE FIVE***

## ***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

## ***REPEATEDLY CAUSING DAMAGE TO PRIVATE PROPERTY WHILE OPERATING A SCHOOL BUS***

93. On December 15, 2014, the owner of a property located at the corner of Congress Avenue and Texas Avenue located in the Villas section of the District reported that on December 12, 2014 during her morning bus run, Ms. Grey cut the corner of the roadway while making a turn and drove across the private property, causing damage and leave tire track ruts on the property.
94. On December 15, 2014, the Transportation Supervisor met with Ms. Grey, discussed the incident and provided her with a write-up reminding her to be mindful of property lines when making turns with the school bus.
95. On December 15, 2014, Ms. Grey signed the acknowledgment of write-up form without providing any comments.
96. On May 13, 2015, the Transportation Department received another complaint from the same homeowner that Ms. Grey was causing damage to his property by running over the corner of his yard and leaving tire marks in his grass.
97. On May 13, 2015, the Transportation Supervisor met with Ms. Grey, discussed the second incident of property damage and provided her with a second write-up again reminding her to be mindful of property lines when making turns with the school bus.
98. Despite having the meeting and being provided with a copy of the write-up, Ms. Grey refused to sign the acknowledgment section of the May 13, 2015 write-up form.

## ***CHARGE SIX***
## ***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

***FAILURE TO COMPLY WITH PROCEDURE TO MAINTAIN UPDATED BUSROUTES, MAPS AND SEATING CHARTS***

99. Board bus drivers are responsible for maintaining updated bus routes, maps and seating charts for their bus runs at all times in the event a substitute driver is needed.
100. Board bus drivers are regularly reminded of their responsibility to maintain these updated documents on their buses.
101. For example, a March 13, 2013 memorandum was distributed to all bus drivers, including Ms. Grey, which indicated "All routes, maps and seating charts are to be kept up to date NO EXCEPTIONS."
102. On April 14, 2015, Ms. Grey was scheduled to be absent from work for an appointment.
103. However, Ms. Grey left no routes, maps or seating charts for her bus runs to be used by the substitute driver covering for her, resulting in a disruption of the transportation of students to school, among other issues.
104. On April 15, 2015, the Transportation Supervisor met with Ms. Grey, discussed the incident and provided her with a write-up directing her to ensure that all bus routes, maps and seating charts are updated and maintained on her bus at all times.
105. Ms. Grey signed the acknowledgement portion of the April 15, 2015 write-up and added comments indicating that she had intended to provide updated maps, but that she did not. Ms. Grey further admitted that once she was informed of the situation, she made an arrangement for the updated maps to be delivered later on April 14, 2015.

***CHARGE SEVEN***
***"UNBECOMING CONDUCT" AND "OTHER JUST CAUSE"***

***GENERAL FAILURE TO COMPLY WITH ADMINISTRATIVE DIRECTIVES***

106. As noted above, despite being advised in writing of the expected responsibilities of a bus driver, including in multiple write-ups and reprimands issued to her, Ms. Grey continued to disregard directives from the Administration.

107. Perhaps the most significant examples of Ms. Grey's disregard for Administrative directives came after Ms. Grey was made aware that video footage from school buses of driver conduct was being actively monitored as of March 2015.
108. In that regard, despite being fully aware of the fact that her actions were being video-taped and monitored, she was observed to continue to violate Board Policy and applicable law by using her cellular telephone while operating a school bus and attempting to conceal same in her purse) and attempting to clean her bus while operating it at speeds in excess of 45 miles per hour.
109. The Administration has engaged in multiple and repeated attempts for years to advice and counsel Ms. Grey regarding the expectations regarding her conduct as a Board employee and bus driver, as well as to repeatedly impose disciplinary sanctions on Ms. Grey for violations of Board policy and applicable law.
110. Notwithstanding the Administration's continued efforts, those Administrative interventions appear to have had little or no effect as Ms. Grey has continued to engage in inappropriate conduct, including through the end of the most recent 2014-2015 school year.

## ***CONCLUSION***

WHEREFORE, for the foregoing reasons, Respondent Heather Grey should be terminated for unbecoming conduct and other just cause.

On September 23, 2015, Respondent's attorney entered his appearance and submitted an answer to the charges. The answer stated "after reviewing all the charges, I have elected to defend as I do not believe that there is sufficient cause for the taking of my tenure." After the receipt of the Respondent's answer, the Commissioner of the Department of Education of the State of New Jersey reviewed the charges and determined that they were sufficient, if true, to warrant dismissal or reduction in salary.

Accordingly, the matter was referred to the undersigned arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, Ch. 26.

After a brief discovery period, a hearing was convened and held on November 24, and December 7, 2015 and January 13 and 14, 2016 in the offices of Respondent's counsel in Vineland, New Jersey. The School Board presented the testimony of the following witnesses: Kelly Hewitt, Transportation Supervisor and George Drozdowski, Superintendent of Schools. Respondent testified as well as Police Officer Darrin Hickok, Pamela Gittle, Bus Aide, Ryan Adams, Head School Bus Mechanic and the Respondent's father, Robert Stansbury.

Throughout the hearing both the School District and the Respondent were represented by counsel who presented evidence through the sworn oral testimony of witnesses as well as through documents. Each side had the opportunity to confront the evidence presented by the opposing party. The hearing was officially closed upon the receipt of written post-hearing letter/briefs.

## BACKGROUND AND THE EVIDENCE PRESENTED

The Lower Township Board of Education operates an elementary school district that consists of 4 schools located in the vicinity of Cape May, New Jersey. These schools are the Sandman Consolidated School, the Maud Abrams School, Memorial School, and the Carl T. Mitnick School. The superintendent of the School District is Mr. George Drozdowski.[2]

[2] Throughout this opinion there will be references to a number of transcript pages and party exhibits [T#.#] represents the Transcript, followed by the volume number then the page. Documentary exhibits will be referred to as [B#] for Board or School District exhibits or [R#] for Respondent exhibits.

The alleged infractions that have served the bases for the charges herein are based upon the interpretation and application of a number of Board policies regarding the operation of the school buses. Specifically, in 2008 the Board promulgated Policy 8630 regarding bus driver responsibility. The relevant paragraph in this particular case concerns the use of cellular or wireless telephones on the buses. In particular the policy states as follows:

> A school bus driver, during the driver's work schedule, may only use a cellular or other wireless telephone, for school related business. The driver is prohibited from using a cellular or other wireless telephone, while operating a school bus. A cellular, or other wireless telephone, may only be used for school related business by the school bus driver while operating the school bus, when the school bus is parked in a safe area off a highway or in an emergency situation. A driver who violates this policy provision is subject to fines pursuant to N.J.S.A.39:3B-25. [B7]

The Board has pointed out that bus drivers receive reminders concerning this policy especially with respect to the use of cell phones as part of the orientation at the beginning of the academic school year. It is asserted that individuals received copies of these reminders in 2012 and 2013 at the beginning of each academic year. [B8, B9] Specifically it is noted that in August 28, 2012 the Board through Ms. Kelly Hewitt the Transportation Supervisor advised all bus drivers that "no bus driver is allowed to use their cell phone for either conversation or texting while operating the bus."

Another policy that has been involved in this case concerned the notice of the use of monitoring devices in school vehicles. This was also edited and created in October 2008 as policy number 2690 entitled Monitoring Devices on School Vehicles. In relevant portion the policy states as follows:

> "To maintain the safe and secure conditions for all pupils transported on school owned or contracted school vehicles, the Board may use devices to

> monitor and/or observe pupil behavior, teacher and support staff behavior, school bus driver discipline procedures and/or school bus driving techniques. The device may be a sound video camera, a voice monitoring device or other appropriate devices..." [B14]

Another policy which addressed the safety of students on school buses was issued in 2013 and concerned the assurance that all students be accounted for at the end of a designated or assigned run. In a memorandum from Mr. Drozdowski dated October 29, 2013 it was stated that all school bus drivers must physically check that no student is remaining on the bus at the end of the driver's run. This was the result of an incident that occurred in 2011. As part of the policy the Respondent received in-service training for a new child alert system which must be shut off from the rear of the bus. According to the testimony provided, the bus driver is required to walk to the back of the bus to turn off the alarm. By making this trip to the rear of the bus, drivers will have to check all of the seats to ensure that no child has remained on the bus. [B19]

The third policy considered in this case involves an internal memorandum concerning the maintenance and upkeep of route and emergency binders. According to a memo distributed by Ms. Hewitt, all bus drivers were expected to maintain a route/emergency binder that are to be kept up to date and on the buses at all times. [B22]

The Respondent was initially hired by the Lower Township Board of Education in December 1999 initially as a bus aide. She worked continuously for Lower Township with the exception for one year in 2003. She subsequently qualified to become a bus driver in 2008. At all times material herein she was supervised by Ms. Kelly Hewitt [T3.10-12]. Ms. Kelly reported to the District's Business Administrator Mr. Frank Onorato who reported to the superintendent Mr. Drozdowski.

As a bus driver, the Respondent was responsible driving four separate routes in the morning from pickup points throughout the School District to transport children to the elementary schools. On or about 4:00 p.m. she would pick up those students from their elementary schools and drop them off at pre-designated locations. According to the testimony, her first run of the morning involved the transportation of between 20 and 55 students from designated locations to the Sandman School [T1.1-2].

The first incident that served as a basis for one of the charges set forth herein arose on October 23, 2013. On that date, the Respondent received a warning as a result of a complaint from a parent who accused her of driving and speeding while texting on her cellular phone. In the warning letter, she was reminded of the 2003 policy that addressed this issue. The Respondent signed the warning and receipt. Even though the Respondent was represented by a collective bargaining representative there is no evidence that she had attempted to file a grievance challenging the warning.

On or about April 2, 2014 Respondent was informed by Ms. Hewitt that she "had received a concern that you were talking on the cell phone while driving the bus." [B12] In her testimony, Ms. Hewitt could not recall who submitted the concern [T1.56]. Nevertheless, as a result, she requested that the video tape on the bus be viewed. After she viewed it she contacted the School Resource Officer [SRO] Darren Hickock, an officer with the Lower Cape May Police Department. Officer Hickock reviewed the video and as a result issued a warning ticket to the Respondent for talking on the cell phone in violation of NJ State statutes. [B11]

Two days later, the Respondent was issued an "official reprimand" for driving while talking on her cell phone. Her response in writing and through her testimony stated

that while she was driving and about to pull her bus into the driveway leading to the bus parking lot, her cell phone rang. Her bus aide Pamela Gittle informed her that the number showing on the phone was from the Lower Cape May Regional school nurse. Surmising that it may concern one of her own children, she asked the aide to answer it. As she was pulling into the driveway leading to the bus lot, the aide handed her the phone. She subsequently pulled over in the driveway to speak to the nurse. [T3.72] She maintained in her testimony moreover that she never saw the disputed video and maintains that it never existed [T3.70]

Respondent's counsel during the hearing called both Officer Hickock and Ms. Gittle. Officer Hickock testified that Ms. Hewitt explained to him that there was a complaint about a driver using a phone and that led him to go to the Transportation Department and watch the video [T4.10-11]. In viewing the video Officer Hickock stated that he observed the Respondent on the cell phone as she was pulling into the Mitnick school driveway. He therefore decided to issue the warning ticket.

The Respondent's response to the warning was not reflective of what she saw on the tape. According to Officer Hickock the Respondent had the cell phone in her hand as she pulled off Seashore Road into the driveway [T4.13]. Therefore he used his discretion and issued the warning ticket [T4.17].

Ms. Gittle stated that she was assigned to assist the Respondent on the bus and as they were concluding their run and turning into the Mitnick School driveway, Respondent's cell phone rang. Ms. Gittle testified that she answered the call and handed the phone to the Respondent. It was the school nurse who said one of her children was

sick and she had to pick them up. She testified that she only handed the Respondent the phone when she had pulled into the driveway [T4.29].

There were no further incidents that semester until October 1, 2014 when Respondent received a warning based upon a complaint from another motorist who noted the bus number (Bus 7) and asserted that the Respondent was speeding and tailgating. While the Respondent admitted being in the area at that date and time, she denied she was ever speeding and tailgating. She refused to sign the warning letter under protest, based upon advice received.

Two days later, the Respondent submitted to Ms. Hewitt's office a doctor's note that was dated on the date of the warning letter of October 1, 2014. The doctor's note stated that the Respondent would not be able to work from Friday, October 3, 2014 to Friday, October 17, 2014. [B1][T1.25]. According to Ms. Hewlett's testimony, she received a text from her secretary stating that the Respondent was out with a note. It was noted that the Respondent had worked on October 1, and 2 and the morning runs of October 3 before presenting the note. She did not volunteer any diagnosis or basis for the upcoming absence. Ms. Hewlett testified that she tried to follow up with the Respondent and texted her to find out if she was okay. She recalled that the Respondent said things were "crazy there" and that the doctor did not want her to work. She then forwarded the matter to Mr. Drozdowski the Superintendent [T1.28].

Mr. Drozdowski testified that when he received the note he was confused. Specifically, he did not know what the doctor meant when he stated that the Respondent was not to work [T2.23]. Mr. Drozdowski stated that he had never seen a restriction given days before it was to take effect. He felt it was necessary to request specifics with

respect to the absence [T2.24]. He therefore asked his secretary to contact the doctor's office to confirm the reason for the absence. On cross examination Mr. Drozdowski maintained that he inquired about the note because he wanted to ascertain when the Respondent was seen by the doctor and he wanted to determine the degree to which she was disabled or whether she would be able to work in a light duty capacity. [T2.93]

On the following Monday, October 6, 2014 Mr. Drozdowski's secretary emailed the doctor's office to query and clarify the doctor's note. In the email, the secretary informed the office manager that Mr. Drozdowski understood the HIPPA laws but needed to confirm whether the Respondent's illness was severe enough that she was unable to work for two weeks. After several email exchanges the doctor's office manager replied that the doctor was not "at liberty to discuss the matter any further." [B2] In addition the following Monday and Tuesday October 6 and 7, Ms. Hewlett physically visited the Respondent's home. She stated that she did so out of concern for the Respondent's wellbeing. She testified that when she visited the home she noticed that Respondent's car was present but no one responded to her knocks on the door. [T1.30]

Subsequently on October 14, 2014 Ms. Hewitt and Mr. Drozdowski became aware of a police incident in which the Respondent's dog was struck by a vehicle. The investigation showed that the Respondent was not present but in Florida [B3]. The fact that the Respondent was indeed in Florida was confirmed by one of the Respondent's co-workers. [T1.32].

On November 3, 2014 Ms. Hewlett and Mr. Drozdowski convened a meeting which was attended by Ms. Hewlett, Mr. Drozdowski, the Respondent and a Union representative. Ms. Hewlett recalled that she specifically asked the Respondent if she

was in Florida to which the Respondent stated that she was not. Rather she maintained that she was at home. [T1.40] Subsequently by a letter to Mr. Drozdowski dated November 18, 2014 the Respondent stated among other things that:

> "I am writing this letter per your request in reference to my absence from 10/3-10/17/14. I was under the care of Dr. Burton Waisbren during that time period. He ordered me to stay out of work as I was unable to perform my duties. I was at home for most of this absence." [B5]

After receiving this letter, Mr. Drozdowski convened another meeting on December 22, 2014 which was also attended by Ms. Hewlett, the Respondent and the Union representative. During that meeting she was asked again by Mr. Drozdowski about her whereabouts during her absence. According to Ms. Hewlett, the Respondent first said that she was home and then she got agitated and disclosed that she was indeed in Florida. She then according to Ms. Hewitt, called Mr. Drozdowski a "bully." Mr. Drozdowski immediately terminated the meeting [T1.41-43]. On cross, Ms. Hewlett admitted that there is no policy that mandated that a person has to remain home if they are out sick [T1.181] but nevertheless maintained that the Respondent lied to management. This testimony was confirmed by Mr. Drozdowski who stated that the Respondent finally admitted that she was indeed in Florida and became agitated and referred to him as a bully [T2.43].

Mr. Drozdowski testified that management considered docking the Respondent's time for the period that she was absent which would have been eight days. Subsequently supervision entered into discussions with the union concerning the penalty and as a result decided to reduce the penalty from 8 to 4 days provided that the Respondent signed a last chance agreement [B6]. The Union representative took the draft and returned it to Mr.

Drozdowski with minimal revisions which Mr. Drozdowski felt was acceptable. The Union however returned with another version which management considered not to be acceptable because it took out any admission of using the time inappropriately. Ultimately, management never received a signed document but it still docked her for the four days. [T2.41-47]

The Respondent testified that she began seeing her doctor, Dr. Waisbern in 2012 for a number of reasons but disclosed that she was having anxiety attacks beginning in September 2014 and thought that it was having a deteriorating impact on her concentration and ability to drive. She stated that "I explained to him how things at work had just progressively gotten worse, how I felt like Ms. Hewlett was harassing me and constantly calling me in over things that were not true or happening, and we discussed them." [T3.26]

The Respondent recalled that there was an event on October 2 that increased her anxiety such that she was crying uncontrollably and she had to call the school nurse. This was exacerbated by the conversation during the meeting that resulted in the October 2 warning [T3.28]. Her doctor had previously given her the note [B1] and said that she could use it if she felt anxiety. She said that she spoke to her Union representative and school nurse and felt that she was under stress so she called the doctor and informed him that she was using the note. She testified that on that day she felt "distracted" and could not drive [T330-32]. So therefore on October 3 after her morning run she presented the note.

The Respondent stated that her father had indeed made plans to have a family trip to Florida before she asked for the note from her doctor. She had originally planned to

drive with her husband on October 9 and return on the following Monday with her children. School was closed for the four day weekend and her children would be flying down with her father. As a result of her illness she stayed home from October 3 to October 9 and then drove to Orlando. Once they arrived and she was out of work she decided to remain with her family until October 16. She drove home and arrived back home on October 17 [T3.42].

She stated that after she returned she was called into the superintendent's office and was nervous when she was asked about the absence. She recalled that Mr. Drozdowski had asked for a letter explaining where she was during her leave. He also asked her to sign over her medical records from one year prior to her leave. The Respondent testified that she felt that this was unnecessary and was unreasonable. Yet she said that she would talk to her doctor about it. The Respondent stated that her doctor also felt that the request was "absurd" and recommended that they should not be turned over. Rather, she informed Mr. Drozdowski that she was at home for most of the absence but was indeed in Florida from October 10 to October 16. [T3.45-49]

The Respondent's trip to Florida was confirmed by her father's testimony. He testified that he began to make plans during May or June of that year. He wanted to take his grandchildren to Disneyworld. Therefore, he rented a house for 10 days in order to host his three daughters, their spouses and grandchildren. The plan was for Respondent's children to fly to Orlando while Respondent and her husband would drive down on October 9 and return with the children [T4.56-61].

Respondent's father further testified that he noticed that the Respondent appeared to be stressed and upset. She had told him that she was afraid of her job and of other things that were happening at work [T4.61].

The Board challenged the veracity of the Respondent's explanation. During the hearing, after reviewing her medical records, the Board noted that at no point in those doctor's notes did the Respondent mention a concern for driving or anxiety to her doctor or any type of distress [T3.96, 98]. Rather, the notes indicated that she saw her doctor on October 1 saying that she could not concentrate and drive yet; she continued to drive her students on October 1, October 2 and in the morning of October 3 [T3.88-90] [B24].

It was pointed out by the Board that the Respondent never mentioned to Ms. Hewlett that she did not think that she was medically able to drive. Rather she returned to work and worked as normal on October 20 and never spoke to her superintendent or the administrator [T3.103]. The Board also noted that there was no documentation from the school nurse indicating that the Respondent visited her on October 1 or 2. It also argued that the nurse was also a representative of the union and that there was no evidence saying that she approached her claiming that she was suffering an anxiety attack due to harassment from management. [T3.107].On December 15, 2014, the Respondent again received a transportation incident form based on a complaint from a homeowner on her route who alleged that on December 12 as she was turning the corner she took the corner "too close" to the homeowner's property and left tire marks on the grass. The Respondent signed the memorandum without protest [B20]. At the hearing, a photograph of the corner was attached to the December notice. Respondent disputed this because it appeared that there was only one tire track in the grass while the bus had two tires on its

rear end. Moreover Respondent's counsel contended that in the photograph there were leaves on the trees which would not be indicative of a photograph taken at the time of the December incident. [T1.109, 157]. As described below, a similar memorandum was issued on May 13, 2015 [B21].

Subsequently, according to Ms. Hewitt, in March 2015 she began regularly monitoring videos in response to a request by Mr. Drozdowski to review activity on the buses. This increased monitoring was the result of an incident in which a child was inadvertently left on a bus at the conclusion of a driver's run. To management, this showed that the driver had failed to adequately check her bus as required. Therefore, Mr. Drozdowski testified that he gave Ms. Hewitt a specific order that the bus videos be reviewed [T2.56].

Ms. Hewitt documented a number of violations involving the Respondent which had occurred on March 17 and March 27, 2015. On March 17, 2015 it is alleged that she was observed using a cell phone and texting while students were on the bus and she was also placing a cell phone call while students were on the bus. Furthermore, on March 27, 2015 Ms. Hewitt stated that she observed the grievant driving one handed with a coffee cup in her hand. Moreover on that day she had failed to deactivate the rear alarm system which according to policy required bus drivers to walk to the rear of the bus to deactivate the alarm. Thus the driver would have to scan all of the seats to make sure no one was left behind. It was noted that in this particular video a student had deactivated the rear alarm system. Moreover, the Respondent was observed using her cell phone and texting while students were either on the bus or disembarking the bus. Finally, it was asserted that she did not check her bus prior to departing. [B15]

The Respondent challenged the violations especially with respect to using a cell phone while students were on the bus. In this regard, the Respondent contended that she was parked and the bus engine was been turned off while she was waiting for a word to have the students disembark. Therefore under her interpretation of the policy and state law she was not "operating the bus", therefore there was no violation [T1.122-139].

Ms. Hewitt and Mr. Drozdowski on the other hand testified that the Board has always interpreted its policy as stating that the driver is operating the bus whenever there are students present. This would mean that even though the driver may not be actually driving a bus, according to Ms. Hewitt and Mr. Drozdowski, the driver is still directly responsible for observing and monitoring the children. Moreover, the policy itself only allows for the use of a cell phone only on those occasions which involve school business. [T1.205, T2.19]

Two weeks later, on April 14, 2015 the Respondent received a memo stating that she violated school district policy when she failed to have updated routes, maps and seating on her bus. According to the memorandum, the Respondent was scheduled to be off on the day in question. However, when the substitute driver arrived there were no route maps available for him to utilize [B23]. According to Ms. Hewitt's testimony the Respondent said that she took the maps home to update them but was not able to get them to the substitute by the next morning [T1.115]. In her response to the memo, the Respondent stated that she had taken the maps home to update but intended to send them in with another driver but did not get them to her in time. The substitute did eventually have maps by the time he made his run to the Maude Abrams School.

In her testimony, Respondent acknowledged that even though she had a scheduled day off she was supposed to have the maps and routes updated. She stated that the substitute had accompanied her on the route before and had rode with her the prior Friday and Monday. However on that Monday, she had to add three students to her route. Therefore, she took the maps home to update them. She maintains that she intended to update them and give them to another driver to return them to the school and deliver them to the substitute the next morning. However, since she had missed the driver she gave the maps to her children to make sure that another driver got them to the substitute but the children forgot. Eventually, she gave the maps to her father to deliver which he promptly did. [T3.81-83]

On May 13, 2015 the same homeowner who had complained on December 15, 2014 contacted the school that stated that Respondent had again run over the corner of his property. [B21].

On June 4, 2015 the Respondent received a disciplinary memo citing five more violations of policies, they were: On May 1, 2015 she was seen using the cell phone while students were on the bus as it was parked at Sandman school at 7:41 a.m.; on May 20, 2015 she was improperly wearing her seatbelt, she was not wearing it correctly and removed it while the bus was moving.; On May 21, 2015 again a student was observed walking from the back of the bus to the front while the bus was moving. In addition, she was observed sweeping the bus while the bus was moving. Finally, on June 1, 2015 she was observed filling out a daily condition report while the bus was moving. [B17]

The Respondent responded to many of the incidents directly on the form. First, she continued to dispute the fact that using a cell phone with students on the bus is a

violation of policy and law. She also stated that she was removing her seatbelt while entering her spot "due to time restrictions." Finally she stated that she was using a broom to swat at a wasp that had gotten into her bus. Overall she claimed that this feels "like this is harassement [sic] in order to remove me from my position." Most of this wouldn't have been an issue if the camera was fixed like we discussed last school year."

Indeed, during the hearing, the Respondent claimed that she was "targeted" by Ms. Hewitt and management because the forward camera on her bus was focused on her rather than on the children. She stated that she complained to Ms. Hewitt and Mr. Onorato about the camera after an incident in April 2013. She realized that the camera was inappropriately focused on her when she attempted to see a video of an incident on her bus which involved a special needs student. However, they could not see the student who was apparently sitting on the front of the bus because the camera was focused rather on her. She stated that she was being harassed by having the camera exclusively focused on her. She stated that "I feel like I am under scrutiny constantly. It's not safe for me to be driving when I feel like I'm being spied on basically." [T3.57] According to the Respondent, Mr. Onorato and Ms. Hewitt promised that they would repair the focus but it was never changed. [T3.58]

Ms. Hewitt on the other hand claimed that the cameras were all focused the same way on all buses [T1.104]. Moreover, Mr. Drozdowski stated and it was stipulated that the drivers were aware of the camera system on the buses [T2.51]. Therefore, consistent with policy in the notice one of the cameras was always pointed on the driver [T2.63].

Nevertheless, the Respondent presented the testimony of Mr. Ryan Adams the senior mechanic at the bus garage. According to Mr. Adams, he was instructed in the fall

of 2013 to change the focus of the camera on the Respondent's bus. Before that the camera was focused toward the rear but he moved it to view the driver. This was not the same with all of the other 25 buses [T4.44]. Moreover, he was required to pull the Respondent's tapes more frequently than the other 24 drivers [T24.49].

Mr. Drozdowski maintained that the Respondent's continued employment was not safe and that her termination was in the best interest of the school district. [T2.69] Accordingly, he eventually showed the videos, especially of the March and May incidents, to the Board and recommended the non renewal of the Respondent's contract. However, he was advised that drivers are tenured employees and thus subject to a due process hearing. Therefore, the non renewal notice was withdrawn and tenure charges filed.

## SUMMARY OF THE ASSERTIONS OF THE PARTIES

*The Board*

The Board acknowledges that it has the burden of showing by a preponderance of the evidence that the Respondent was terminated for the reasons as charged. According to the Board, the Respondent is tenured in her position as a bus driver due to a prior administrative grant of tenure to transportation workers in the School District. Tenure protects certain public employees from arbitrary dismissal for an "unfounded, flimsy or political reasons." Admittedly, according to the Board, there is no reported authority directly relating to tenured disputes involving bus drivers. In this case, the Board maintains that its basis for terminating the Respondent's tenure was founded on facts that clearly indicated that she had engaged in unbecoming conduct as a bus driver. The Board maintains that unbecoming conduct is a term that is broadly defined to include any

conduct which has a tendency to destroy public respect for government employees and confidence in the operation of public services. As such, a determination of unbecoming conduct may be based merely upon the violation of any particular rule or regulation but also may be based upon the violation of an "implicit standard of good behavior which develops upon one who stands in the public eye as an upholder of that which is morally and legally correct."

The determination of whether to remove an individual from a tenured position requires consideration of the nature of the act, the totality of the circumstances and the impact on the individual's career. In this case, the Board asserted that it has presented sufficient evidence to show that the Respondent is unfit to perform her job as a bus driver and that her conduct destroyed public respect and confidence in the operation of a critical public service. According to the Board, the Respondent was counseled and cautioned and disciplined by supervision which put her on notice and gave her a chance to correct any issues with her performance. However, if one reviews the totality of the circumstances in this case, the Board's decision to terminate the Respondent's tenure was appropriate and should be upheld.

In addressing specific charges, the Board has maintained that the Respondent violated her obligation to safely perform her duties. According to the Board it provided a number of instances in which the Respondent was observed violating the clear safety rules which applied to her as a school bus driver. This conduct was contrary to her essential employment obligations which are to safely and properly operate a school bus. The term "operation" according to the Board includes not only safely driving the vehicle but also in supervising the children on the bus. In this respect, the grievant had been

previously warned that it is inappropriate to use her cell phone while on the bus even though the bus may be parked and turned off as long as there are children that needed supervision. Therefore, given the Respondent's continued pattern of dangerous and troubling behavior, the Board asserted that it has demonstrated that it has lost confidence in her ability to continue to be a driver for the school district.

The Board further argues that even though there is no evidence that anyone was injured as a result of the Respondent's actions, the evidence is clear that the Board does not have to wait for harm or an injury to occur before it can terminate the employee who placed children in such a vulnerable position.

The Board also maintained that the Respondent improperly used her sick leave. According to the Board the Respondent improperly claimed to be too sick to work so that she could join her family on a pre-planned trip to Disney World. Although the Board did not take immediate action to terminate the Respondent following her act, the incident played a significant role in the totality of the circumstances and must be seriously considered in determining the future of the Respondent's tenure.

The Board also maintained that the Respondent's testimony with respect to the allegations is simply not credible. According to the Board the testimony was not corroborated by any actual facts or persuasive evidence. Virtually all of the excuses that she presented are undercut by the consistent and credible testimony of the Board representatives. Indeed, according to the Board it produced ample evidence and testimony to demonstrate that not only had the respondent been provided with proactive training regarding reminders and memoranda regarding cell phone usage, she had been repeatedly disciplined for the improper use of her cell phone over the course of several

years. The Board can only describe the Respondent's testimony as "self serving" and was riddled with inconsistencies and convenient "truths", therefore this testimony should be given little or any weight in this matter.

In summary, the Board claims that the Respondent engaged in a "pattern of dangerous, reckless, unlawful an unbecoming conduct" that was demonstrated through a significant amount of testimony and supporting documentation. Accordingly, the Board had met its burden of proof showing that the Respondent's termination was not only appropriate but given the degree of her responsibility as one entrusted with the safety of children in a public school, termination was also necessary.

*Respondent*

The Respondent had been working for the Lower Township Board of Education for approximately 17 years, half of her life. She became a qualified school bus driver in 2008. According to Respondent's counsel, since she is a tenured employee she may only be terminated for just cause. Accordingly therefore, the Board carries the burden proof of showing by a preponderance of the evidence that the Respondent is guilty of the charges set forth herein. The Respondent's counsel addressed each of the charges through its arguments.

With respect to Charge 1 regarding the use and false reporting of sick and medical leave, the Respondent alleges that if there had truly been a question of whether the Respondent could or could not work, the School District did not take advantage of its rights and request that the Respondent undergo a fitness examination. Respondent also reviewed the testimony of Mr. Drozdowski and Ms. Hewitt as well as the Respondent. Mr. Drozdowski testified that he found that the note saying that the Respondent could not

work, to be unusual. Therefore, he falsely believed that somehow the Respondent and the doctor were in "cahoots." In that respect, Respondent contends that the Board did not meet its burden of substantiating a finding of improper use and false reporting of sick leave. Instead Respondent contends that the superintendent's motives were driven by his preferences as to how he thought the respondent should have handled the matter. This according to the Respondent does not amount to a violation of policy. Respondent testified credibly that she had been complaining about stress at work and was having anxiety. She was forthright with her explanations. Therefore, there was no improper use or false reporting of sick or medical leave.

In addressing the second charge alleging that the Respondent repeatedly failed to comply with Board policy and applicable law in using her cellular phone while operating the school bus, the Respondent challenged the language of the policy itself. There is no dispute that during the ten minutes in which the Respondent was parked at the Sandman school, she was not "operating the bus." Rather, the clear language shows that in order to operate "a bus" the Respondent would have to drive it.

Just because supervision said this does not necessarily mean operation does not in and of itself make it so. The Respondent reviewed the policy and statute cited. Based upon the language any use of cell phone while parked is allowed by state law and policy. The supervision's interpretation is contrary to the plain language of the policy.

With respect to the April 2014 incident where Officer Hickock issued a warning against the Respondent for using a cell phone while driving on Seashore Road without any substantiation. Rather, the Respondent denies that this happened and her testimony was clearly substantiated by the testimony of the bus aide Pamela Gittle. Moreover, one

must note that the video that Officer Hickock apparently reviewed was never presented. Therefore, the charge must be denied because there was insufficient proof that the Respondent was indeed operating the bus.

With respect to the third charge, in which it was alleged that the Respondent repeatedly failed to safely operate a school bus, the Respondent asserted that there was no evidence to show that the Respondent was tailgating or speeding as complained. There could be no corroboration except for the hearsay representation by an anonymous motorist. This is insufficient to support a charge to revoke the Respondent's tenure.

With respect to charge four alleging the failure to comply with the Board policy regarding the child safety school bus inspection, the Respondent denied violating the policy. Moreover, it was noted that this policy was imposed because another driver had inadvertently left a student on her bus. There is no allegation that the Respondent left a student on the bus. Therefore, this allegation is not founded.

Charge five alleges that the Respondent repeatedly caused damage to a private property while operating her bus. This is denied by the Respondent. Moreover, the Respondent's counsel claims that the photographic evidence attached to the December 15 allegation did not support the written allegation. It was noted by the Respondent that the photograph appeared to have trees with leaves on them which would not have happened during winter. Also the Respondent asserts that the rear wheels of the bus are double wheels and the evidence of any damage shows it was done by only one tire. The Respondent alleges that there is no corroboration of video or other testimony from the citizen homeowner. Therefore the Respondent asserts that the Board did not meet its burden in proving the charge in that instance.

In Charge six, it is alleged that the Respondent failed to comply with procedures to maintain updated bus routes, maps and seating charts. In this regard, the Respondent's counsel asserts that Respondent's testimony and explanation was forthcoming and honest. The Respondent had taken the bus routes, maps and seating charts home to update them and even though she attempted to return them in time, she was unable to do so. However, there is no evidence that this was somehow detrimental to the children. Indeed, the substitute had previously ridden with the Respondent. Therefore, no one was disadvantaged by not immediately having the bus routes, maps and seating charts. At most, it was an honest mistake that was rectified as soon as possible. It was not sufficient to sustain the invocation of tenure charges.

Finally, in Charge Seven it was alleged that the Respondent generally failed to comply with administrative directives. Respondent's counsel asserts that this charge was "not specific enough to defend."

To the contrary, Respondent points to the fact that she received evaluations from 2008-2013 which did not show any alleged disregard for her responsibilities. Moreover, after the events that gave rise to the charge occurred, the Respondent was given additional duties. She was asked to take an additional run with a preschool student who had special needs. If the Respondent was such a challenged driver then the question must be raised as to why the School District would have entrusted her with the responsibility of taking an additional new route.

In general, the Respondent maintains that after the sick leave incident the supervision became and still is prejudiced to the fact that there was wrong doing on the part of theft of time. Everything else thereafter was geared toward collecting additional

evidence to try to take away her tenure. In short, the Respondent's counsel asserts that there was significant animus toward the Respondent simply because she refused to sign a last chance agreement and subsequently disagreed with her supervisor in writing and refused to sign any disciplinary memoranda. No matter what the Respondent did in her job performance, she was not going to be successful.

In conclusion, the Respondent alleges that she has worked for the District since she was 19 years old and there have been no other write ups but when the note of no work came from her doctor the whole attitude and temperament of the District changed and even though she had a sufficient number sick days in her bank and an excuse note, she has not been believed to this day. The Respondent has been a good employee for 17 years and wants to continue as a driver. Therefore the Respondent requests that the charges be overturned and the Respondent reinstated to her position.

## ANALYSIS AND OPINION

The New Jersey statute that provides tenure for teachers and other covered employees provide that a person protected under the statue cannot be dismissed from employment "except for inefficiency, incapacity, unbecoming conduct, or other just cause." NJSA 18A: 6-10(b). The general purpose of such a statute is to protect individuals under the statute from dismissal for "unfounded, flimsy or political reasons" Spiewak v. Board of Education, 90 NJ 63, 73; 447 A.2d 140 (1982).

In order to sustain charges for dismissal the charges filed must be substantiated by a fair preponderance of the evidence. In Re Polk, 90 NJ 550, 560; 449 A.2d 7 (1982). The standard has been interpreted as one of reasonable probability. For example, the decision maker has to determine whether or not the evidence presented is of sufficient

quality to generate a belief that the submitted theory of the case is in all likelihood the truth of what occurred. The evidence must be such as to lead a reasonably cautious mind to the giving conclusion. It should be noted that the evidence presented does not have to have the indicia of certainty but must be well founded in "reason and logic. Lesniewski v. WB Furze Corp., 308 NJ Super. 270, 279; 705 A.2d 1243 (App. Div., 1998).

The School Board is seeking to remove the Respondent Heather Grey from her employment as a school bus driver based upon seven distinct charges of unbecoming conduct and other just cause. The term unbecoming conduct has been interpreted in some New Jersey case law even though the cited law has not been applied to individuals in the Respondent's position. Nevertheless, it has been defined as conduct that has the tendency to destroy public respect for such employees as well as the confidence and the operation of the Board. Karin v. City of Atlantic City, 152 NJ 532; 706 A.2d 706 (1998). This may include any conduct which adversely affects the morale or efficiency of the Board. The substantiation of conduct as being unbecoming does not have to be predicated on a violation of any particular rule or policy. Such a conclusion maybe based merely on the violation of an implicit standard of good behavior which devolves upon one who stands in the public eye as an "upholder of that which is morally or legally correct" Karin v. City of Atlantic City, 152 NJ 555.

In determining whether an individual has engaged in such conduct, the arbitrator has to take into an account "any harm or injurious effect which the [teachers] conduct may have had on the maintenance of discipline and the proper administration of the school system." In Re Grossman, 127 NJ Super 13; 316 A.2d 39 (1974).

The term unbecoming conduct and other just cause must be viewed in the context of the Respondent's responsibility as an employee of the School District. The Respondent has been employed as a school bus driver responsible for the safe and efficient transport of school children both to and from home. The Respondent is a skilled and professionally trained driver who holds a commercial driver's license. Therefore she is held to a higher standard as an individual whose conduct in fulfilling this responsibility is clearly in the public eye. Parents have an interest in insuring that the drivers pick up their children, transport them to school and return them home in the safest and most responsible manner possible. These parents are also members of the motoring public who constantly observe the school bus drivers conduct in driving their bus. So evidence of negligence or carelessness in the performance of the driving assignment must be given weight in determining whether a driver has engaged in unbecoming conduct.

In order to future appreciate the nature of the conduct which serves as the basis for these charges, one must consider the evidence presented in the chronological order in which each incident occurred. The evidence shows that prior to 2013 Respondent worked under another supervisor and then worked under Ms. Hewitt beginning in 2013 [T3.12-13] According to the Respondent, the mere presence of Ms. Hewitt as a supervisor has resulted in constant harassment over the course of her employment.. In other words, according to the Respondent, the charges constituted nothing but "harassment in order to remove me from my position."

Overall however, the acts raised by the School Board clearly have a negative impact on its interest in insuring the safe and professional transportation of its children.

As indicated in detail below, the conduct taken as a whole did have a destructive impact on the maintenance of discipline and the proper administration of the school system.

During the academic year ending in June 2013, the Respondent had only two concerns that had been raised by Ms. Hewitt. On October 23, 2013 the Respondent received a "write – up" based upon a complaint from a parent alleging that she was speeding and texting. In that instance, the Respondent acknowledged the complaint without question.

Six months later however, the Respondent received a complaint that also included an official warning from Officer Hickock. While Respondent disputed the warning saying that she was on "school property" and the aide had handed her the phone to respond to a call from her child's school nurse, there were no other incidents or warnings for the remainder that academic year. In essence, the Respondent finished the 2013-2014 academic year and entered the summer break without any further incident. To the extent in which the Respondent was the subject of debilitating harassment during that time period, it was not apparent. These were the only complaints on the grievant's record prior to the events that led first charge in which the Respondent allegedly engaged in the improper use and false reporting of her sick leave.

If one continues to review the charges within the chronology of the underlying events, one would discover that even though the Respondent had no disputes and possibly did not interact with Ms. Hewitt for three of the prior six months, Respondent still felt that it was necessary to complain to her physician that she was under substantial harassment from Ms. Hewitt. Specifically, the Respondent testified "I explained to him how things at work had just progressively gotten worse, how I felt like Ms. Hewitt was

harassing me and constantly calling me in over things that were not true or happening, and we discussed them." [T3.25 Line 21]. For some reason, in September 2014 she began complaining of stress saying that she could not drive or concentrate even though she had only been driving a few weeks into the academic year. It is difficult to credit an assertion of such anxiety based upon a hostile workplace environment when the academic year had just begun. While I am not in a position to question whether she was indeed feeling anxious, it is difficult to conclude that such anxiety was entirely the result of her relationship to Ms. Hewitt to the extent that she could not drive. Yet, she relied on that perception to convince her physician to give her a "just – in - case" medical slip allowing her to take two weeks off during the time in which she was previously aware that her family had a preplanned vacation over the Columbus Day holiday.

According to the evidence presented on October 1 the Respondent received a complaint form alleging that she was speeding and tailgating. In that moment, the Respondent refused to acknowledge the complaint and then decided to use the slip provided to her by her physician two days later. Suddenly, the Respondent presented the slip on October 3 stating that she could not work until October 17 due to insurmountable stress and anxiety even though this condition was never disclosed to her employer. She was so stressed and anxious that she could not fulfill her responsibilities as a professional driver of children.

Mr. Drozdowski questioned the note because of the timing. Respondent argued that in raising these questions, Mr. Drozdowski somehow overstepped his authority as superintendent. I must disagree, if the source of the Respondent's illness is related to her responsibility as a school bus driver, she is obligated to disclose that limitation to her

employer. The note itself raised a number of questions are the District's interest. For example, if Respondent could not drive, should the employer engage a substitute? Can she perform light duty? Was her illness compensable under worker's compensation? Yet the Respondent through her physician decided to stonewall her employer's queries.

The Respondent claims that she is somehow not obligated to disclose the work – related nature of her illness since she entitled to the benefit since she has accrued sick days and there is no inherent violation in her going to Florida while she was on leave. The issue here is not about the trip to Florida. If the Respondent was truly stressed out and could not work she could have disclosed this to her employer and engaged in finding a solution for the overall problem. She still may have been able to work out an accommodation which would have allowed her to spend time in Florida with her family.

Such conduct indeed did have the impact of destroying any confidence in the Respondent's ability to meet her obligations as a driver. It is the mendaciousness of the explanation for her leave and, even if she was suffering from debilitating stress, her refusal to disclose it to the employer that provides a reasonable basis to support the allegations of the first charge in this matter. It also serves as a basis to question her honesty and ability to be forthright to her employer for the remainder of her academic year.

The second charge concerns the Respondent's repeated failure to comply with Board policy and applicable law regarding use of cellular telephones while operating a school bus. An assertion that was raised by counsel in the context of this charge concerns the interpretation and application of Board policy. Specifically, the issue concerns the interpretation of the following sentence as presented in Board Policy 8630: "the driver is

prohibited from using a cellular or other wireless telephone, while operating a school bus." The policy goes on to cite state statute. The evidence relating to the charge shows that the Respondent was disciplined for using a cellular phone on October 23, 2013, April 2, 2014, March 17, 2015, March 27, 2015 and May 1, 2015

In this regard the Respondent claims that in those instances in which she received discipline she was not "operating" the bus. Indeed, she notes that at the times she was alleged to have violated the policy, her bus was parked and the engine was turned off. She was sitting on the bus waiting for the school to release her children to travel from the bus to the school entrance. The Board interprets "operating" in this context that the times in which students are present on the bus. It is expected that even though the driver is not in the act of driving, he or she must be actively monitoring the children's behavior. While one my question the wording of the policy, it is reasonable to expect the drivers to be active monitors while waiting to release the children. The Board's interpretation therefore is not arbitrary or capricious especially in light of the fact that the Board through the testimony of all of its witnesses has consistently applied this interpretation.

On the other hand, no witnesses were provided other than the Respondent to show that there was some confusion among the bus drivers with respect to the policy. Indeed, one must note that even though the Respondent was disciplined five times no one has ever challenged the policy, not the Union and not the Respondent. Furthermore, the evidence shows that since the Board has consistently applied this interpretation. Accordingly by the third or fourth time in which she was advised of the issue she should have been fully aware of this interpretation and the Board's expectations regarding compliance. Therefore to continue to violate the policy on numerous occasions

regardless of the interpretations is insubordinate and is conduct unbecoming. Therefore the second charge is sustained.

In the third charge, the Board alleges that the Respondent engaged in unbecoming conducted by repeatedly failing to safely operate the school bus. In support of the charge in addition to the incident on October 1, 2014 the Respondent was observed on video footage engaging in a number of activities on the bus which the Board considered to be unsafe. These are noted specifically in paragraphs 79 and 80 in the Statement of Tenure Charges including incorrectly wearing her seatbelt and removing it while the bus was moving, permitting a student to walk from the back of the bus to the front while the bus was moving, removing a broom, using that broom to swat at a wasp and then wiping down the area all while the bus was moving and finally accessing her purse while the bus was moving.

The Respondent did not substantially challenge these incidents accept to say that these are examples of how the Board in general and Ms. Hewitt in particular had targeted her by using the camera devices. Respondent testified that she had raised the issue regarding the position of the cameras with Ms. Hewitt and Mr. Onorato as early as April 2013. According to the Respondent even though she alleged that they would look into it she admitted that the cameras continued to be on her in 2014 and 2015. [T3.60]

In 2008, the Board promulgated a policy that put the Respondent and other drivers on notice regarding the use of "devices to monitor and/or observe pupil behavior...school bus driver discipline procedure and/or school bus driver driving techniques." The School District has an interest in monitoring driver performance on the bus. Based upon the language of this policy, it has been consistently applied.

One must note that the testimony that most supports the allegation of disparate treatment in this regard is that of mechanic Mr. Ryan Adams who said that the tapes from the Respondent's bus was requested to be viewed more often than others [T4.48]. There is no dispute that the Board began to view more tapes after an incident in which a student was left on another bus. This did not involve the Respondent. Even though more of the Respondent's tapes may have been pulled, one could argue that it was justified given the issues raised by the Respondent during that year and behavior in October 2014. In sum, there is insufficient evidence to show that the violations which were visible in the video could somehow be excused because she was being disparately targeted by placing video cameras and the review of the tapes. Accordingly, in and of itself the violations that were observed on the tapes given the definition of unbecoming conduct as cited above, clearly contrary to the expectations of one who is responsible for the transport of children and also someone who is professionally licensed and charged to exercise that responsibility. Accordingly, I am sustaining charge number three.

Charge four alleges that the Respondent failed to comply with Board policy regarding child safety bus inspection. The evidence in this case is based upon a video which showed a student going to the rear of the Respondent's bus to release the child safety alarm. In this regard, the Respondent had provided little testimony to disprove what had occurred. The Board's policy is quite clear. The driver is expected to walk to the back of the bus to disengage the alarm in order to ensure that there are no other students that remain on the bus after a route has been concluded. In my opinion, the policy as stated is clear and is very reasonable in its purpose. Nevertheless while this does not in and of itself constitute serious misconduct, in light of the overall conduct that

has occurred within the short period of time, I do find that this is a basis to support this particular charge.

In Charge five, the grievant is alleged to have repeatedly caused damage to private property while operating her school bus. This charge centers around two complaints by a property owner asserting that the Respondent had cut her bus short and drove across the corner of his property. The two incidents occurred in December 2014 and May 2015. The Respondent generally denied riding across the individual's property. Nevertheless, the complaint that was registered identified the Respondent's bus on both occasions and the corner is on the route.

The basis of the denial in addition is based upon the issue of the photographs taken by Ms. Hewitt who visited the property after the complaints were submitted. The photographs were attached to the complaint dated in December 2014. In that regard, Respondent's counsel accurately pointed out that the photograph showed leaves on the trees in the background of the photograph. Therefore, I agree with the conclusion that those photographs could not have been taken during the investigation in December incident. At the same time however one must keep in mind that the second incident occurred in May 2015. In that regard, the photograph would have supported what was seen in the investigation. Given these circumstances there is a presumption that the photographs were mistakenly attached to the wrong complaint.

Respondent also noted that it appeared that there was only one wheel on the property which would not identify the Respondent's bus. I must disagree with the observation and note that it appeared to this arbitrator that indeed two wheels cut the corner of this property. Therefore I believe that the Board has met its burden in showing

that the incident did occur and that the Respondent's bus definitely was identified and there is no dispute that the property was on the Respondent's bus route. Therefore, I will sustain charge five.

In Charge six the Respondent allegedly failed to comply with procedures to maintain updated bus routes, maps and seating charts. During testimony, the Respondent freely admitted that the route charts were not present because she had taken them home to update them. However, she was not able to return the document prior to beginning of the first route the following morning. At first, she had asked her children to drop off the necessary documents before they reported to school, but they failed to do so. Eventually, the Respondent's father delivered the packages. He arrived too late to meet the beginning of the morning routes.

The Respondent further maintained that the substitute driver had ridden with her previously and therefore there should have been no problem with him understanding the route. However, this conclusion is inconsistent with the fact that the route as well as the identification of one of the children to be picked up was changed on the day before which necessitated the update. It would not be fair to assume that a substitute, even though he did preview the route, would have been able to pick up and respond to the adjustment which required the update of the list. This is why the School District placed this requirement. In this regard, therefore I find that the Respondent violated the policy.

Finally, the Board stated that the Respondent had engaged in a general failure to comply with the administrative directives. This represents a compilation of all of the directives that have been mentioned above and the Respondent's failure to comply with them. It is noted that the Respondent has alleged that she had been the subject of

harassment by management in general and Ms. Hewitt in particular. In all of these cases it is noted that the Respondent in meeting with Ms. Hewitt, Mr. Onorato and Mr. Drozdowski did have union representation. In addition, the Respondent also has asserted that the policies which were cited were unreasonable and to a certain extent, administered in an unfair manner. Yet over all of this time the Respondent did not grieve a single discipline or policy application even though the evidence showed that she did have the representation of her union. In addition it is important to note that even though the Respondent felt that she was harassed to the extent that she could not work, that she did not place any grievance or claim alleging that there was a hostile work environment due to such harassment.

One must also ask whether these disciplines and charges warranted such a severe discipline as the removal from a position given the fact that the Respondent did have a number of moderate to positive annual evaluations. The one evaluation that was critical in this case was the one that was issued in April 14, 2015. The reviews were indicative of moderate to satisfactory performance with the exception of poor dependability due to an unsatisfactory attendance record. [R3] In addition, this evaluation was issued before the numerous violations noted in May and June, 2015. Therefore, despite these reviews, the Board has met its burden by showing by a preponderance of the evidence that the Respondent did commit the actions that served as the basis for the charges set forth herein.

It is important to note that all of these disciplines with the exception of one or two occurred within one academic year. This demonstrates a clear pattern of misconduct that warrants consideration of the removal of one's tenure. In this regard, I must find that the

weight of the evidence presented support this conclusion. Therefore, based upon the evidence presented I must find that the School District has established a sufficient basis for the charges set forth herein. The charges are sustained.

Dated: May 23, 2016

Alan A. Symonette, Arbitrator
For the Commissioner of Education
State of New Jersey

Commonwealth of Pennsylvania )
) ss.:
County of Philadelphia )

I, Alan A. Symonette, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Dated: May 23, 2016

Alan A. Symonette

Megan Mc Crea 5/23/16

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Megan Mc Crea, Notary Public
City of Philadelphia, Philadelphia County
My Commission Expires Aug. 31, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

198-16

DOCKET # 259-9/15-12/14
X----------X
In the Matter of the Tenure Charges Preferred by

**STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, NEW JERSEY**
"District

-against-

**LEONARD YARBOROUGH**
"Respondent"

**ARBITRATOR'S OPINION and AWARD**

X----------X
**BEFORE:**
**ARTHUR A. RIEGEL, ESQ., ARBITRATOR**

**APPEARANCES:**
**FOR THE DISTRICT:**
**SCARINCI & HOLLENBECK, LLP by RAMON RIVERA & SHANA DON, ESQS.**

**FOR THE RESPONDENT:**
**STUART BALL, LLC by CHARLES AUFFANT & WILLIAM THIERSTEN, ESQS.**
**LEONARD YARBOROUGH, RESPONDENT**

## *PROCEDURAL HISTORY*

On August 10, 2015, Sandra Marques, Principal, Hawkins Street School (Marques) filed tenure charges with the New Jersey Commissioner of Education (Hearing Officer Exhibit [HOX] 4) . The charges were served on Respondent on September 9, 2015.

A pre-hearing conference was held on October 2, 2015. At that conference, a calendar was developed relative to the submission of and responses to interrogatories, to the submission of and responses to motions and to the production of witness lists and documents to be introduced at the hearings. In addition, a date for oral arguments relative to motions made was set, December 18, 2015. Additionally, a tentative schedule of hearing dates was established.

Subsequently, the parties exchanged initial disclosures and discovery. Further, Respondent submitted a motion to dismiss the charges on December 1, 2015 (HOX2). The District submitted its opposition to the motion to dismiss on December 15, 2015 (HOX3). As indicated above, oral arguments concerning the motion to dismiss were offered on December 18, 2015. The Arbitrator denied the motion to dismiss the charges on January 6, 2016. Hearings were conducted on January 14, 15, 21, February 2, 8, 11, 2016. Post hearing briefs were submitted on May 1, 2016

## THE CHARGES

### CHARGE ONE: INEFFICIENCY

Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in the following manner:

1. Respondent was rated Ineffective in his 2012-2013 Annual Summative Evaluation.

2. Respondent was rated Partially Effective in his 2013-2014 Annual Summative Evaluation.

3. Respondent was rated Partially Effective in his 2014-2015 Annual Summative Evaluation.

4. Respondent failed to implement curricular goals and objective(s).

5. Respondent failed to design coherent instruction.

6. Respondent failed to assess student learning.

7. Respondent failed to create an environment of respect and learning.

8. Respondent failed to manage student behavior.

9. Respondent failed to manage classroom procedures.

10. Respondent failed to establish a culture of learning.

11. Respondent failed to communicate clearly and accurately.

12. Respondent failed to use questioning and discussion techniques with flexibility and responsiveness.

13. Respondent failed to engage students in learning.

14. Respondent failed to provide feedback to students.

15. Respondent failed to attain student achievement that meets or exceeds performance benchmarks.

16. Respondent has failed to reflect on teaching.

17. Respondent has failed to contribute to the School and District.

18. Respondent has failed to grow and develop professionally.

19. Respondent has demonstrated unprofessional and inappropriate behavior before students and staff.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

**CHARGE TWO: CONDUCT UNBECOMING**

1. The District re-states the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.

2. On or about October 21, 2013, Respondent used inappropriate corporal punishment, shoving an elementary school student.

3. On or about February 28, 2014, Respondent again used inappropriate corporal punishment, grabbing the arm of an elementary school student and shoving him.

4. Respondent demonstrated a pattern of hostile and threatening conduct before students and staff.

5. The above-referenced conduct individually is a violation of NJSA 18A:6-1, and cumulatively reflects a pattern unbecoming a public educator.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

**CHARGE THREE: AND OTHER JUST CAUSE**

1. The District re-states the allegations contained in Charges One and Two and re-alleges and incorporates them by reference as if fully set forth at length herein.

2. The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

Wherefore, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the School District, and he should be dismissed.

## POSITIONS OF THE PARTIES

### CONTENTIONS OF THE DISTRICT

The District argued as follows:

Respondent is a tenured teacher. Tenure charges have been proffered against him. These charges are based upon Inefficiency, Conduct Unbecoming and Other Just Cause.

Charge One alleges Inefficiency. Respondent received ratings of Ineffective (2012-13) and Partially Ineffective (2013-14 and 2014-15). He was under a Corrective Action Plan (CAP) as of

March 2015. The plan was initiated at that time because he had been removed from the school until February of the 2014-15 school year.

When he returned to the Hawkins Street School in February 2015, he was placed in a third grade class. In order to address his deficiencies, he began working on the CAP with Vice Principal Orr (Orr). He was not formally observed at this time because he purportedly could not manage the class. In an effort to reduce the disruptiveness, Principal Marques (Marques) created a kindergarten position for Respondent. He was required to teach letter identification to 30 kindergarten students, in groups of five. Despite the efforts of Marques and Orr, Respondent rendered inefficient service for the period February-June of the 2014-15 school year.

NJAC 6A:10-4.4 (e)1 states that teachers who are present less than 40% of the school days shall receive at least two observations to earn a *teacher practice score.* Due to his administrative removals, Respondent had extended absences in 2013-14 and 2014-15 and the District was in substantial compliance with the evaluation requirements of the TEACHNJ Act.

Charge Two, Conduct Unbecoming, and Other Just Cause deal with the inappropriate use of corporal punishment on two occasions. Respondent's misconduct in this regard led to significant disruption in the school and in his classroom. His inability to manage his class shifted his responsibility to other teachers, security guards and to administrators.

Charge Three alleges that, based on the totality of the circumstances, Respondent neglected his duties as an educator. The District's unrebutted evidence shows that Respondent failed to follow district policies and procedures concerning student management and failed to invest in his own

professional development and to address his deficiencies despite the efforts made by the District and school personnel.

The District produced the following witnesses: Keith Barton, Executive Managing Director of Operations for the District, Principal Sandra Marques, Vice Principal Ronald Orr, Mitchell Center, Assistant Superintendent of the District, and Vice Principal Christine Magalhes DiTaranto. Respondent was the only witness for the defense.

The District's witnesses supported the tenure charges. Respondent's testimony did not adduce credible evidence to rebut the evidence produced by the District.

The District established the Tenure Charge of Conduct Unbecoming. It defined *Conduct Unbecoming* through citation to case law. It is understood that a charge of Conduct Unbecoming goes to a teacher's fitness to perform his/her duties and functions. A single incident involving Conduct Unbecoming is grounds for the revocation of tenure.

The record shows that, on two separate occasions, Respondent made physical conduct with students in an effort to discipline them. This constituted corporal punishment and is a violation of District policy and State statute. Respondent's actions in this regard caused a risk of harm to the students and disrupted the school community.

Respondent was aware of the District policy of student disciplinary procedures and staff behavior. It is contained within the Hawkins Street School Handbook. Teachers are expected to respond to student misbehavior by seeking counseling and other proper interventions through referrals to the SST team.

Repeated acts of teacher hostility, whether directed at students or displayed in their presence, negatively impacts the educational environment and constitutes justification for removing the teacher from the school. In this case, Marques witnessed the incident involving NM. Her testimony was supported by contemporaneous documents and an unrebutted Memorandum of Conduct Unbecoming.

Respondent denied shoving NM but admitted yelling at him. Respondent showed no remorse for yelling at NM and offered no evidence in support of his denial of shoving the student.

As to the incident with TP, Respondent claimed that the student was acting out as an excuse for grabbing the student's arms. However, on cross-examination, Respondent denied grabbing TP by the arms and shoulders and alleged that the student was running around the room and knocking over chairs and desks. For his part, TP told Marques that Respondent had hurt his arms.

Marques noted that the majority of the students confirmed TP's statements. The principal found TP to be credible.

Under New Jersey law, a letter of reprimand is a form of discipline. It may form the basis for additional disciplinary action and can support a charge of Conduct Unbecoming.

Respondent poses a harm or the potential to cause harm to students. He had been administratively removed from his classroom for one day and received a Memorandum of Conduct Unbecoming. He was also administratively removed from his classroom from February 28, 2014 until the end of the 2013-14 school year while a second incident of corporal punishment was investigated.

Further, at the end of the end of the 2013-14 school year, tenure charges were served on Respondent. These charges were dismissed based on an interpretation of the 2012-13 school year as a *pilot year.* Respondent returned to Hawkins Street School in February 2014 and was given two Memoranda of Conduct Unbecoming based on interactions with school staff and administrators. The District met its burden of proving that Respondent has demonstrated unbecoming conduct.

With respect to the charge of Inefficiency, the District met its burden to dismiss Respondent under a preponderance of the evidence standard and the TEACHNJ Act. Under TEACHNJ, tenure charges for Inefficiency must be filed to teachers receiving the ratings that had been given to Respondent.

As to the number of classroom observations performed on Respondent during the 2012-13, 2013-14 and 2014-15 school years, the District either complied or substantially complied with the regulations. In order to dismiss a tenure charge based on a flawed evaluation process, there needs to be evidence that an error in the process materially affected the outcome of the evaluation.

The question to be resolved is whether the District was in substantial compliance with the evaluation process. A review of the record indicates that the District met its burden of substantially complying the required number of evaluations set forth in the statute.

Even if the rubric set forth in NJSA 18A:6-17.2 is found not to be appropriate for the judging of the evidence in this matter, the District met its burden under the well settled preponderance of the evidence approach. Despite significant reviews of Respondent's performance and significant efforts and time on the part of administrators to support Respondent's areas of weakness, Respondent did

not improve upon his inefficient performance. Thus, based upon a preponderance of the credible evidence, the District proved that Respondent is an ineffective teacher and that his tenure should be terminated.

The District established Other Just Cause to dismiss Respondent. The undisputed evidence of numerous classroom management and supervision issues and neglect of duty sufficient to revoke tenure.

There is evidence of a three year period of demonstrated poor performance, resistance and a refusal to accept support. Respondent shirked his duty to manage classroom behavior and to follow relevant protocols for addressing student behaviors.

He was given coaching and support to address challenging students. He did not implement the strategies he was shown and did not complete the paperwork needed for referrals to SST. He did not follow the District's Discipline Policy and attempted to shift the responsibilities onto administrators, including the principal, and security personnel. When Respondent testified, he did not comment about his unprofessional conduct when arguing with staff in the presence of students and becoming confrontational and pounding on a desk during his Annual Evaluation Conference.

Respondent was uncooperative during the creation of a CAP and was unprofessional in his interactions with colleagues and administrators. During the 2014-15 school year, Respondent engaged in altercations with another teacher. Principal Marques recorded several incidents that took place in February and March 2015.

Respondent's actions in failing to adhere to disciplinary policies and protocols and his refusal to take responsibility for his own behavior or that of students disrupted the Hawkins Street School.

A special assignment which Respondent requested was created for him. Despite this, he continued to act inappropriately with administrators, he refused to sign evaluations and raised his voice and pounded a desk during a post-observation conference. This pattern of conduct constitutes unbecoming conduct, which is sufficient to establish just cause to terminate Respondent's employment with the District.

Respondent has demonstrated inefficiency, unbecoming conduct and other just cause for dismissal. His tenured employment with the District should be terminated.

**CONTENTIONS OF RESPONDENT:**

Respondent argued as follows:

The tenure charges of Inefficiency warrant dismissal since the District failed to substantially comply with the evaluation and rehabilitative procedures set forth by the TEACHNJ Act. In addition, the tenure charge of Conduct Unbecoming must be dismissed because it is not supported by a preponderance of the evidence and is precluded by the Entire Controversy Doctrine.

TEACHNJ was signed into law on August 6, 2012. As of the 2013-14 school year, an evaluation rubric was established. Under the statute, teachers who are rated Ineffective or Partially Effective in two Summative Annual Evaluations are to be charged with Inefficiency. The only evaluations which may be used for this purpose are those conducted in accordance with the established rubric.

The Tenure Charges of Inefficiency, which can only be brought under Section 25 of TEACHNJ should be dismissed. There is nothing in Section 25 that would allow a charge of inefficiency to be heard under Section 8. Case law indicates that Section 8 refers to Conduct Unbecoming. Nothing in Section 8 allows for the charging of inefficiency.

Section 23(a) of the Act suggests that inefficiency charges must be brought pursuant to Section 25. This section sets forth the determinations to be made by an arbitrator in Section 25 cases.

In this case, the District failed to substantially adhere to the evaluation process. Its actions were arbitrary and capricious.

The statute requires a requisite number of observations, measurement of student progress through Student Growth Objectives (SGO) and assistance for underperforming teachers through professional development, which included CAPs.

The District failed to provide Respondent with the requisite number of observations. The statute indicates that teachers shall be observed at least three times during a school year. It adds that teachers on a CAP must be observed an additional time.

Respondent was on a CAP for the 2013-14 and 2014-15 school years. He did not receive the four required observations in either year. In 2013-14, Respondent received a long observation on October 4, 2013 and a short observation on November 15, 2013. He received his Annual Summative evaluation on May 15, 2014.

In 2014-15, he was again observed twice; a short observation on April 10, 2015 and a long observation on May 7, 2015. Although he received another short observation on o June 16, 2015, it was not part of his Summative Evaluation since it was completed on June 2, 2015.

Thus, in 2013-14 and 2014-15, the District fell short of the required four required observations of teachers on a CAP. It must be noted that Peer Evaluations of teachers cannot be considered observations.

The District failed to comply with statutory procedures because Respondent should not have received summative evaluations without having the requisite number of valid Teacher Practice and Student Achievement components. Evaluations underlying charges of Inefficiency must be at least based on objective measures of student performance, i.e. SGOs., using standardized assessments.

This matter is also reflected in *Framework for Effective Teaching* policy manual. This policy defines a student learning goal as a long-term objective on which the teacher will focus for his/her students.

These policies are consistent with State regulations concerning evaluations of teachers. SGOs are explicitly mandated by statute as a component of student achievement upon which Summative evaluations are based. Under the law, SGOs must be specific and measurable, based on available student learning data, aligned to Core Curriculum and based on growth and/or achievement.

Each teacher, like Respondent, without a student growth percentile must have at least two SGOs developed in conjunction with his/her supervisor or a principal's designee. These SGOs can only be adjusted by the teacher in consultation with an administrator by February 15th of the school

year and may only be calculated by the supervisor. Once the SGOs have been calculated, they must be discussed during the annual summary conference, if available at that time.

Teachers are evaluated based on components of Teacher Practice and Student Achievement. Even teachers who are absent for a portion of student school days may receive a summative evaluation as long as they have both a practice score and a student achievement score based on the requisite number of observations and SGOs.

Teachers present for fewer than 40% of the number of school days must receive at least two observations. Student progress is measured by assessing the progress of students meeting two SGOs. Teachers without component scores in Teacher Practice and Student Achievement may not receive a summative rating for the year.

Respondent does not have valid component scores in Teacher Practice because he received only two observations n 2013-14 and three in 2014-15. Even though he was on administrative leave in both years, he was present 40% or more in each of the years. Since he did not have the required number of observations in either year, he did not have a valid score in the Teacher Practice component in both years.

As to the SGOs, Respondent was required to have two SGOs for each of 2013-14 and 2014-15. Marques testified that no SGOs were established for 2013-14. She said that Respondent was measured on student growth areas, which she noted were different from SGOs.

As to 2014-15, the school was authorized to use student growth areas in lieu of SGOs for 2014-15. However, no such authorization was given for the 2013-14 school year. Thus, Respondent

should not have received a summative rating for 2013-14. Therefore, without a summative rating for both 2013-14 and 2014-15, the District was precluded from bringing forth tenure charges for Inefficiency.

The District failed to comply with the statutory requirements for CAPs. CAPs need to address areas in need of improvement identified in the evaluation rubric, set forth specific , demonstrable goals for improvement, include responsibilities of the employee and District in the implementation of the CAP and include time lines for meeting the goals.

Respondent received CAPs for the 2013-14 and 2014-15. He was on administrative leave until February of the 2014-15 year and began teaching kindergarten in March 2015. He was on the CAP for only three or four moths.

Case law in tenure cases suggest that TEACHNJ anticipates observations being scheduled throughout the year, a mid-year review and a CAP will provide the assistance needed for an underperforming teacher to correct deficiencies.

Respondent was not given an appropriate amount of time in which to improve his evaluations. In addition, the District did not provide specific support for Respondent, as required by the CAP. While Marques and Vice Principal DiTaranto indicated Respondent's specific needs, Vice Principal Orr said that a teacher was assigned to assist Respondent for one week and Marques conceded that the resources provided to Respondent were provided to all teachers. The District failed to provide any professional development that was tailored to assist Respondent overcome his deficiencies.

The District engaged in arbitrary and capricious conduct. It has brought charges of Inefficiency against Respondent three times. Instead of spending three years trying to remove Respondent from his profession, it should have met its obligation to provide the support needed for him to remedy his deficiencies.

It acted in an arbitrary and capricious manner by failing to adhere to the TEACHNJ requirements. As such, the evidence cannot support the revocation of Respondent's tenure and the dismissal of charges of Inefficiency must be dismissed.

The Conduct Unbecoming charges must be dismissed because they are not supported by a preponderance of the evidence and they are barred by the *Entire Controversy Doctrine*. Unfitness to remain a teacher can be demonstrated by a single incident if it is serious enough, while less serious matters should be subject to progressive discipline.

He cites judicial case law relative to the use of corporal punishment. He stresses the *Murphy* case that indicated that a loss of pay was warranted but dismissal was not.

Corporal punishment is defined by statute. Respondent is being charged with unbecoming conduct based on two incidents of alleged corporal punishment. He was accused of shoving students on two different occasions.

In one instance, Respondent raised his voice but did not commit corporal punishment. There was no finding of abuse and half the students in the class said that there was no physical touching, Despite the preponderance of evidence that Respondent did not commit corporal punishment, he was disciplined with a letter of reprimand.

In the second instance, Respondent gently put his hands on an unruly and out of control student and guided him to where he had been seated. Respondent was put on administrative leave for the rest of the year despite the presence of an investigation that vindicated him. He ultimately returned to the classroom.

Respondent denies shoving or exerting undue physical force on any student. He was merely trying to quell disturbances from out of control unruly students and to prevent these students from injuring themselves and/or others. The instances do not rise to the level of corporal punishment and do not support a charge of Conduct Unbecoming.

Even if Respondent engaged in Conduct Unbecoming, progressive discipline should be employed. Thus, his tenure should not be revoked because of these two incidents. He had been previously disciplined and the District should not be permitted to further discipline him.

Furthermore, the District was obligated to bring all of its claims during the 2012-13 and 2013-14 school years. Under the *Entire Controversy Doctrine,* the District should be precluded from bringing this charge in the current set of charges.

All of the tenure charges should be dismissed.

## OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Leonard Yarborough is guilty of Charge II. Charges I and III are dismissed. For the sake of clarity, each of the charges will be addressed separately.

## ANALYSIS OF THE CHARGES

### CHARGE I:

This charge alleges Inefficiency. A fundamental issue in this case relates to the evaluation process requirements set forth in TEACHNJ. According to the statute, teachers who are rated Ineffective or Partially Effective in two consecutive years must be charged with Inefficiency.

The District asserted that the process it followed was in substantial compliance with the statute, while Respondent argued that the District was out of compliance with the statutory requirements. As such, Respondent maintained that Charge I must be dismissed.

It is appropriate to first review the evaluation requirements under TEACHNJ. This charge references the 2012-13, 2013-14 and 2014-15 school years. Respondent received end of year evaluations in each of the years. He was rated Ineffective in 2012-13 and Partially Effective in 2013-14 and 2014-15.

TEACHNJ became effective during the 2013-14 school year. It had no bearing on the 2012-13 school year. Thus, the discussion of the statutory evaluation requirements is limited to 2013-14 and 2014-15.

As noted above, under the statute, teachers who are rated Ineffective or Partially Effective in two consecutive years must be charged with Inefficiency after the second of the consecutive years. Consistent with this requirement, the instant charges were served and the instant proceeding was convened.

There are substantive requirements under TEACHNJ. First, the Annual Summative evaluations must be based on three lesson observations. In addition, teachers who are serving under a Corrective Action Plan (CAP) must have one additional observation. In short, these teachers must be observed a minimum of four times.

A review of the record indicates that Respondent was observed twice in 2013-14 and twice in 2014-15. The District pointed out that a relevant provision of the statute indicates that teachers who are present less than 40% of the total school days for students must receive a minimum of two observations during that academic year in order to earn a teacher practice score. For purposes of this analysis, *teacher practice* reflects the efficiency or competency with which the teachers practices his/her teaching.

The District stressed that this exception pertains to this case. In order to determine the applicability of this exception to the statutory requirement, an analysis of Respondent's attendance in 2013-14 and 2014-15 had to be done.

The record suggests that there are 191 days of teacher attendance in the school year. 40% of 191 days is 76 days. Thus, according to the *40% exception,* a teacher had to have taught 76 or fewer days for there to have been a reduction in the number of observations from three or four, depending on the CAP status, to two.

A review of Respondent's attendance data suggests that Respondent was present on more than 100 student school days in 2013-14. This number is significantly higher than the maximum of 76 days permitted under the *40% exception* rule.

Respondent needed to be observed four times during the 2013-14 school year, three times based upon TeachNJ and once because he was on a CAP. One must recall that that Respondent was rated Ineffective in 2012-13 and was under a CAP in 2013-14.

A second evaluation requirement in 2013-14 is that teachers set one or two Student Growth Objectives (SGOs). A review of respondent's 2013-14 Annual Evaluation reveals that there were *student learning goals* set. They were not called SGOs but substantively, they were very similar.

It should be added that the outcomes of these goals was not determined. Respondent was removed from the school as of March 1, 2014 and did not return before the end of the year.

Thus, the District did not comply with the TeachNJ requirement of Respondent being observed four times during the 2013-14 school year. Therefore, the 2013-14 Annual Evaluation is invalid and cannot be considered under Charge I.

Turning now to 2014-15, Respondent was present on approximately 80 student attendance days. In addition, the District was given a waiver with respect to SGOs. Ordinarily, the District would have been in substantial compliance with the evaluation regulations in 2014-15.

However, Inefficiency charges are brought after two consecutive years of Ineffective or Partially Effective ratings. In this case, the District did not comply with the statutory evaluation requirements in 2013-14. Therefore, even if 2014-15 was found to be in compliance with the TEACHNJ requirements, at most it could only be the first of the two consecutive years of Ineffective or Partially Effective ratings.

As a consequence, despite best efforts by its counsel, the District's failure to comply with the evaluation standards must result in the dismissal of Charge I.

**CHARGE II:**

The gravamen of Charge II is that Respondent used inappropriate corporal punishment on two different occasions, once on October 21, 2013 and again on February 28, 2014. The District concluded that Respondent was guilty of Conduct Unbecoming.

For purposes of this discussion, NJSA 18A:6-1 proscribes the use of physical force against students in educational settings. The statute states as follows:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

With definition in mind, it is necessary to consider the facts of the two cited instances. They

will be addressed separately.

**October 21, 2013**

Principal Marques testified that she entered the classroom and witnessed Respondent shoving an eight year old student, NM, while screaming at him (TS page 163). Marques considered Respondent's actions to constitute corporal punishment. She removed Respondent from the classroom for a day and issued a Memorandum of Conduct Unbecoming (DX3).

For his part, Respondent indicated that he raised his voice in order to cause NM to stop disrupting the class (TS page 698). He insisted that he did not inflict corporal punishment.

He observed that NM had been questioned about the incident by the school nurse and school social worker. He stressed that NM told both of these people that Respondent did not shove him (TS page 102-13).

Marques arranged for the matter to investigated. The students in the class were interviewed and their statements were summarized and were added to the Report of Incident (DX1&2). The statements of the students varied. However, two comments were clear. First, a significant number of students confirmed that Marques had entered the room at the time of the incident and, second, a significant number of the students interviewed stated that Respondent became angry at NM, yelled at NM and pushed or grabbed him (NM)

The confirmation of Marques's presence at the time of the incident adds credibility to her testimony about seeing Respondent shoving NM. Further, the confirming statements of the students also makes it more likely than not that Respondent pushed or shoved NM.

It is true that there were students who did not say that they saw Respondent make physical contact with NM. To a large extent, this should be expected. Eye witness testimony is not always reliable because witnesses often view the same incident in very different ways. As to what NM may have told the nurse and the social worker, students who had misbehaved may be reluctant to say that they were shoved for fear that they will be subject to additional criticism.

What is dispositive here is that Marques was clearly present at the time of the incident and her rendition of what happened was confirmed by students. In sum, the undersigned is persuaded that Respondent inflicted corporal punishment on NM.

Respondent argued that he had already been disciplined for this matter and that further discipline would constitute double jeopardy. This argument fails.

The memorandum he received (DX3). While it is entitled a *Letter of Reprimand,* it is, in fact, a counseling memo. It recites a discussion that took place between Marques and Respondent and counsels Respondent of the potential for future discipline. There was no discipline imposed but cautioned as to the potential for disciplinary action in the future.

A review of the statutory definition makes it clear that none of the exceptions to corporal punishment are applicable here. The Arbitrator concludes that Respondent was having difficulty managing NM and resorted to physical means of controlling the child.

**February 28, 2014**

The second alleged instance of corporal punishment took place on February 28, 2014. The incident was reported to Marques. Respondent was charged with grabbing TP by the arm and hurting the student. Marques reported the matter to DCP&P. The matter was investigated and a report was generated by that agency (DX6).

There were two important findings in the report. For purposes of this hearing, Respondent was found to have grabbed TP by the arms and shoulders and to have pushed him to the floor. In addition, TP was found to not be an abused child as defined in NJSA 9:6-8.21.

The instant hearing has been convened to determine if corporal punishment was employed. The DCP&P report is relevant in terms of the investigation it conducted. Its findings suggest that Respondent did, indeed, employ corporal punishment. While the agency is charged with determining if there was abuse, this proceeding has been convened to determine if corporal punishment was used.

There are different statutory standards for corporal punishment and abuse. It may well be that the standard for abuse was not satisfied, However, such a finding does not preclude the presence of corporal punishment.

Respondent stated that TP was a danger to himself and others and was knocking over furniture (TS702). Respondent's version of the incident was not confirmed by the report. It simply stated that TP refused to follow Respondent's directives.

The Arbitrator concludes that grabbing a student by the arms and shoulders and then pushing the student to the floor constitutes corporal punishment. With that being said, the undersigned finds that the District met its burden of proving Specifications 2-5 of Charge II.

Further, Respondent asserted that, under the Entire Controversy Principle, the charges of corporal punishment had to have been raised in the charges served after the 2012-13 and 2013-14 school years. He stressed that the failure to do so then precludes their being considered at this time.

It is clear that the two earlier sets of charges had been dismissed on procedural grounds. As such they are a nullity and the fact that the corporal punishment was not charged earlier does not suggest that the District's earlier error, if it was a legal error, cannot be cured by including the charges in a subsequent set of charges that, in fact, survived a Motion to Dismiss.

Respondent's argument suggests that the corporal punishment charges could never be litigated if those charges were not part of the 2012-13 charges. Such a position is extreme and flies in the face of numerous examples of manners in which errors can be remedied.

In short, the District met its burden of proving Charge II. Therefore, Respondent is guilty of Conduct Unbecoming.

**CHARGE III:**

This charge alleged *Other Just Cause* for dismissal. It restated the allegations found in Charges I and II and alleged that the cumulative effect of Respondent's misconduct and inefficiency constitute other just cause for dismissal.

Charge I has been dismissed based on improper evaluations. To consider them under Charge III would constitute an *end run* around the statute. It would, in effect, resurrect dismissed charges under a different heading. That would thwart the apparent intent of TEACHNJ.

Respondent was found culpable of Charge II. To consider them again under Charge III would raise the specter of double jeopardy. One may not be charged with the same misconduct twice. To do so would result in a respondent being penalized twice for the same misconduct.

In sum, Charge III is dismissed.

## PENALTY

Having reviewed the case law, the undersigned is persuaded that dismissal is excessive in this case. Charge I was dismissed because of the District's failure to properly implement the evaluation procedures and standards set forth in TEACHNJ. Charge III was dismissed due to its redundancy of Charge I.

The issue here is the determination of an appropriate penalty. When considering this question, the focus must be on Respondent. Specifically, if he is to be reinstated, the matter to be resolved is whether Respondent has grown as a result of the process of going through this hearing.

The Arbitrator has serious doubts about Respondent's recognition of his need to re-examine his professional bearing. A review of his testimony suggests that he has taken little or no responsibility for his actions.

He was found culpable of two instances of corporal punishment. He essentially blamed the students for his actions. There was little that showed any introspection on his part. He failed to recognize that he needs to focus on additional ways and means of managing his classes.

He seems to believe that it may be beyond his ken to properly manage students who are beyond the kindergarten level. His teaching certificate does not limit him to teaching kindergarten.

He expressed little remorse for his conduct. As noted above, he held the students, not himself, accountable for the corporal punishment. He insisted that he is an effective teacher when that may not be true.

It is the view of the undersigned that the past may be prelude to the future if Respondent does not seriously hold himself accountable for his actions. If he fails to do so, he may be part of the disciplinary process again. If he successfully does so, he will likely have a satisfying career as a teacher. He has serious choices before him and the undersigned trusts that he will make good ones.

As to the penalty, Respondent cited *Murphy* as being a case that is on point. Like Respondent, Murphy was found guilty to have engaged in corporal punishment twice. S/he was not discharged but was denied pay for 120 days.

Given the totality of the circumstances here, the undersigned concludes that a similar penalty is appropriate here. Thus, the Arbitrator finds that appropriate penalty to be imposed on Leonard Yarborough is a 120 day suspension without pay. Therefore, based on the above, the undersigned makes the following

## AWARD

1. Leonard Yarborough is guilty of Charge II.
2. The following charges are dismissed: Charges I & III.
3. The penalty imposed on Leonard Yarborough is a 120 day suspension without pay.

Dated: May 24, 2016
Hewlett Harbor , NY

ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

## AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU )

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.

ARTHUR A. RIEGEL

199-16LM

199-16

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

May 26, 2016

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Re: *In the Matter of the Tenure Hearing of Penny Keough, School District of the City of Burlington, Burlington County.* Agency Dkt. No. 119-4/16.

Dear Counsel:

I have reviewed the materials filed in connection with respondent Penny Keough's Motion for a Stay of the tenure proceedings pending the resolution of the discrimination and retaliation complaint that was filed by the respondent against the Burlington Board of Education in the Superior Court, Law Division. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that the moving party has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the respondent has failed to meet the standard required for a stay of the tenure proceedings. Most notably, the respondent has failed to establish that a stay is necessary to prevent irreparable harm. Harm is irreparable when it cannot be addressed with monetary damages. *Crowe*, *supra*, 90 *N.J.* at 132-332. This standard contemplates that the harm also be both substantial and immediate. *Subcarrier Communications, Inc. v. Day*, 299 *N.J. Super.* 634, 638 (App. Div. 1997).

The respondent argues that a stay is necessary because if she wishes to litigate the issue of discrimination and retaliation, she must do so in Superior Court only, or forever forfeit her right to do so. In support of her argument, however, the respondent misconstrues the holding in *Steven J. Winters v. North Hudson Regional Fire and Rescue, et al.*, 212 *N.J.* 67 (2012). The Court did not hold that all administrative proceedings should be stayed pending the outcome of a

retaliation claim in Superior Court; but rather, the Court found that any retaliation claims that are not fully presented during an administrative proceeding may not be subsequently filed in another forum after the administrative proceeding is completed. In *Winters*, *supra*, the employee initially raised the retaliation claim in the administrative proceeding but he did not fully present his evidence during the administrative proceeding. Under those circumstances, the Court held that, "Winters cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it. Retaliation was a central theme of his argument and that he chose not to present there his comprehensive proofs of that claim does not afford him a second bite at the apple...." *Winters*, *supra*, at 88. Moreover, in *Winters*, *supra*, the Court actually put employees "on notice that integration of employer-retaliation claims should be anticipated and addressed where raised as part of the discipline review process." *Winters*, *supra*, at 74.

Throughout the tenure proceedings in this case the respondent will be afforded the opportunity to fully and comprehensively present the discrimination and retaliation claims in defense of the tenure charges. As the Court pointed out, "administrative tribunals can and do provide a full and fair opportunity for litigation of an issue." *Winters*, *supra* at 87 (citations omitted). Further, unlike in *Winters*, *supra*, the respondent has already filed a complaint in Superior Court, therefore, she has persevered any claims that do not fall within the Commissioner's jurisdiction. Therefore, the respondent has failed to establish that she will suffer irreparable harm if the tenure proceedings proceed in accordance with *N.J.S.A.* 18A:6-16.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the respondent's request for a stay of the tenure proceedings is hereby DENIED.[1] The respondent shall file an Answer to the tenure charges within 10 days after the date of this decision.

Sincerely,

Peter Shulman
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

200-16L

200-16

# State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
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CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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May 27, 2016

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Re: *In the Matter of the Suspension of the Teaching Certificate of Chae Hyuk Im, School District of the Township of Wayne, OAL Dkt. No. EDU 1019-14, Agency Dkt. No. 357-12/14.*

Dear Counsel:

I have considered the papers filed in connection with the respondent's request for interlocutory review of ALJ Cohen's Order of May 11, 2016, granting partial summary decision to the petitioner in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.*

Sincerely,

William Haldeman
Acting Commissioner

c: Honorable Carol I. Cohen, ALJ
County Superintendent
State Law Library

WH/MKD/JKH

**Via Facsimile and Regular Delivery**

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

201-16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JAMES MESSINA, SCHOOL DISTRICT OF THE CITY OF HOBOKEN, HUDSON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

In February 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning his position without giving the required notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-1.5(e), the allegations – which respondent has chosen not to deny – may be deemed admitted. Accordingly, the Commissioner granted summary decision to the petitioner and forwarded a copy of this decision to the State Board of Examiners for implementation of the suspension.

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

May 31, 2016

AGENCY DKT. NO. 39-2/16

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JAMES MESSINA, SCHOOL DISTRICT OF THE CITY OF HOBOKEN, HUDSON COUNTY. | : | COMMISSIONER OF EDUCATION<br><br>DECISION |

For Petitioner, Marie-Laurence Fabian, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on February 17, 2016, by way of an Order to Show Cause served by petitioner, the Hoboken Board of Education (Board), upon the respondent, James Messina, requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated February 18, 2016, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on March 15, 2016, the Bureau sent respondent a second notice – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the March 15, 2016 notice was delivered on March 17, 2016.

No answer having yet been received, on April 4, 2016, the Bureau sent respondent a final notice, via regular and certified mail, directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the April 4, 2016 notice was delivered on April 7, 2016. No answer to the Order to Show Cause has been filed as of this date.

The affidavit submitted by the petitioner in this matter states that: the respondent entered into a contract with the petitioner for the 2015-2016 school year; on January 4, 2016, the respondent informed the district that he would not be fulfilling the term of his employment; and the respondent resigned effective January 4, 2016, giving the district no notice. The respondent has not denied the allegations therein; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/31/16

Date of Mailing: 5/31/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division

OAL DKT. NO. EDU 12704-14
AGENCY DKT. NO. 229-8/14

| | | |
|---|---|---|
| A.P.W., ON BEHALF OF MINOR CHILDREN, A.T.W. AND N.A.W., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL, MERCER COUNTY, | : | |
| RESPONDENT. | : | |

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

Upon review, the Commissioner observes that the Board President of the Princeton Charter School Board of Trustees signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

To the extent that Paragraph 7 of the settlement agreement provides for confidentiality, the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/01/16

Date of Mailing: 6/01/16

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 12704-14
AGENCY DKT. NO. 229-8/14

**IN THE MATTER OF A.P.W. ON BEHALF OF MINOR CHILD, A.T.W. AND N.A.W., PRINCETON CHARTER SCHOOL, BOARD OF TRUSTEES, MERCER COUNTY.**

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**A.P.W.**, petitioner, pro se

**Derlys M. Gutierrez**, Esq., for respondent (Adams, Gutierrez and Lattiboudere, LLC)

Record Closed: April 8, 2016 Decided: April 21, 2016

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 1, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

April 21, 2016
DATE

**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: April 21, 2016

Date Mailed to Parties: April 21, 2016

/cb

**ADAMS GUTIERREZ & LATTIBOUDERE, LLC**
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
Board of Trustees of the Princeton Charter School

**OFFICE OF ADMINISTRATIVE LAW**

| | |
|---|---|
| A.P.W. obo A.T.W. and N.A.W.<br><br>Petitioners,<br><br>v.<br><br>BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL,<br><br>Respondent. | Agency Reference No.: 229-8/14<br>OAL Docket No.: EDU 12704-2014 S<br><br>**SETTLEMENT AGREEMENT** |

WHEREAS, during the period September 2012-April 1, 2014, A.T.W. and N.A.W. were enrolled at the Princeton Charter School (PCS), with the Board of Trustees of the Princeton Charter School ("Board") being a local education agency responsible for providing educational services to A.T.W. and N.A.W. during that period; and

WHEREAS, A.P.W. is the parent of A.T.W. and N.A.W. ("Parent"); and

WHEREAS, the Parent filed a petition pursuant to the Anti-Bullying Bill of Rights Act requesting a hearing on behalf of her children A.T.W. and N.A.W., currently docketed as Agency Reference No. 229-8/14 and OAL Docket No. EDU 12704-2014 S;

WHEREAS, the Parent filed a Notice of Tort Claim with the Board and its insurance carrier providing notice of a Tort claim against the Board and/or its agents for claims of compensatory damages and expenses due to personal injuries to A.T.W. and emotional distress to A.T.W. and N.A.W. arising out of the facts alleged in said petition;

WHEREAS, without waiving their respective positions and without any admissions by either party, the Parent and the Board wish to fully resolve all outstanding litigations between the parties pursuant to the terms set forth herein;

NOW THEREFORE, on their own behalf and on behalf of both A.T.W. and N.A.W., the Parent and the Board hereby agree to the following terms:

1. The Board or its insurance carrier shall make a one-time payment to Parent in the amount of twenty-nine thousand dollars ($29,000.00). Payment shall be made within thirty (30) days following execution of the Agreement by all parties.

2. The payment under paragraph 1 shall be in full and final settlement of any and all claims known claims that could have been made through the date of execution of this Agreement, including any claims for compensatory damages, fees, compensatory educational services, or costs. Said payment shall represent the Board's entire financial obligation to the Parent.

3. Parent agrees to dismiss with prejudice the petition filed on behalf of her children A.T.W. and N.A.W., currently docketed as Agency Reference No. 229-8/14 and OAL Docket No. EDU 12704-2014;

4. In consideration of the above, Parent, individually and on behalf of A.T.W. and N.A.W. fully and completely releases the Board, its agents, and representatives, from any and all known claims they have or may have accrued as of the date of this Agreement under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794(a), § 705(8), the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g et seq., 42 U.S.C. § 1983, 42 U.S.C. § 1988, 29 U.S.C. § 705(20), the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 et seq., the Rehabilitation Act of 1973, 20 U.S.C. § 7801, Title II of the ADA, 42 U.S.C. § 12132 et seq., N.J.A.C. 6A:14-1.1 et seq., N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., the ADA, 42 U.S.C. § 621 et seq., the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-3.2 et seq., the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., all as amended, any statutes of New Jersey, including but not limited to Title 18A and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or any other claims which have been or could have been asserted by A.T.W. or his parent on behalf of A.T.W. or asserted by N.A.W. or her parent on behalf of N.A.W, or the Board, in any forum arising out of or connected with A.T.W.'s or N.A.W.'s education at the PCS, including any claims for compensatory damages, fees or costs, to the extent permitted by applicable law through the date this Agreement is executed. Parent agrees to withdraw with prejudice the petition for due process filed on behalf of her son, captioned A.P.W. obo A.T.W. v. Princeton Charter School, Agency Reference 2016-23889.

5. Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the parties seeking to enforce any term or provision of this Agreement.

6. Neither party shall be deemed a prevailing party and both parties are responsible for their own counsel fees, expert fees and costs.

7. As a result of this Agreement, the parties agree to keep confidential and not share any information as to the terms of the settlement with any third party hereto, except as required pursuant to a properly-served subpoena or court order. In the event either party receives a subpoena or court order requiring disclosure of the terms of this settlement, notice of said subpoena or court order shall be provided to the other party hereof, as soon as reasonably possible.

8. This Agreement is subject to the approval of the Board of Trustees of the Princeton Charter School.

9. In the event payment is not timely made to petitioners as required by this Agreement, A.W. may recover reasonable attorneys' fees and costs in any enforcement action necessitated by said failure to pay.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL

By [illegible]
[illegible]

March 9, 2016
Date

A.W.

Feb. 23, 2016
Date

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

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In the Matter of the Tenure Hearing of

DEBORAH COULSON

and

SUSSEX COUNTY TECHNICAL SCHOOL DISTRICT
SUSSEX COUNTY

Agency Docket No. 99-3/16

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The above-entitled matter was submitted to the undersigned Arbitrator from the Commissioner of Education through the Director of the Bureau of Controversies and Disputes by letter dated April 25, 2016, pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26. Hearings were scheduled on May 16, May 20, and May 23, 2016. Before the first hearing, the parties requested an adjournment pending settlement discussions. These discussions were successful, and the parties advised the Arbitrator that the matter had

been settled and that the settlement had been ratified by the Board of Education.

On May 23, 2016, the Arbitrator received for examination and approval an executed Settlement Agreement, Affidavits, and a Resolution of the Board of Education of Sussex County Technical School District approving the terms of the parties' settlement Resolution E-2, dated May 10, 2016. After duly considering the nature of the tenure charges, the Respondent's record of service to the Sussex County Technical School District, and the advantages and factors cited by the Board as the bases for its Resolution dated May 10, 2016, I hereby find that the terms and conditions agreed upon by the Board and Respondent, each of whom has been advised by counsel, are reasonable and in the best interest of both the parties and the public.

There being no charge against the Respondent of any moral turpitude, the cessation of the Respondent's employment by the Sussex County Technical School District and conditions negotiated by the parties under the parties' Settlement Agreement serve the best interest of the public and the students of the Sussex County Technical School District and satisfy the criteria set forth in N.J.A.C. 6A:3-5.6 (a). Consequently, I accept the Settlement as proposed by the parties, and hereby issue a Consent Award incorporating the terms of the Settlement Agreement executed by the parties, effective May 31, 2016, provided that Respondent has not revoked her execution of the Settlement Agreement.

On May 23, 2016, an executed Settlement Agreement and a Resolution of the Board of Education of Sussex County Technical School District approving the terms of the parties' settlement Resolution E-2, dated May 10, 2016, were submitted to the Arbitrator for examination and approval. After duly considering the nature of the tenure charges, the Respondent's record of service to the Sussex County Technical School District, and the advantages and factors cited by the Board as the bases for its Resolution dated May 10, 2016, I hereby find that the terms and conditions agreed upon by the Board and Respondent, each of whom has been advised by counsel, are reasonable and in the best interest of both the parties and the public.

There being no charge against the Respondent of any moral turpitude, the cessation of the Respondent's employment by the Sussex County Technical School District and conditions negotiated by the parties under the parties' Settlement Agreement serves the best interest of the public and the students of the Sussex County Technical School District and satisfies the criteria of N.J.A.C. 6A:P3-5.6 (a). Consequently, I accept the Settlement as proposed by the parties and hereby issue a Consent Award incorporating the terms of the Settlement Agreement executed by the parties, effective May 31, 2016, provided that Respondent has not revoked her execution of the Settlement Agreement.

CONSENT AWARD OF ARBITRATOR

Based on the facts elicited by the evidentiary record in the instant matter regarding Respondent Deborah Coulson, and having examined the terms of the Stipulation of Settlement executed by Respondent and by a duly authorized representative on behalf of the Sussex County Technical School District, I find that the terms and conditions set forth in the parties' Stipulation of Settlement dated May 10, 2016 appear to me to be reasonable and to be consistent with the terms and intent of the TEACHNJ Statute and applicable regulations.

I hereby endorse and approve the parties' Stipulation of Settlement as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ Statute.

June 1, 2106

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 1st day of June, 2016 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF SUSSEX
SUSSEX COUNTY, NJ, AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of the Vocational School in the County of Sussex, Sussex County, NJ, convened in a Special Meeting on May 10, 2016 at 4:00 p.m. at 105 North Church Road Sparta, New Jersey.

The following members of the Board of Education were present: Ms. Shake, Mr. Miller and Dr. Lamonte

Member(s) Absent: Mr. Cofrancesco and Mrs. Wexler

The following resolution was offered by Ms. Shake, and seconded by Mr. Miller, and adopted by the Board of Education by the following roll call vote:

**SUSSEX COUNTY TECHNICAL SCHOOL BOARD OF EDUCATION**

**RESOLUTION NO. __E2___**

**RESOLUTION APPROVING SETTLEMENT AGREEMENT**

**BE IT RESOLVED,** that Sussex County Technical School (the "Board") hereby approves the Settlement Agreement and General Release to be entered into between the Board and Employee Number ____1449_____ ("Employee"); and

**BE IT FURTHER RESOLVED**, that the Board accepts the retirement of Employee Number ____1449_____, effective June 30, 2016; and

**BE IT FURTHER RESOLVED,** that the Board President, Board Secretary, and Board Counsel are directed to execute the Settlement Agreement and General Release and take such action as necessary to effectuate the terms of the Agreement.

| | | | |
|---|---|---|---|
| Roll Call: | Ayes: | 3 | Ms. Shake, Mr. Miller and Dr. Lamonte |
| | Nays: | 0 | |
| | Absent: | 2 | Mr. Cofrancesco and Mrs. Wexler |
| | Abstain: | 0 | |
| | Not Voting: | 0 | |

State of New Jersey )
County of Sussex ) SS

I, Andrew Italiano, Secretary of the Board of Education of the Vocational School in the County of Sussex, Sussex County, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 10, 2016, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Board of Education of the Vocational School in the County of Sussex, and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of May, 2016.

Andrew Italiano, Board Secretary

# CONFIDENTIAL SEPARATION AGREEMENT/MUTUAL RELEASE

This Separation Agreement and Mutual Release (the "Agreement") is made this ___ day of May, 2016, by and between Deborah Coulson, 16 Fairchild Lane, Sussex NJ 07461 ("Ms. Coulson"), and the Sussex County Technical School Board of Education, 105 N. Church Street, Sparta NJ 07871 (the "Board").

WHEREAS, Ms. Coulson is a tenured teacher employed by the Board; and

WHEREAS, Ms. Coulson wishes to retire from teaching, effective at the end of the school year on June 30, 2016 and collect her pension; and

WHEREAS, the Board agrees as of June 30, 2016 to accept Ms. Coulson's retirement from her teaching position with the Board on that date; and

WHEREAS, the Board and Ms. Coulson have agreed that, effective June 30, 2016, their employer-employee relationship will terminate; and

WHEREAS, the Board and Ms. Coulson desire to resolve amicably and in good faith all matters and issues arising out of Ms. Coulson's employment relationship with the Board; and

WHEREAS, after careful consideration of all issues surrounding this matter, the Board believes this Agreement is in the best interests of the Sussex County Technical School District and in the public interest;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Ms. Coulson and the Board further agree as follows:

1. Separation of Employment — Ms. Coulson and the Board hereby agree that Ms. Coulson's employment with the Board will, in all respects, cease effective June 30, 2016. Simultaneous with signing this Agreement, Ms. Coulson shall submit a letter of retirement,

terminating any and all employment with the Board, effective June 30, 2016.

2. Mutual Releases — As an inducement for the parties to enter into this Agreement, each party does hereby remise, release, and forever discharge all other parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one party now has or hereafter may assert against the others arising out of the within disciplinary matter to the date of full execution of this Agreement, including, but not limited to, all claims, liabilities, costs and attorneys' fees under:

(i) Any claims or actions under Title VII of the Civil Rights Act of 1964, the Constitution of the United States; the Constitution of New Jersey; the Fourteenth and Fifteenth Amendments to the United States Constitution; the Age Discrimination and Employment Act, the Worker Adjustment and Retraining Notification Act, the Public Employee Relations Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Protection Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, the Fair Labor Standards Act, Section 1981-1988 of Title 42 of the United States Code, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Occupational Safety and Health Act of 1977; the Education Laws and Regulations;

(ii) Any other claims or actions under the New Jersey Equal Pay Act, the New Jersey Law Against Discrimination, the New Jersey Wage-Hour and Wage-Payment Laws, the New Jersey Worker Health and Safety Act, the New Jersey Family Leave Act, and the New Jersey Conscientious Employee Protection Act; the New Jersey Attorney Ethics Act/Rules of Professional Conduct and/or;

(iii) Any claims arising out of the terms and conditions of Ms. Coulson's employment with the Board, the termination of such employment, and/or any of the events

relating directly or indirectly to or surrounding that termination; and any other causes of action whether enumerated herein specifically or not;

(iv) Any and all claims for damages of any kind;

(v) Any and all claims arising out of the execution of this Agreement;

(vi) Further, Ms. Coulson and the Board, to the extend provided by law, hereby waive any and all relief not explicitly provided for in this Agreement.

(vii) Ms. Coulson specifically waives any right to become, and promises not to become, a member of any class action in any case in which any claim is asserted against the District, involving any event that has occurred on or before the date of this Agreement and General Release. The District affirms that, as of the date of execution of this Agreement and General Release, it has no knowledge of any pending class action against it to which Coulson could be a potential class member.

3. Termination of Controversy - The Board, having reviewed the relevant facts and finding that it is in the best interests of all concerned, including the public interest, agrees to withdraw all tenure charges against Ms. Coulson and will withdraw any other proceedings the Board may have initiated against Ms. Coulson before any State agency, including but not limited to, the Department of Education, Division of Pensions or the State Board of Examiners. The parties acknowledge that the resolution of this matter through this Agreement ends any such controversy amicably and that the Board hereby withdraws all such claims.

4. Retirement of Ms. Coulson - The Board agrees to accept the retirement of Ms. Coulson, such retirement to become effective June 30, 2016.

5. Full Salary and Benefits - The Board agrees to restore Ms. Coulson retroactively to her full salary and benefits, including but not limited to her medical benefits, including

continued health insurance coverage through June 30, 2016, and to fully compensate her in a lump sum payment due on or before June 30, 2016 for any salary not paid to her while the District had brought tenure proceedings against Ms. Coulson.

6. Terms of Separation Agreement are Confidential - The parties agree on their own behalf and on behalf of their agents, representatives and any other person acting on their behalf, with respect to the confidentiality of this Separation Agreement, not to disclose or cause to be disclosed to, directly or indirectly, any person, including but not limited to members of the general public, the terms of this Separation Agreement, except to the extent needed to consummate or comply with this Agreement and except as required by law.

7. References - Upon inquiry by any future employer or potential employer, the Board or its agents will provide the dates of Ms. Coulson's employment with the Board, the position she held in the District, that she has retired in good standing, that her last day of employment with the Board was June 30, 2016 and, if requested, her salary when she ended her employment. No further information will be provided. All calls from prospective employers will be directed to the Superintendent or his/her designee.

8. No Further Consideration - Ms. Coulson and the Board each expressly acknowledge and represent that she/it will neither seek nor be entitled to any further consideration from the other in connection with this Agreement other than the consideration as detailed herein.

9. Collection of Possessions – At a time mutually acceptable to Ms. Coulson and the Board and on or before June 30, 2016, the Board shall permit Ms. Coulson to collect her physical possessions from her classroom. On or before June 30, 2016, the Board will also provide Ms. Coulson with a computer storage disk containing her personal emails, including confidential

emails related to her medical care and other confidential matters. The Board shall not retain any confidential electronic information in its possession that belongs to Ms. Coulson but not to the Board.

10. Entire Agreement — This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the parties with respect to the subject matter hereof, except as specifically set forth herein. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

11. No Admissions — Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

12. Withdrawal of Litigation Against Ms. Coulson - Upon signing the Agreement, the Board shall immediately dismiss and/or withdraw any proceedings in which relief of any kind is sought by the Board against Ms. Coulson, including but not limited to a tenure proceeding now pending in the New Jersey Department of Education, bearing Docket No. 99-3/16. The Board agrees, furthermore, not to apply for the withdrawal of any teaching certificate held by Ms. Coulson.

13. Binding Effect — This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

14. Governing Law and Choice of Forum — This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey. In the event that

litigation is instituted concerning the Separation Agreement and its interpretation and performance, same shall be brought in the Superior Court of New Jersey and venued in Sussex County.

15. Headings — The headings set forth in this Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Agreement.

16. Signature in Counterparts — This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

17. Authorization — The Board and Ms. Coulson hereby represent and warrant that the undersigned officer of the Board and Ms. Coulson, respectively, are fully authorized to execute this Agreement on the Board's and Ms. Coulson's behalf.

18. Older Workers Benefit Protection Act. Ms. Coulson understands that, pursuant to the Older Workers Benefit Protection Act of 1990, if applicable, she has been advised to consult with an attorney before signing this Agreement, had twenty-one (21) calendar days to consider the Agreement before signing it, and may revoke the Agreement within seven (7) calendar days after signing it. Ms. Coulson further understands that the Agreement will not become effective or enforceable until the seven (7) day revocation period has expired. Timely revocation of this Agreement must be made in writing, signed by Ms. Coulson, delivered to and received by Weiner Lesniak, LLP, General Counsel for Sussex County Technical School, Janet C. Lucas, 629 Parsippany Road, Parsippany, New Jersey 07054 by no later than 5:00 P.M. on the seventh ($7^{th}$) day after Ms. Coulson signs this Agreement. Ms. Coulson expressly understands and agrees that if she does not sign this Agreement, or if she revokes it within the Revocation Period, the

Agreement shall not be effective or enforceable, and she will not be entitled to any of the payments and other benefits provided for in this Agreement until the Revocation Period expires. If the Agreement is revoked or not signed by Ms. Coulson, the parties shall revert to the positions they were in as though the Agreement was never made.

19. Acknowledgments — The parties to this Separation Agreement acknowledge and agree that they have entered into this Separation Agreement voluntarily and have executed it without duress, coercion or any other undue influence, and have done so after having consulted legal counsel, Judson Hand, Esq., on behalf of Ms. Coulson, and Janet Lucas, Esq., on behalf of the Board.

20. Construction and Enforcement — The terms of this Separation Agreement are the product of negotiations between the parties, each having retained legal counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Separation Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Separation Agreement on the date above written.

Deborah Coulson

Date: May 6, 2016

SUSSEX COUNTY TECHNICAL SCHOOL BOARD OF EDUCATION

By: _____
Jarrod Cofrancesco, President

Date: 5/6/16, 2016

June 30, 2016

Augustus O. Modla, Superintendent
Sussex County Technical School District
Sussex County Technical School
105 N. Church Road
Sparta, NJ 07871

**Re: My Retirement**

Dear Mr. Modla:

Subject to the approval of my proposed Separation Agreement by the Sussex County Technical School District Board of Education, I hereby retire from my position as teacher in the Sussex County Technical School District, effective June 30, 2016.

Very truly yours,

Deborah Coulson

205-16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF BRIGITTE GEIGER, SCHOOL DISTRICT | : | |
| OF THE TOWNSHIP OF MOUNT OLIVE, | : | |
| MORRIS COUNTY. | : | COMMISSIONER OF EDUCATION |
| AND | : | DECISION |
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF SHARON JONES, SCHOOL DISTRICT | : | |
| OF THE TOWNSHIP OF MOUNT OLIVE, | : | |
| MORRIS COUNTY. | : | |

## SYNOPSIS

This case, on remand from the Appellate Division, stems from certified tenure charges of unbecoming conduct filed by the Board against respondents – tenured physical education teachers employed at Mount Olive High School – for allegedly engaging in a verbal exchange that was racially derogatory and overheard by students. Respondents denied making the alleged comments, and contended that the students had fabricated their story based on biases against the respondents. The Board argued that the respondents' March 2012 conversation in the girl's locker room, during school hours, amounted to conduct unbecoming of teachers, and sought removal of respondents from their tenured positions. Subsequent to a hearing in the Office of Administrative Law (OAL), the ALJ determined that the respondents' actions in making derogatory comments – together with their denial of and failure to take responsibility for their actions – constituted conduct unbecoming, and warranted dismissal from their tenured positions. The matter was delegated by the Commissioner – pursuant to *N.J.S.A.* 18A:4-34 – to an Assistant Commissioner, who concurred with the ALJ's findings and conclusions. The Initial Decision of the OAL was adopted as the final decision in October 2013. Respondents appealed to the Appellate Division of the Superior Court.

On appeal, the Appellate Division upheld the determination that the respondents were guilty of conduct unbecoming, but remanded the matter to the Commissioner for further consideration of the severity of the penalty imposed based upon then-existing precedent in similar cases. In so deciding, the Appellate Division recommended, going forward, that the Commissioner give notice of an intent to impose greater discipline for racially insensitive comments made in the school setting.

Pursuant to the direction of the Appellate Division, and based on the precedent that existed at the time of the respondents' racially derogatory comments, the Commissioner determined that the appropriate penalty for respondents' unbecoming conduct shall be forfeiture of the 120 days of salary already withheld pursuant to *N.J.S.A.* 18A:6-14, suspension for an additional six months without pay, and the withholding of salary increments for two years. In accordance with the Appellate Division's instructions, the Commissioner noted that this decision shall serve as notice to the regulated community that similar conduct in the future will result in more severe sanctions.

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

OAL DKT. NOS. EDU 5974-12 and EDU 6047-12 (consolidated)
AGENCY DKT NOS. 106-4/12 and 107-4/12

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF BRIGITTE GEIGER, SCHOOL DISTRICT | : | |
| OF THE TOWNSHIP OF MOUNT OLIVE, | : | |
| MORRIS COUNTY. | : | COMMISSIONER OF EDUCATION |
| AND | : | DECISION |
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF SHARON JONES, SCHOOL DISTRICT | : | |
| OF THE TOWNSHIP OF MOUNT OLIVE, | : | |
| MORRIS COUNTY. | : | |

This consolidated case involves tenure charges of unbecoming conduct brought by the Board against respondents – Brigitte Geiger and Sharon Jones, two teachers in the Mount Olive School District – based on the use of racially derogatory comments in reference to African American students. Specifically, it is alleged that two students – G.H. and Z.C. – overheard a conversation in the locker room in which respondent Jones said something to the effect of "these Negros think they are tough shit" to which respondent Geiger replied "yeah, that is what they are a bunch of Negros, Negros, Negros." The Administrative Law Judge ("ALJ") found that the respondents were guilty of unbecoming conduct, and recommended that they be dismissed from their tenured positions with the Mount Olive School District.

In a decision dated October 7, 2013, an Assistant Commissioner concurred with the ALJ that the Board established that the respondents were guilty of unbecoming conduct. The Assistant Commissioner was also in accord with the ALJ's determination, based on the circumstances and considerations existing in the matter, that the removal of respondents from their tenured positions was appropriate. The respondents appealed the Assistant Commissioner's October 7, 2013 decision, and on November 18, 2015, the Appellate Division affirmed the Assistant Commissioner's determination that

respondents were guilty of unbecoming conduct, but remanded the matter for determination of a lesser sanction than removal.

In a supplemental submission following the Appellate Division's November 18, 2015 decision, the Board argues that the penalty imposed on respondents should be an unpaid suspension for time served from October 7, 2013 – the date of the Assistant Commissioner's decision, when respondents were terminated – to January 2, 2016, when respondents were reinstated, plus any other penalties that the Commissioner finds appropriate, such as increment withholdings or sensitivity training. The Board emphasizes that the respondents' behavior cannot be tolerated, especially in light of the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13, *et seq.*, which prohibits discrimination on the basis of characteristics, such as race.

Further, the Board contends that the Appellate Division's reliance on: *In the Matter of the Tenure Hearing of Lauren Cooke, School District of the Township of Egg Harbor*, Commissioner Decision No. 503-10, decided November 22, 2010; *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County,* Commissioner Decision No. 371-02, decided October 12, 2002; *In the Matter of the Tenure Hearing of Jayson H. Burg, State-Operated School District of the City of Newark, Essex County*, Commissioner Decision No. 649-97, decided December 18, 1997; and *In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange Township, Essex County*, Commission Decision No. 362-06, decided October 19, 2006, was misplaced, because respondents' conduct was more severe than that of the teachers in those cases. Instead, the Board argues that this matter is more similar to the discriminatory comments in *In the Matter of the Tenure Hearing of Madhumita Chaki, Franklin Township School District, Somerset County,* Commissioner Decision No. 542-11, decided December 12, 2011, which resulted in the teacher's removal. Finally, the Board points out that back pay of any sort would not be a penalty and would instead punish the District for appropriately pursing tenure charges.

In response, the respondents reiterate that they should be disciplined consistent with the precedent that existed at the time of their conduct, and that similar circumstances previously resulted in a

suspension rather than a removal. Respondents contend that in determining an appropriate penalty, the Commissioner should consider that the statements at issue were not directed at students – nor were they intended to be heard by students – and that respondents had unblemished records of thirty-one and twenty-eight years, respectively. In consideration of those factors and existing precedent, respondents argue that – at most – a two-month suspension is justified. Respondents further argue that the regularity and pervasiveness of the conduct in *Chaki* distinguishes that case from the instant matter. Finally, respondents insist that they are entitled to back pay and increments – except for the period of any suspension that the Commissioner imposes – in order to be made whole.

Pursuant to the direction of the Appellate Division, the Commissioner has considered the precedent that existed at the time of respondents' racially derogatory comments, as well as the mitigating and aggravating factors. Accordingly, respondents: shall forfeit the 120 days' salary that has already been withheld pursuant to *N.J.S.A.* 18A:6-14; shall be suspended for an additional six months without pay; and shall have their increments withheld for two years. In accordance with the Appellate Division's instructions, this will serve as notice to the regulated community that similar conduct in the future may result in more severe sanctions.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/06/16

Date of Mailing: 6/07/16

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

203-16

**STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

In the Matter of Tenure Hearing of Kevin Karp:

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**BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY**

**Case No. 102-4/16**
**OAL Dkt. No. 05106-16**

and

DECISION ON MOTION

**KEVIN KARP**

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Before:
Edmund Gerber, Arbitrator

Appearances:
For the Board of Education of the Township of Barnegat:
Stephen B. Hunter, Esq.
Detzky, Hunter & DeFillippo, LLC

For the Respondent:
Jerry J. Dasti, Esq.
Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors

Respondent Kevin Karp has taught in the Barnegat School District for seven years. The Petitioner, the Barnegat Township School District, certified tenure charges against the Respondent on March 23, 2016. On May 2, 2016 I was appointed by the Department of Education to serve as arbitrator in this matter.

The tenure charges allege that:

1) The Respondent "repeatedly brushed up to and against the breasts of a (then) 12 year old female student (A.R.), when she was a seventh grader." A.R. specifically alleged that, when handing out papers in class the Respondent, K.K., reached out

across her desk and brushed up against her breasts with his arm, placing a paper on her desk. "On a few occasions A.R. advised that she attempted to move back in her seat to avoid contact, however, K.K. continued to manage to brush up against her."

2) A.R. alleged that K.K. made "cat calls" to her while she was in the hallway.

3) R.R. reported that K.K. made her uncomfortable by touching her exposed bra strap and on another occasion brushed up against her shoulders in class. K.K. made creepy comments about taking off sweaters and sweatshirts. K.K was very touchy to her and other female student. On one occasions K.K. touched her hair and complimented her.

4) E.R. reported that when he was a student in K.K.'s wrestling class, there was a female wrestler, N.T. in the class. E.R. reported that K.K would on occasion stare constantly at N.T. without her realizing it. "Other male wrestlers saw this and all the male wrestlers talk(ed) to each other about how K.K. unnecessarily and improperly continued to glance and stare at N.T. during wrestling practice. E.R. reported that K.K. made inappropriate comments and jokes to the students in his class, referring to the jokes as "dirty".

5) Another female student, K.Q. reported that she was in K.K.'s computer class in 7th grade, K.K. made a comment to K.Q. and her female friend for holding hands. He then essentially said "it was OK to try new things over Spring Break" to K.Q. and her two friends, (one male and one female).

6) K.Q. also reported that she sat at the end of row the in typing class. K.K. would brush against her when handing out papers in the row.

The charges include a Statement of Evidence sworn to and sighed by Karen M. Wood Superintendent of Schools that the evidence in support of the charges is contained in a documentary exhibit annexed to the charges. The annexed exhibit contains emails and the transcribed notes of Superintendent Wood concerning her conversations with the board attorney, the local police, Ocean County Prosecutor's office and the Strauss Esmay Associates. There are also unsigned statements of two school administrators who interviewed the students whose complaints form the basis of the tenure charges. There are no signed statements in the annexed exhibits, not from the complaining students or the aforesaid school administrators.

N.J.S.A. 18A:6-11 states, in pertinent part, that:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the Secretary of the Board in writing, and a written Statement of Evidence under oath to support such charge shall be presented to the Board. The Board of Education shall forthwith provide such employee with a copy of the charge, a copy of the Statement of Evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. ...

N.J.A.C. 6A:3-4.1(b) (1) states that:

> In all instances of the filing and certification of tenure charges, except charges filed against a teacher, principal, assistant principal or vice principal for reasons of inefficiency pursuant to N.J.S.A. 18A:6-17.3, the following procedures and timelines shall be observed:
>
> 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the Secretary of the District Board of Education or with the State District Superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges.

N.J.A.C. 6A:3-5.1(6) states, in pertinent part, that:

> If the District Board of Education or the State District Superintendent finds probable cause exists and the charges, if credited, are sufficient to warrant a dismissal or reduction of salary, then the District Board of Education or the State District Superintendent shall file, within fifteen days, written charges with the Commissioner. The charges shall be stated with specificity as to the action or behavior underlying the charges. ...

Respondent has filed two motions seeking the dismissal of the tenure charges. The first seeks emergent relief, contending that Karp was improperly denied a "Rice Notice" when the District failed to notify Karp that it intended to discuss possible discipline of Karp. Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 72 (1977). The motion was initially denied by Administrative Law Judge (ALJ) Patricia M. Keirins on April 19, 2016 who found that the Respondent failed to meet the irreparable harm standard of Crowe v. DeGoia, 90 N.J. 126 (1982).

The second Motion to Dismiss argues that the tenure charges as filed are deficient and fail to comply with the requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1.

The parties made oral arguments on the motions at a hearing on May 18, 2016. The Respondent did not make specific argument as to its application for emergent relief but asked that I reconsider its motion and relied upon its submissions before Judge Keirins. Respondent made argument on its second motion. Specifically:

**The Respondent argues** that the Board of Education failed to comply with the requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1. The annexed exhibit to the Tenure Charges fail to state any of the dates or times when the alleged operative events occurred. The names of the persons involved are not provided and the Respondent asserts that it is impossible for him to identify all of the persons involved by the initials provided. Nothing in the annexed exhibit indicates the Board relied upon more than vague assertions. The Superintendent of Schools who signed the Statement of Evidence under oath did not assert any direct knowledge of any of the facts and relied upon the unsigned reports of school administrators who apparently interviewed the complaining students. There are no signed statements from any of these students. Nor are there any dates or times of the alleged acts mentioned in the annexed exhibit.

There is no indication as to what facts the Superintendent of Schools is attesting to under oath. There is merely a *jurat* and signature of a notary republic signed by the Superintendent entitled Statement of Evidence followed by the fifteen pages of unsigned documents which allegedly constitute the basis for the fling of tenure charges.

Respondent cites In the Matter of the Tenure Hearing of Frank King, School District of the City of Salem, Salem County, 2007 N.J. AGEN LEXIS 589 (2007) and In the Matter of the Tenure Hearing of Edwards, East Orange Board of Education, 1982 S.L.D. (2011) and the Matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451 (Aff'd 458). In all three cases tenure charges were dismissed for their lack of specificity. In King the tenure charges, "failed to state a time, or the alleged dates of the violations, nor were the names of the alleged victim or victims of the "unprofessional conduct" provided. Here the Board failed to provide the time or dates of the alleged occurrence nor has the Board provided the names of the alleged victims.

In Edwards the ALJ held that the statute requires a statement of evidence under oath in support of the charge. An oath connotes swearing to the truth of the facts asserted. But here the Superintendent is swearing to the truth of second hand assertions. The superintendent signed the oath without ever speaking to the victims or providing signed statements from the victims or even those members of the administration who interviewed said alleged victims.

The Respondent notes that Straus Esmay Associates develops policy and regulation manuals for school districts. The Annexed Exhibit lists the recommendations made by Straus Esmay. These included: Have the District obtain signed statements from

the complaining students; "Have the Principal call students/parents in and sign; K.W. (apparently, the Superintendent) should sit with the two school principals (apparently referring to the Principals who talked with the complaining students) and bring students in. Superintendent needs to hear it herself; personally with Principals talk with teacher (apparently the respondent), – explain". There is no evidence or representation that the District did any of these things.

There is no reference in any of the documents attached to the tenure charges that anyone spoke to student E.R. and/or student wrestler N.T. Accordingly, the Respondent urges that the tenure charges be dismissed.

**The Petitioner School District argues** that the tenure charges were properly filed and meet all the statutory requirements. The documentary evidence annexed to the certification of the Board Superintendent includes fifteen pages of notes, investigative reports recitation of interviews with students and the parents of some of those students which provide ample evidence of the improper sexual conduct and sexual abuse inflicted by Mr. Karp.

The documentation attached to the tenure charges reveals the names of all the Board administrators who conducted the investigation and includes the dates that investigation was conducted and who was present. Although it does not indicate the names of the students involved, it was legal and appropriate for the Board to identify students by their initials and not use their proper names. The allegations of sexual abuse by the Respondent were made by children. The District was simply trying to protect the interests of minor children. The investigatory documents are through and detailed.

The District contends that the facts here are distinguishable for those in the cases cited by the respondent. In King, the Board only set forth general allegations of the Respondent's unprofessional conduct. There was no written record of specific allegation to which the Respondent could respond. Here, one can easily see what the allegations against the Respondent concern sexual misconduct. In Feitel the Commissioner of Education held that that Board was woefully deficient in meeting the time requirements and failed to comply with prior directives of the Commissioner. These are not issues before this tribunal. Feitel has no relevance to this proceeding.

The Petitioner asserts that the allegations are specific, although for the protections of the students involved it used their initials rather than their full names. The tenure charges state specific acts and meet the requirements of the statue. The tenure charges are clear, expansive and very detailed. The documents meet all the requirements of N.J.S.A. 18A:6-11 and N.J.A.C.6A:3-5.1.

## DISCUSSION

The Superintendent of the Barnegat Township School District, Karen Wood, swore to a statement of evidence and signed under oath the tenure charges but nothing in the record indicated she directly participated in the investigation of the student's complaints or talked to any of these students and/or their parents. Moreover the documents which were relied upon when the tenure charges were brought before the Board consisted of emails and unsigned memorandum from the school administrators who conducted the investigation and the Superintendent's own notes. There are no signed statements from any of the complaining students or their parents. N.J.S.A. 18A:6-11 requires that a "written Statement of Evidence under oath to support such charge shall be presented to the Board," Edwards. An oath connotes swearing to the truth of the facts asserted. Here however, no signed written statement by someone with direct knowledge of the alleged events was ever presented to the Board. The tenure charges were certified on the basis of double hearsay. It is troubling that the recommendations by the independent advisory association, to have signed statements by the students and parents and to have the Superintendent interview the students, were never followed.

In order for a school district to certify tenure charges it must provide a clear statement of the facts including the time and dates when the alleged incidents occurred. King requires that tenure charges, "state a time, or the alleged dates of the violations." But the Petitioner's tenure charge fails to allege any dates at all, not even a year. Moreover, some of the allegations in the tenure charge, e.g. Karp made "cat calls" are so vague as to be meaningless. What exactly was said? Was this a whistle? One of the alleged victims' the female wrestler, N.T., apparently was never even questioned.[1]

On the basis of the record before me it is evident that the charges filed by the Barnegat Board of Education failed to satisfy N.J.S.A. 18A:6-9 and N.J.A.C. 6A:3-1.6.[2]

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[1] However, the Board's failure to submit the names of the complaining students was not improper. Given that nature of their complaints, it was appropriate to protect their privacy. If the Respondent could not reasonably identify the students through their initials and the specific time and dates of the alleged offences, the Respondent's attorney could have requested a confidential list of the names of the complaining students.

[2] Having found that the Petitioner's tenure charge fails to meet the requirements of the statute it is not necessary to consider the merits of the Respondent's motion seeking emergent relief.

## AWARD

For the reasons contained herein it is hereby ORDERED that the tenure charges lodged against the Respondent Kevin Karp be DISMISSED, without prejudice, and that he forthwith be restored to his positon as a schoolteacher with all salary and emoluments to which he would be entitled had charges not been filed against him.

Edmund Gerber, Arbitrator
May 26, 2016

206-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

In the matter of the tenure hearing of:

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**The School District of the**
**Township of Irvington, Essex County**
**Petitioner**

**and**

**David Pickney**
**Respondent**

**Agency Docket No. 303-10/15**

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Opinion

and

Award

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|---|---|
| Before: | Stephen J. Rosen, Arbitrator |
| Hearing Dates: | March 4, 2016 and March 24, 2016 |
| Briefs Received: | May 16, 2016 |

Appearances:

Petitioner:
Hunt Hamlin & Ridley
By: Ronald C. Hunt, Esq.
60 Park Place
Newark, NJ 07102

Respondent:
Oxfeld Cohen, P.C.
By: John Branigan, IV, Esq.
60 Park Place
Newark, NJ 07102

This matter arises out of tenure charges filed against the Respondent, David Pickney, on October 19, 2015. Those charges were certified on November 25, 2015. Petitioner filed the charges against Mr. Pickney pursuant to the State Evaluation System, AchieveNJ and the Teach NJ Act. By letter dated December 21, 2015, the Commissioner of Education referred the charges to me pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, C. 26 and P.L. 2015, C109. Hearings were held at the offices of the Board of Education, One University Place, Irvington, NJ. With the exception of the Superintendent of Schools and the Respondent, witnesses were sequestered. A transcript of the hearing was prepared. In consideration of receipt of the transcript, the parties agreed to submit briefs on May 2, 2016. At the request of the attorney for the Petitioner, and with the acquiescence of the attorney for the Respondent and the arbitrator, submission of briefs was rescheduled until May 16, 2016. Pursuant to the Statute, after 120 days, Mr. Pickney was placed on the District's payroll.

BACKGROUND:

Mr. Pickney began his employment with the District on September 1, 2001. He holds teaching certificates in social studies and general education.

During the 2013-2014 school year, under the TeachNJ Act, new teacher evaluation and observation methods were adopted by the District. Following the implementation of new guidelines, Respondent's evaluations were classified "Partially Effective" and "Ineffective." Based upon these evaluations, Mr. Pickney was placed on a Corrective Action Plan (CAP). The intent of the CAP is to improve a teacher's proficiency in the classroom. Under the CAP, a

District Supervisor conducts an additional yearly observation and schedules a post-observation meeting with the teacher within 15 teaching days.

Under N.J.A.C. 6A:10-4. 4(c), a teacher is required to be observed at least three times during the school year. When under a CAP, a teacher is to be observed at least four (4) times in the course of the school year. The Respondent's attorney argued that the District failed to adhere to the Statute.

The Petitioner submitted letters of reprimand and contended that a prior 60-day improvement plan failed to bring about an improvement in Mr. Pickney's effectiveness. The District contended that despite its efforts the only alternative was to ask that the tenure charges be sustained.

The Respondent had asked that the charges be dismissed given the Petitioner's failure to provide a list of witnesses in accordance within the time frame specified in N.J.A.C. 18A: 6-16 and P.L. 2012, C. 26 (C. 18A: 6-117 et al). The matter was referred by the Department of Education for arbitration on December 21, 2015. On January 11, 2016, counsel for the Petitioner asked for a list of witnesses. On January 13, 2016, Petitioner's counsel responded a list would be provided "shortly." The witness list was eventually transmitted to Respondent's attorney on January 22, 2016, but not a summary of their testimony.

In consideration of the Respondent's request, I considered the time of year (Christmas – New Year) that the matter was referred for arbitration by the Department of Education. I had also been informed by the law firm representing the District that it had reassigned the matter to a different attorney.

Given the change in the Petitioner's attorney of record and scheduling conflicts brought to my attention by both parties, the first hearing was not held until March 4, 2016. It was also my

understanding that the Respondent's attorney had been in possession of the case file compiled by the District. In consideration of these factors, I determined that the matter should proceed.

The Respondent's attorney argued that the District had submitted past incidents that occurred years before the instant matter. It was also contended that the penalty imposed by the District was unreasonable and excessive.

The Petitioner argued that the termination of the Respondent from the Irvington School District was supported by unsatisfactory evaluations over a two year period. The charge of inefficiency and failure to exercise good judgment were based upon the following:

1. On or about December 17, 2013, Respondent was evaluated by Teresa Steele-Hunter, Social Studies, Supervisor. This evaluation was announced. Respondent received the rating of Unsatisfactory, based on a score of 1.2.

2. A post evaluation conference was held on or about January 27, 2014. Respondent received the following recommendations: (1) be mindful of what you state to students, comments conveyed to students were inappropriate and culturally insensitive; (2) enroll in professional development with an emphasis on instructional strategies, differentiated instruction, assessments, classroom management, and lesson design; (3) read and utilize all handbooks distributed to you for enhancing instructional practices; (4) request permission from building administrators to visit classrooms of master and/or lead teachers to learn how to use grouping strategies effectively and to implement a lesson following the lesson design process; and, (5) construct lessons that engage students in higher order thinking and problem solving.

3. On or about April 2, 2014, Respondent was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an announced evaluation. Respondent received the rating of Unsatisfactory, based on a score of 1.0.

4. A post evaluation conference was held on or about April 25, 2014. Respondent received the following recommendations: (1) plan meticulously when constructing instructional activities so that a variety of activities are implemented to motivate and challenge students; (2) standard practices must be routinely enforced for upholding the tenets of the school's rules and regulations: (3) seek opportunities for enrolling in professional development for classroom management, differentiated instruction, student engagement, formative assessments, lesson design, and instructional strategies; (4) become more proficient in using technology (smart board) as an interactive tool; and, (5) be mindful of what you state to students with regards to your role as a professional.

5. On or about April 7, 2014, (Mr. Pickney) was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an unannounced evaluation. Respondent received a rating of Unsatisfactory, based on a score of 1.0.

6. A post evaluation conference was held on or about April 25, 2014. Respondent received the following recommendations: (1) review the Social Studies Curriculum Guide and Common Core Standards for a thorough understanding of the curriculum expectations for implementing the content with rigor; (2) use the English language correctly and appropriately, the use of slang does not belong in the classroom "what you gonna do?" and, (3) enroll in professional development with an emphasis on instructional strategies, differentiated instruction, classroom management, lesson design, and formative assessments.

7. On or about May 19, 2014, Respondent was evaluated by Ms. Chinaire Simmons, University Middle School, Assistant Principal. The evaluation for unannounced. Respondent received the rating of Developing, based on a score of 2.0.

8. A post evaluation conference was held on or about June 6, 2014. Respondent received the following recommendations: (1) plan for and implement differentiated instruction to meet the needs of all learners; (2) plan for and integrate tiered activities into lessons: (3) follow the lesson design process; (4) communicate and refer to the lesson objective throughout the lesson; (5) post and discuss a Daily Lesson Agenda with timed expectations; (6) challenge students with higher order thinking questions; (7) ensure that students are aware of assessment criteria; and, (8) seek your immediate supervisor's guidance in implementing effective lessons in the immediate future.

9. On or about June 27, 2014, Ms. Chinaire Simons, University Middle School, Assistant Principal, completed a Summative Report. Respondent received the rating of Unsatisfactory, based on a score of 1.43.

10. The Respondent was also evaluated for calendar year of 2014-2015.

11. On or about December 12, 2014, was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This was an announced evaluation. Respondent received the rating of Developing, based on a score of 2.0.

12. A post evaluation conference was held on or about January 30, 2015. Respondent received the following recommendations: (1) enroll in professional development outside of the district for differentiated instruction, cooperative learning, instructional strategies for teaching social studies, and effective lesson planning; (2) design and implement lessons with rigorous activities that engage students in critical thinking and authentic writing assignments using rubrics; (3) continue to create and display teacher-made anchor charts, exemplars and rubrics; and, (4) complete all CAP requirements as directed.

13. On or about May 29, 2015, Ms. Andrea Tucker, University Middle School, Principal and Dr. Neely Hackett, Superintendent evaluated Respondent. This was an announced evaluation. Respondent received the rating of Unsatisfactory, based on a score of 1.2.

14. A post evaluation conference was held on or about June 17, 2015. Respondent received the following recommendations: (1) review lesson plans of master teachers for exemplars in effective planning for small group instruction; (2) professional development is needed for higher order questioning; (3) use 3 to 5 seconds of wait time between asking a question and accepting a response; (4) post authentic anchor charts around the classroom that reflect the current unit of study; (5) review lesson plans of master teachers for exemplars on ensuring that the measure is appropriate to assess the content or skill covered in the lesson; and, (6) continue to become familiar with the Social Studies Core Content Standards.

15. On or about June 15, 2015, Respondent was evaluated by Ms. Teresa Steele-Hunter, Social Studies, Supervisor. This evaluation was unannounced. Respondent received the rating of Unsatisfactory, based on a score of 1.0.

16. A post evaluation conference was held on or about June 16, 2015. Respondent received the following recommendations listed as follows: (1) enroll in professional development for differentiated instruction, cooperative learning, best practices for teaching Geography, and writing lesson plans; (2) plan for and implement more authentic writing assignments (avoid drawing and coloring); (3) create and post anchor charts relative to what you are teaching; and, (4) review the content standards for Social Studies for alignment to the department's pacing guide and curriculum guide for Geography.

17. In August 2015, Respondent's Summative Report was completed by Ms. Andrea Tucker, University Middle School, Principal. Respondent received the rating of Unsatisfactory, based on a score of 1.8.

18. Furthermore, Respondent's Corrective Action Plan that was completed for the 2014-2015 school year, indicates that the Respondent did not meet the goals of CAP.

19. Respondent's conduct violates the State Evaluation System, AchieveNJ and the TeachNJ Act.

20. In addition to receiving inefficient evaluation scores, Respondent received the below letters of reprimand since the start of his employment:

    a. Reprimand dated May 1, 2006, from Dr. Wilma Crespo, University Six School Principal – Failure to Submit Lesson Plan;
    b. Reprimand dated February 12, 2013 from Ms. Theresa Steele-Hunter, Social Studies, Supervisor – Failure to Implement Previous Recommendations for Classroom Instruction and Environment;
    c. Reprimand dated February 13, 2007 from Dr. Wilma Crespo, University Six School, Principal – Watching TV During Social Studies Class;
    d. Reprimand dated June 15, 2011 from Ms. Cheryl Chester, Union Avenue Middle School, Principal – Failure to Record Grades for Students;
    e. Notice of Increment Withholding Letter dated June 27, 2011 from Dr. Ethel Hasty, former Superintendent;

f. Confirmation of Increment Withholding Letter dated July 1, 2011 from Ms. Alberta Sharif, Director of Human Resources;
g. Reprimand dated October 26, 2011 from Ms. Cheryl Chester, Union Avenue Middle School, Principal – Inappropriate Contact and Language Towards a Student;
h. Increment Withholding Letter dated June 22, 2012 from Ms. Alberta Sharif, Director of Human Resources;
i. Reprimand dated March 6, 2014 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Inadequate Instructional Practices;
j. Letter from Ms. Teresa Steele-Hunter, Supervisor of Social Studies to Mr. Musa Malik, Manager of Human Resources dated May 9, 2014 – based on Mr. Pickney's Failure to Respond to Request for Post Observation Questions;
k. Reprimand dated May 9, 2014 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Failure to Respond to an Administrative Directive;
l. Reprimand dated September 29, 2014 from Dr. Angelica Allen, Assistant Superintendent for Curriculum and Instruction – Playing Music with Profanity and not Providing Instruction to English Language Learners;
m. Reprimand dated May 13, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Failure to Follow Procedures Regarding the Submission of Student Growth Objectives;
n. Reprimand dated May 14, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Playing Vulgar Music in Class; and,
o. Letter dated June 2, 2015 from Ms. Teresa Steele-Hunter, Social Studies, Supervisor – Lyrics to the Song Referenced in Reprimand dated May 14, 2015;

21. Petitioner firmly believes that when staff members receive continuous inefficient evaluation scores, in addition to letters of reprimand as shown above, such actions are unacceptable because it negatively affects the academic development of students.

RESPONSE OF THE RESPONDENT

Under N.J.A.C. 6A: 10, the District is required to follow guidelines in the observation of and follow-up conference with classroom teachers. These mandatory guidelines were not met by the Petitioner.

> Under N.J.A.C. 6A: 10, "Each teacher shall be observed as described in this section, at least three times during each school year but not less than once during each semester. For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference, and at least one of the required observations shall be unannounced. The chief school administrator shall decide whether the third required observation is announced or unannounced."

During the 2013-2014 school year, the Petitioner failed to adhere to the required guidelines. As a result, the post-observation meetings were not held in the required time period. On two occasions, the Petitioner was forced to nullify an evaluation because the time frame was not followed. However, the District still included one of the two nullified evaluations in the Respondent's Summative Evaluation for the 2014-2015 school year.

A review of the Respondent's record reveals that his evaluations fell from usually "Effective" to "Partially Effective" to "Ineffective." Beginning in school year 2013-2014, Respondent was deemed ineffective and placed on a Corrective Action Plan (CAP) for the 2014-2015 school year.

As required, a teacher under a CAP is to be observed at least one additional time above the previous year. The record shows Petitioner failed to schedule the required number of observations and post-observation conferences. As stated in N.J.A.C. 6A: 10-4, 4 (c):

> "Observation conferences shall include the following procedures: A supervisor who is present at the observation shall conduct a post-observation conference with the teacher being observed. A post-observation conference shall occur no more than 15 teaching staff member working days following each observation." (Emphasis added)

Under N.J.A.C. 6A: 10-2, 5 (k), a teacher under a CAP is to be observed at least four (4) times. One observation took place on October 20, 2014 but was nullified when Petitioner failed to meet the 15-day post-observation time limit. However, the October observation was included within the year end summative evaluation. In addition, the third and final observation under CAP took place on the last teaching day of the year, which left no time for a fourth observation.

Respondent's attorney noted that the District did issue several letters of reprimand during Mr. Pickney's period of employment as a teacher but never suspended him. The Petitioner

considered the letters of reprimand a justification to satisfy the standard of just cause. Under just cause the Petitioner would be required to suspend the Respondent before seeking his dismissal.

Removal of a tenured teacher is a serious action. Before a tenured teacher is removed, the District must adhere to the provisions contained under N.J.A.C. 6A: 10. Because the Petitioner failed to observe the guidelines, the Respondent's opportunity to remove any alleged deficiencies was denied. The standard of proof is significant in the removal of a tenured teacher. As described in the following decision:

> "Tenure protects employees from unfounded dismissals. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed 2d 502 (1983). Tenure statutes are 'designed to aid in the establishment of a competent and efficient school system by affording to [covered employees] a measure of security in the ranks they hold after years of service.' Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Further, tenure laws 'should be given liberal support, consistent, however, with legitimate demands for governmental economy.' Ibid."

The just cause standard requires that the Petitioner prove by a preponderance of evidence that the dismissal of a tenured teacher was warranted. In a 2009 decision, In the Matter of the Tenure Hrg. of Lisa Weaver State Operated Sch. Dist. of the City of Paterson, Passaic County, 159-, 2009 WL 1108536, at *21 (N.J. Adm. Apr. 20, 2009).

> "Evidence is said to preponderate 'if it establishes 'the reasonable probability of the fact.' 'Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423. (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis."

The Petitioner's failure to conduct observations and post-observation conferences had a negative impact on Mr. Pickney's efforts to correct alleged insufficiencies. This failure had a detrimental impact on Respondent's evaluations. The Petitioner's multiple violations of the Stature prompted Mr. Pickney to file grievances. As stated previously, the rescheduling of

observations resulted in two observations (April 2 and 7, 2014) within five (5) days, with no post-observation held in between. The post-observation meeting was not held for both observations until April 28, 2014.

Under N.J.A.C. 6A: 10, the Petitioner was not permitted to convene one post-observation meeting for two separate observations. One post-observation can be combined with a teacher's summary conference only if it is "within the required 15 teaching staff member working days following the observation for the purpose of evaluation." If two post-observations were permissible, it would have been specifically stated in the regulation.

The negative impact of the combined post-observations is confirmed by the fact Mr. Pickney received the same exact numerical score for the April 7, 2014 evaluation as he did for the April 2, 2014 evaluation. Without feedback of any deficiency noted in the April 2 observation, he was at a disadvantage when he was observed on April 7.

After the post-observation session was held, the Respondent was then able to improve his rating when observed on May 19, 2014. While the Petitioner noted that Mr. Pickney consented to the scheduled observations in April, he believed that he did not have a choice.

Mr. Pickney testified that he was not consulted or had any input prior to the implementation of the CAP in the 2014-2015 school year. The absence of a teacher's input is a violation of N.J.A.C. 6A: 10-2.5 (a).

> "A corrective action plan shall be developed by the teaching staff member and a teaching staff member serving in a supervisory capacity to address deficiencies outlined in the evaluation when the employee is rated ineffective or partially effective. The corrective action plan shall include timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the plan."

Respondent's attorney took issue with the actual number of countable observations conducted during the 2014-2015 school year. The end of the year summative evaluation lists

four observations although the first observation on October 20, 2014 did not result in a post-observation conference, thereby nullifying this observation.

There was also confusion concerning observations conducted in the 2013-2014 school year. The December 17, 2013 observation was not relevant because the post-observation conference was not held within the 15-day window. Since the October 20, 2014 observation score was not revealed, its possible impact on the end of the year Summative Evaluation cannot be assessed.

If the nullified December 7, 2013 observation was permitted to stand, Respondent was observed four times in the 2013-2014 school year. Therefore, Respondent should have been observed five times in 2014-2015, since under the CAP a teacher is to be observed one additional time over the previous year.

The final, or technically third observation, for the 2014-2015 school year took place during the last teaching week of the year on June 15, 2015. This observation took place before the May 29, 2015 post-observation conference convened on June 17, 2015. This was the second time that the Respondent was denied the opportunity to receive constructive suggestions on a timely basis.

The post-observation conference for the June 15, 2015 observation was scheduled for July 10, 2015, when Respondent had already left for his summer vacation. Thus, there was never a post-observation conference.

An observation scheduled for the last week of classes and the failure to conduct a post-hearing conference by June 30, 2015 meant the Petitioner was not in compliance with the Statute. Whatever the reason, the Petitioner did not attempt to comply with the applicable regulation.

Timeliness is relevant since recollection of an observation diminishes over time. The Petitioner noted that the Respondent had rescheduled several "benchmark" meetings as required under his CAP. However, each time a benchmark CAP meeting was rescheduled, it was for just a few days. There is no evidence that Mr. Pickney sought to intentionally avoid these meetings.

Counsel for the Respondent took issue with various letters of reprimand that were placed in Respondent's personnel file. These documents were inadmissible since they were not plead in the Statement of Charges prepared by the Petitioner.

The Respondent was not put on notice for these alleged incidents. Although the documents were contained within the Petitioner's Statement of Evidence, Mr. Pickney was not specifically charged. Thus, the Respondent cannot be found guilty for incidents for which he was not charged.

The Petitioner's inclusion of the letters of reprimand amounts to double jeopardy. These letters were not contested because the Respondent did not believe, at the time, they necessitated further action. The District's reliance on these letters constitute punishing Mr. Pickney twice for the same incidents. Although the Petitioner considered the letters warranted just cause, they did not remove the Respondent until they charged him with inefficiency.

If the letters of reprimand qualify under just cause, then the Petitioner was obligated to impose progressive discipline prior to a discharge. Except for two letters concerning an inappropriate song, none of the letters indicate repeated violations of policy.

In addressing the matter of just cause and progressive discipline, Respondent's attorney argued that the District never considered a suspension before filing tenure charges. None of the letters of reprimand rise to the level for the removal of the Respondent.

After being issued a letter of reprimand, the Respondent corrected his behavior. Although Mr. Pickney believed the Roots video was appropriate during Black History Month, he discontinued using this video when told it was unacceptable. When he was informed the song he played in class showed poor judgment, he no longer used this song. In response to any possible objection to a video, the Respondent listed those selected in his lesson plans. Listing the title of a video in his lesson plan provided his Supervisor with the opportunity to review what he selected before it was shown in class.

The Respondent also stated that the song his superiors considered inappropriate did not actually contain the lyrics. Mr. Pickney testified that when he met with his supervisors they admitted there were no lyrics played in class. The reference to lyrics did not surface until one month after the write up of the incident. The song, "Fancy," by Iggy Azalea, was a popular song at the time and one the students listened to before he played it in class.

In addressing the District's action, the Respondent's attorney stated that teachers have been suspended for reasons far worse than the charges leveled against Mr. Pickney.

The Respondent, it was argued, was subjected to a level of discipline that exceeded the charges. "At the very worst, Respondent should be suspended for a minimal amount of time." By not even considering suspending the Respondent, Petitioner has displayed an unwillingness to uphold the principles of just cause.

DISCUSSION AND FINDINGS

Under N.J.S. A: 6-17. 2, the arbitrator is required to observe the following criteria when deciding the dismissal of tenured teachers for inefficiency.

(1) (if) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affect the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

The Petitioner submitted four (4) evaluations for the 2013-2014 school year. They were conducted on December 17, 2013, April 2, 2014, April 7, 2014 and May 14, 2014. The 2013-2014 school year Summative Assessment Report showed an overall "unsatisfactory" assessment score of 1.43.

In the event that a teacher is deemed to be Ineffective or Partially Ineffective, the District is required to develop a Corrective Action Plan (CAP). As stipulated under N.J.A.C. 6A: 10-2.5. and described in a New Jersey Department of Education guidance Summary of Legal Requirements for Evaluation and Tenure Cases, a CAP should adhere to guidelines that address timeliness and minimum number of observations.

District Supervisor of Social Studies Teresa Steele-Hunter testified that she observed Mr. Pickney on December 17, 2013 and rated Respondent unsatisfactory. She recommended that Respondent enroll in a Professional Development course. Ms. Steele-Hunter also listed

classroom management, differentiation of instruction, student engagement and instructional strategies deficiencies.

Ms. Steele-Hunter observed the Respondent again on April 2, 2014. Like the December observation, it had been announced in advance. Prior to an announced observation, the observer schedules a pre-conference with the teacher. Ms. Steele-Hunter stated that the Respondent failed to complete a required pre-conference form before meeting with her. Mr. Pickney was given an Unsatisfactory rating. Supervisor Steele-Hunter testified that her visitation revealed that the Respondent had not shown meaningful improvement since her last observation in December.

A third observation took place on April 7, 2014. Attorney for the Respondent argued it was unfair to schedule an observation just five (5) days after the previous classroom visitation. Ms. Steele-Hunter testified she had been on medical leave from December until April and found it necessary to schedule an observation on April 7, 2014. She stated the Respondent was informed he had the option to reschedule it to a later date but agreed to the April 7, 2014 observation. Even if the April 7th observation is discounted, the Respondent received an Unsatisfactory rating for the April 2nd observation.

As required under N.J.A.C. 6A: 10-2.5, a Corrective Action Plan (CAP) was developed for the 2014-2015 school year. Assistant Principal Chinaire Simons was selected to coordinate the implementation of the CAP. Ms. Simons testified that the Respondent did not meet the criteria in any of the four designated domains. Ms. Simons contended that Respondent failed to complete assignments or attend monthly meetings on a timely basis

The hearing record reveals that not all monthly CAP meetings were convened within a specific time period. Both the Petitioner and Respondent were at times responsible for rescheduled meetings. There is no evidence that rescheduled meetings had a negative impact on

the CAP. However, the Petitioner considered the postponement as indicative of Respondent's commitment to correct deficiencies.

In the 2014-2015 school year, Respondent was observed on December 12, 2014, and was given a "Developing" rating. Director Steele-Hunter noted in her comments that Mr. Pickney had shown some progress but indicated there were areas that needed further improvement. In particular, Respondent was encouraged to design lessons with more rigorous activities.

On May 29, 2015, Middle School Principal Andrea Tucker and Superintendent Hackett conducted an unannounced evaluation. The observation which did not require a post-observation conference resulted in an Unsatisfactory rating.

Ms. Steele-Hunter observed the Respondent on June 15, 2015. Ms. Steele-Hunter testified that her observation was delayed because a prior evaluation had been completed not long before her classroom visitation. Ms. Steele-Hunter wrote that there was no discussion, no collaboration or reading of any articles. The class drew and colored pictures. She rated Respondent's evaluation Unsatisfactory. There was no post-conference held, although the Director attempted to meet with Mr. Pickney on the last day of the school year. The Respondent in an exchange of e-mails with Ms. Steele-Hunter explained he would be in and out of New Jersey and unable to meet with her.

Ms. Steele-Hunter testified that the Respondent had incorrectly completed an end-of-the-year Student Growth Objective report in 2015. As a result of completing the document incorrectly, Ms. Steele-Hunter suggested it was useless to the District.

Superintendent Hackett testified that the decision to revoke Respondent's tenure was based upon a history of poor performance. Dr. Hackett stated, prior to her appointment as Superintendent, Respondent received several letters of reprimand and an increment that was

withheld. She also testified that Respondent was issued a letter of reprimand when he failed to record grades for two months. There were additional letters of reprimand cited in Mr. Pickney's personnel record. Attorney Branigan argued that these letters of reprimand were not germane to the charges. This argument is relevant to the extent that certain letters of reprimand did address past violations of rules and policies that occurred several years ago.

In a letter of reprimand drafted by the former Assistant Superintendent for Curriculum and Instruction, Dr. Angelica Allen, dated September 29, 2014, Respondent was criticized for playing the song "Fancy." Dr. Allen stated that the song contained inappropriate lyrics that had no place in a classroom. Mr. Pickney contended he played only the music and not the lyrics. However, the inappropriate language was confirmed in an arbitration award issued after the letter of reprimand was grieved.

The Respondent's record reveals in 2011-2012 Mr. Pickney's increment was withheld. Yet, attorney for the Respondent argued that Mr. Pickney had received satisfactory evaluations prior to the years identified by the District. Attorney Branigan contended that earlier evaluations should be given weight. As stated previously by Respondent's attorney, just cause demands that a suspension should precede removal.

Superintendent Hackett described a pattern of behavior that started several years ago and has continued into the present. She cited a reprimand in 2006 for a lack of a lesson plan, and in 2015 Respondent again did not submit an acceptable lesson plan. In spite of available professional development resources, Dr. Hackett contended, the Respondent had not demonstrated improvement or shown a willingness to change. Furthermore, she testified that the requirements contained in the CAP had not been followed by the Respondent. Superintendent

Hackett stated that Mr. Pickney was advised to attend workshops and collaborate with teachers who are considered effective.

The Respondent testified he had been told he could postpone the April 7, 2014 observation. However, he believed he had little choice in permitting two observations within five (5) days. Both observations were rated as Unsatisfactory. The Respondent stated that he was denied an opportunity to improve on April 7th since the post-observation conferences were combined. He contended that any deficiencies observed on April 2nd would have been repeated again on April 7th without the benefit of a post-observation between both visitations, Respondent noted that he did show improvement (Developing) in an unannounced classroom visitation on May 19, 2014. However, as I stated previously, Mr. Pickney's April 2nd observation was nonetheless rated "Unsatisfactory."

The Respondent testified that the song in question was played without lyrics. He argued that Ms. Steele-Hunter and Ms. Tucker acknowledged they did not hear the lyrics. Both administrators contended they heard lyrics.

Mr. Pickney did not dispute that he had not followed the directions for the essay contest. Respondent allowed his students to create posters when the assignment specified written submissions. He was also reprimanded for not first submitting his student's work to an administrator for approval.

The Respondent testified that he did not complete the Student Growth Objectives (SGO's) correctly at the end of the school year. He acknowledged he received SGO training on more than one occasion, but contended he was not sufficiently instructed in regard to "Methodology" changes instituted during the year. The attorney of the District noted that the Respondent failed to request assistance.

The comments contained in the observation of May 29, 2015 referred the same routine on a daily basis. Respondent's lesson plans included the same activities encompassing ineffectively what is known as the Kagan strategies. The plans did not list any additional activities that were appropriate for a Social Studies class. In particular, the observer found no graphic organizers or written assignment related to the subject. Ms. Steele-Hunter wrote that ELL students were merely copying from a textbook the names of countries and dates. Mr. Pickney did not dispute the comments but considered his approach effective. The Respondent cited for low standards argued the charge his teaching was not rigorous was without merit.

Attorney Hunt stated the Respondent had an opportunity to grieve any observations he considered inaccurate or unfair. The Respondent testified that when he returned in September 2015, he received the tenure charges and was denied the option of filing a grievance. In particular, the April 2nd and April 7th, 2014 observations were not grieved although Mr. Pickney was aware of the content. The District also argued that the Unsatisfactory ratings were given during the period of the CAP when Respondent was under an improvement plan.

As argued by the Respondent's attorney, the District did not conduct an additional observation while subject to the CAP in the 2014-2015 school year. As stated under N.J.S.A. 18A: 6-17. 2, "the arbitrator shall only consider whether or not the employee's evaluation failed to adhere substantially to the evaluation process... In the event that the employee is able to demonstrate that this is applicable, "the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed."

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As argued by the Respondent's attorney, the District did not conduct an additional observation while subject to the CAP in the 2014-2015 school year. As stated under N.J.S.A. 18A: 6-17. 2, "the arbitrator shall only consider whether or not the employee's evaluation failed to adhere substantially to the evaluation process… In the event that the employee is able to demonstrate that this is applicable, "the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed."

As previously noted, the Respondent's attorney argued that Mr. Pickney should be reinstated since the District failed to conduct a fourth observation in 2014-2015. The statute directs the arbitrator to consider if the District "failed to adhere substantially to the evaluation process." While the District did not conduct a fourth observation and complete each post-observation meeting within fifteen days, I do not believe it materially affected the outcome of the evaluation process.

There were a total of seven (7) observations in a two-year period. The December 17, 2013 was nullified because a post-observation meeting was not scheduled until the end of January 2014. In each observation Respondent failed to achieve a satisfactory rating. During 2014-2015, Respondent was provided a Corrective Action Plan and, according to the testimony of his supervisors, was encouraged to take advantage of assistance within and outside the District. Respondent's supervisors indicated he resisted attempts to eradicate deficiencies and improve his performance in the classroom. Superintendent Hackett, Social Studies Supervisor Steele-Hunter and Assistant Principal Simons each testified that Respondent did not meet the standards necessary to retain his employment in the District.

Based upon the hearing record, I have determined that the District has met its burden of proof. The tenure charges filed in Agency Docket No. 303 -10/15 are sustained.

**AWARD:**

The tenure charges filed by the Irvington School District against David Pickney, Agency Docket No. 303 – 10/15 shall be sustained

6/1/16
Date

Stephen J. Rosen
Stephen J. Rosen

State of New Jersey}
County of Essex} ss:

On this 1st day of June, 2016, before me personally came and appeared Stephen J. Rosen to me known to be the individual described and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan G Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/4/2019

207-16

OAL DKT. NO. EDU 13585-15
AGENCY DKT. NO. 186-7/15

| | | |
|---|---|---|
| WINSLOW TOWNSHIP EDUCATION ASSOCIATION, on behalf of its members, ERIKA MURPHY AND MARY KENNEDY, | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner observes that it is not clear from the Agreement who signed the document on behalf of the petitioners. The Agreement was not signed by the petitioners' attorney, who is the petitioners' duly authorized representative in litigation, nor does the file contain any evidence indicating that the petitioners authorized an individual to sign the Agreement on their behalf. Therefore, the Commissioner cannot approve the within settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/16
Date of Mailing: 6/07/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 13585-15

AGENCY DKT. NO. 186-7/15

**WINSLOW TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS, ERIKA MURPHY AND MARY KENNEDY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,**

Respondent.

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**Cosmas P. Diamantis,** Esq., for petitioner (Zeller and Wieliczko, LLP, attorneys)

**Audra A. Pondish,** Esq., for respondent (Wade, Long and Wood, LLC, attorneys)

Record Closed: April 26, 2016 Decided: April 26, 2016

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

This matter was transmitted to the Office of Administrative Law (OAL) on August 27, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties agreed to a settlement of all issues in dispute. The fully executed Settlement Agreement and Board Resolution were received on April 26, 2016, upon which date the record in this matter closed.

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

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

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

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

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

April 26, 2016
DATE

**LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 4/29/16

Date Mailed to Parties: 4/29/16

cmo

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Attorneys for Respondent, Winslow
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STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

| | |
|---|---|
| WINSLOW TOWNSHIP EDUCATION ASSOCIATION, individually and on behalf of members Erika Murphy and Mary Kennedy<br><br>Petitioner(s),<br><br>vs.<br><br>WINSLOW TOWNSHIP BOARD OF EDUCATION<br><br>Respondent(s). | STATE OF NEW JERSEY<br>DEPARTMENT OF EDUCATION<br><br>Agency Reference No: 186-1/15<br>OAL Docket No: EDU 13585-2015 S<br><br>SETTLEMENT AGREEMENT |

**WHEREAS,** Petitioner Winslow Township Education Association (hereinafter "Petitioner" or "WTEA") , is the exclusive majority representative of a broad-based bargaining unit consisting of, all certified personnel, secretaries, paraprofessionals, buildings and grounds employees, and athletic trainers employed within Winslow Township School District; and

**WHEREAS,** Respondent, Winslow Township Board of Education, (hereinafter the "Board" or "Respondent"), with its administrative offices located at 40 Coopers Folly Road, Atco, NJ 08004, is charged with administration and supervision of the District, and is the employer of all employees in the bargaining unit represented by Petitioner; and

**WHEREAS,** a dispute arose over the distribution of final paychecks and ownership of various furniture items;

**WHEREAS,** the Petitioner filed a Petition for Appeal; and

**WHEREAS,** without waiving their respective positions and without any admissions by either party, WTEA and the District wish to fully resolve all outstanding litigation between the parties pursuant to the terms set forth below;

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

1. The Board agrees that it will comply with all other Federal and State Laws, including but not limited to N.J.S.A. 34:11-4.4, as well as Board Policies with respect to the payment and withholding of employee pay or salary.
2. The Board agrees it will not withhold, in whole or in part, any pay or salary from any and all certified personnel, secretaries, paraprofessionals, buildings and grounds employees, and athletic trainers employed by the Board, in a manner contrary to Federal and State Law, including but not limited to, N.J.S.A. 34:11-4.4, as well as all Board Policies with respect to the payment and withholding of employee pay or salary, unless permitted by law.
3. Petitioner agrees that that if employee wishes to bring in personally owned furniture items, they must submit a request to the building Principal personally for approval.
4. The parties agree that the Principal shall have a period of five (5) school days to approve or deny the request. Parties agree that if the Principal does not provide a response to the request within five (5) school days, the request is deemed granted.
5. Parties agree that a new request to have furniture items brought in must be submitted annually.
6. Petitioner agrees that if personally owned items are brought in during the course of the school year, they must be removed at the end of the school year.
7. Parties agree to be responsible for their own legal fees relative to this matter.

8. It is mutually agreed that the terms of this Agreement are and will remain confidential to the maximum extent permitted by law. The parties are free to inform others that the dispute between them has been amicably resolved. This provision shall not apply to any and all communications between the Petitioners and Winslow Township Education Association members.

9. This Agreement is not an admission by either party of any liability, or the violation of any law, statute, or regulation, nor shall it be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms.

10. The Petitioners agree to all terms of this Agreement as complete, full and final satisfaction of all claims of any nature against the Respondent, Winslow Township Board of Education for anything that has happened up until the date on which Petitioners signed this Agreement. This release includes, but is not limited to any and all claims and demand for damages that may arise under N.J.S.A. 34:11-4.4 and any regulations promulgated under any aforementioned law, or any other State or Federal law, statue, rule or regulation or common law, contract, policy or directive, for anything that has happened up until the date on which the Plaintiff signed this Agreement.

11. This Agreement represents the entire understanding between the parties and will not be modified, in whole or in part, except by mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion.

12. This Agreement is subject to formal approval by the Winslow Township Board of Education. In the event the District thereafter approves this Agreement, it shall be executed forthwith by the District and shall become effective upon approval by the Court.

13. This Agreement may be executed in counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

**IN WITNESS HEREOF,** the parties have executed this Agreement on the dates set forth below:

Date: 4/13/16

WTEA

Date: 4-13-2016

Dr. H. Major Poteat, Superintendent

Date: 4-13-2016

Cheryl Pitts, Board President

# *Winslow Township School District*

40 Cooper Folly Road, Atco, NJ 08004
(856) 767-2850 x7510

H. Major Poteat, Ed.D.
*Superintendent*

Tyra McCoy-Boyle
*Business Admin./Board Secretary*


Settlement Agreement – WTEA & WTBOE

A motion was made by Ms. Dredden, and seconded by Ms. Mitchell to approve the resolution authorizing the settlement agreement in the matter involving the Winslow Township Education Association and the Winslow Township Board of Education.

*Roll Call:*

| | | | |
|---|---|---|---|
| Mr. Blake | Absent | Ms. Watkins | Absent |
| Ms. Dredden | Yes | Mr. Wilcox | Yes |
| Mr. Hilton | Yes | Ms. Peterson | Yes |
| Ms. Mitchell | Yes | Ms. Pitts | Yes |
| Mr. Vascos | Yes | | |

Motion Carried

This is to certify that the above is a true copy of the motion adopted by the Board of Education of Winslow Township at the regular session held on April 13, 2016.

**Tyra McCoy-Boyle, Business Administrator/Board Secretary**


RECEIVED
2016 APR 26 P 2:09
STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

208-16

OAL DKT. NOS. EDU 12765-15, EDU 00111-16, and EDU 02599-16 (consolidated)
AGENCY DKT. NOS. 228-8/15, 333-10/15, and 20-2/16

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

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY AND PORT JERVIS CITY SCHOOL DISTRICT BOARD OF EDUCATION, ORANGE COUNTY, NEW YORK,

RESPONDENTS,

AND

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

PETITIONER,

V.

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

RESPONDENT,

AND

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/16

Date of Mailing: 6/07/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

| | |
|---|---|
| **BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY**<br>Petitioner,<br>v.<br>**BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY and PORT JERVIS CITY SCHOOL DISTRICT ORANGE COUNTY,**<br>Respondents, | OAL DKT. NO. EDU 12765-15<br>AGENCY DKT. NO. 228-8/15 |
| **BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,**<br>Petitioner,<br>v.<br>**BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY,**<br>Respondent. | OAL DKT. NO. EDU 00111-16<br>AGENCY DKT. NO. 333-10/15 |
| **BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,**<br>Petitioner,<br>v.<br>**BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL, SUSSEX COUNTY,**<br>Respondent. | OAL DKT. NO. EDU 02599-16<br>AGENCY DKT. NO. 20-2/16 |

**Gregory F. Kotchick**, Esq., for the Board of Education of the High Point Regional High School District (Durkin & Durkin, attorneys)

**Daniel M. Perez**, Esq., for the Board of Education of the Township of Montague, (Daniel M. Perez, attorney)

**Thomas Scapoli**, Esq., for the Board of Education of the Port Jervis City School District (Ingerman Smith, LLP, attorneys)

Record Closed: April 18, 2016 Decided: April 25, 2016

BEFORE **EVELYN J. MAROSE**, ALJ:

On August 24, 2015, the Board of Education of the High Point Regional High School District, Sussex County ("High Point") v. Board of Education of Montague, Sussex County ("Montague") and Port Jervis School District, Board of Education, Orange County, New York ('Port Jervis"), Docket No. EDU 12765-15 was forwarded to the Office of Administrative Law (OAL) on a Motion for Emergent relief pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. On September 2, 2015, an Order was entered denying Emergent Relief. The Order was forwarded to the Commissioner of Education, who reversed, granted Emergent Relief and directed that the case proceed at the OAL to resolve the underlying claim on the merits. On November 16, 2015, the matter was placed on the inactive list, at the request of the parties, to allow the parties to address the ancillary issues critical to proceeding to hearing. On October 29, 2015, Montague v. High Point, Docket No. EDU 00111-16 was filed. On February 23, 2016, Montague v. High Point, Docket No. EDU 02599-16 was filed, with a request for consolidation with Docket No. EDU 12765-15, whose time on the inactive list had expired, and Docket No. EDU 00111-16, which was pending. Thereafter, the parties agreed to a settlement of all issues of all three matters. A Consent Order memorializing the terms of the settlement is attached hereto as Exhibit A.

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

1. On June 18, 2013, Montague made an application to the New Jersey Department of Education seeking the withdrawal of the Commissioner's consent for Montague to send its high school students to Port Jervis pursuant to a Send/Receive Agreement.

2. On June 24, 2013, the Commissioner granted Montague's application and granted permission for Montague to enter into a new send/receive relationship with High Point, an in-state District, pursuant to an agreed upon transition plan.

3. On November 12, 2013, Montague submitted its initial application to the Department of Education to facilitate the withdrawal of the Commissioner's consent to the out of state Send/Receive agreement with Port Jervis for the education of its seventh and eighth grade students. The Commissioner granted the request conditioned upon Montague's demonstration that it had suitable facilities to house these grade levels. Based upon material provided to the Commissioner, Montague's request was granted.

4. The Commissioner stated "beginning with the 2015-16 school years, all students in grades kindergarten through eight will attend Montague, and all students in grades nine through twelve will attend High Point consistent with the agreed upon transition plan."

5. No appeal of the Commissioner's withdrawal of consent was filed. However the then current Montague Board of Education favored continuing a send/receive relationship with Port Jervis, as did certain parents with age relative students.

6. The Sussex County Interim Executive Superintendent advised Montague that the Board had an obligation to comply with the Send/Receive Agreement with High Point and with the transition plan for seventh through twelfth grade students. Montague was not to be responsible for any tuition for students attending school in Port Jervis beyond the transition plan.

Any parents who wished to send their children to Port Jervis for education had to be personally responsible for their tuition.

7. Various litigation followed, including actions filed by Montague on October 29, 2015 and January 29, 2016. Montague sought a declaration that pursuant to N.J.S.A. 18A:38-21.1, certain Montague students should be permitted to attend school in Port Jervis through graduation. That statute provides in pertinent part, "Any secondary student in the sending district at the time of the termination of the sending/receiving relationship shall be permitted to complete his secondary education within the receiving district. The sending/receiving relationship shall be continued for these students." High Point disputes Montague's interpretation of "secondary student". High Point essentially argues that at the time of the termination of a send/receive relationship a student can choose to complete his or her education in the school they attended, such as middle school, but cannot choose to complete his or her education by moving through various schools in that district.

8. Numerous Montague students are presently attending school in Port Jervis in reliance on Montague's interpretation of its statutory obligation to allow them to complete their education in Port Jervis to graduation. However, based upon the pending litigation and the Commissioner's direction, tuition for those students has not been paid by Montague. Accordingly, Port Jervis served disenrollment letters concerning those students. Port Jervis is also asserting in a federal complaint that Montague breached its Send/Receive Agreement when Montague applied to the Commissioner to end their relationship, without providing the notice provided in their agreement.

9. If the pending matters are adjudicated in their present venue, numerous appeals will be possible, even likely. Accordingly, seeking repose, the parties have engaged in numerous discussions and have voluntarily agreed to terms and conditions that will resolve all pending claims asserted in the three matters, as evidenced by the signatures of the parties or their representatives' signatures on the attached Consent Order.

10. The Consent Order is contingent upon the approval of the Commissioner of Education.

11. The Consent Order fully disposes of all issues in all three captioned matters and is consistent with law. Montague reserves its right to pursue a previously filed ethics grievance against an individual who acted in a professional capacity on behalf of the district.

I **CONCLUDE** that the Consent Order meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms of the Consent Order and that all three OAL proceedings be **CONCLUDED**.

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

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

4/25/16
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: 5-2-16

Date Mailed to Parties: MAY 2 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EJM/kep

PREPARED BY:
LAW OFFICES OF DANIEL M. PEREZ, ESQ.
BAR NO. 050051995
93 Spring Street, Suite 505
Newton, NJ 07860
(973) 300-5135 (t)
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dan@danperezlaw.com
***Special Counsel to the Montague Township Board of Education***

2015 MAR 24 A 11:53

| | |
|---|---|
| MONTAGUE TOWNSHIP BOARD OF EDUCATION,<br><br>Petitioner,<br><br>HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION,<br><br>Respondent. | **STATE OF NEW JERSEY**<br>**OFFICE OF ADMINISTRATIVE LAW**<br><br>**OAL Dkt. No. EDU 00111-2016 N**<br>**Agency Ref. No. 333-10/15** |

| | |
|---|---|
| MONTAGUE TOWNSHIP BOARD OF EDUCATION,<br><br>Petitioner,<br><br>v.<br><br>HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION,<br><br>Respondent. | **STATE OF NEW JERSEY**<br>**OFFICE OF ADMINISTRATIVE LAW**<br><br>**OAL Dkt. No. EDU 02599-2016 N**<br>**Agency Ref. No. 20-2/16** |

| | |
|---|---|
| BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT,<br><br>Petitioner,<br><br>v.<br><br>BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE and PORT JERVIS CITY SCHOOL DISTRICT BOARD OF EDUCATION,<br><br>Respondents. | **STATE OF NEW JERSEY**<br>**OFFICE OF ADMINISTRATIVE LAW**<br><br>**OAL Dkt. No. EDU 12765-2015 N**<br>**Agency Ref. No. 228-8/15** |

## CONSENT ORDER

**THESE MATTERS** having been opened to the Court (Daniel Perez, Esq. appearing for Montague Township Board of Education, Gregory Kotchick, Esq. appearing for High Point Regional High School Board of Education and Thomas Scapoli, Esq. appearing for Port Jervis City School District Board of Education);

**IT IS HEREBY ORDERED** that:

1. Any Montague pupil who was enrolled in Port Jervis High School as of March 14, 2016 will be permitted to remain enrolled in Port Jervis High School until he or she graduates from Port Jervis High School. This includes any 9th and 10th grade students who were attending Port Jervis High School as of March 14, 2016.

2. Montague 8th grade pupils who were enrolled in Port Jervis Middle School as of March 14, 2016 will be given the option of attending either High Point Regional High School or Port Jervis High School, through graduation. Pupils who enroll in High Point will not be permitted to thereafter transfer to Port Jervis; however, pupils who enroll in Port Jervis High School will be permitted to thereafter transfer to High Point.

3. High Point withdraws its opposition to Montague making tuition payments for the 9th and 10th grade students currently enrolled in Port Jervis High School.

4. Montague will promptly pay any outstanding tuition invoices for Montague pupils who are currently attending High Point as 11th or 12th graders.

5. Montague and High Point reaffirm the send-receive agreement that is currently in place between the districts, subject to the amendments memorialized herein.

6. Montague and High Point will withdraw all pending civil and administrative claims and dismiss them with prejudice, including but not limited to the pending Superior Court action. The parties will exchange and execute mutual releases and appropriately drawn settlement documents. Montague reserves the right to pursue a previously filed ethics grievance against an individual who acted in a professional capacity on behalf of the district.

7. The foregoing terms of settlement are subject to approval by the New Jersey Commissioner of Education.

**IT IS SO ORDERED.**

March ____, 2016.

Honorable Evelyn Marose, A.L.J.

The undersigned hereby consent to the form and entry of this Order.

Daniel M. Perez, Esq. 3/23/16
Attorney for Montague Township B.O.E.

Gregory Kotchick, Esq.
Attorney for High Point Regional High School B.O.E.

Thomas Scapoli, Esq.
Attorney for Port Jervis City School District B.O.E.

209-16

# STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

## BUREAU OF CONTROVERSIES AND DISPUTES

## TENURE HEARING

| | | |
|---|---|---|
| In the Matter of the Arbitration Between STATE-OPERATED SCHOOL DISTRICT, CITY OF NEWARK, NJ | ) | |
| **EMPLOYER** | ) | **OPINION** |
| AND | ) | **AND** |
| VINCENT AJAYI | ) | **AWARD** |
| **RESPONDENT** | ) | |

CASE NO. DOE 338-11/15

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER

| | |
|---|---|
| JOHN CROOT, ESQ. | COUNSEL FOR BOARD |
| ADAM HERMAN, ESQ. | COUNSEL FOR BOARD |
| MICHELLE TAKYI | MANAGER OF INSTRUCTIONAL ABUSE INVESTIGATIVE UNIT |
| BARBARA ERVIN | FORMER PRINCIPAL OF CLEVELAND ELEMENTARY SCHOOL |
| AH | STUDENT WITNESS |
| HA | STUDENT WITNESS |
| LS | STUDENT WITNESS |

FOR THE RESPONDENT

| | |
|---|---|
| JOSEPH FUSELLA, ESQ. | COUNSEL FOR RESPONDENT |
| VINCENT AJAYI | RESPONDENT |

Hearings were held on February 23, March 31 and April 1, 2016. At every hearing a court reporter was present and the Arbitrator received a copy of the transcript. The parties submitted post-hearing briefs and those briefs were received on May 6, 2016. The arbitrator requested an extension of time to submit his award. That request was granted and the award is due on or before May 31, 2016.

All student witnesses are identified by their initials and were accompanied by a responsible adult at the hearings.

**ISSUE:**

While the parties did not stipulate to an issue, after reviewing all of the testimony and the documents in evidence, I have determined the issue is:

*Should the tenure charges filed against Vincent Ajayi be sustained? If not, what shall be the remedy?*

**CHARGES:**

**Charge Number One**

a. Mr. Ajayi failed to exercise self-restraint and controlled behavior which is required and mandated for a teaching staff member entrusted with the care and custody of middle school children.

b. Mr. Ajayi used unnecessary and/or inappropriate physical contact in dealing with a student.

c. Mr. Ajayi's inappropriate and unprofessional conduct violates District policy and law.

d. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.

e. Mr. Ajay's actions demonstrate that he is not fit to serve as a teaching staff member.

f. Mr. Ajayi's inappropriate and unprofessional conduct placed A.H., F.K. and A.A. at risk of physical and emotional harm.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or other just cause warranting his dismissal.

**Charge Number Two**

Mr. Ajayi is guilty of Conduct Unbecoming by way of the following:

a. The Board repeats and reiterates the allegations set forth above.

b. On March 27, 2014, Mr. Ajayi inflicted corporal punishment upon A.H., F.K. and A.A.

c. Mr. Ajayi's conduct was neither reasonable nor necessary.

d. Mr. Ajayi's inappropriate and unprofessional conduct violates District policy and law.

e. Mr. Ajayi's inappropriate and unprofessional conducted placed A.H., F.K. and A.A. at risk of physical and emotional harm.

f. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.

The foregoing misconduct by Mr. Ajayi constitutes conduct unbecoming and/or just cause warranting his dismissal.

**Charge Number Three**

Mr. Ajayi is guilty of Conduct Unbecoming by way of the following:

a. The Board repeats and reiterates the allegations set forth above.

b. On March 27, 2014, Mr. Ajayi committed an assault and battery upon A.H., F.K. and A.A.

c. Mr. Ajayi's inappropriate and unprofessional conduct place A.H., F.K. and A.A. at risk of physical and emotional harm.

d. Mr. Ajayi's inappropriate and unprofessional conduct violates Board policy and law.

e. Mr. Ajayi's actions were sufficiently flagrant and egregious to warrant termination.

f. Mr. Ajayi's actions demonstrate that he is not fit to serve as a teaching staff member.

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted, corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

1. To quell disturbance, threatening physical injury to others;

2. To obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
3. For the purpose of self-defense; and

4. For the protection of persons or property.

**18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation.

(a) if he or she shall be under tenure of office, position or employment during good behavior and efficiency in the public school system o the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

Except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub article provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

**SUMMARY OF FACTS:**

The genesis of all these charges relates to an incident that occurred between Mr. Ajayi and a student identified as student as A.H. on March 27, 2014, in Mr. Ajayi's Science class at Cleveland Elementary School. The then Principal,

Barbara Ervin, testified about the investigation she conducted concerning the March 27, 2014, incident. The record also reflects that an incident occurred on October 23, 2013, between Mr. Ajayi and A.H. The results of that incident will be incorporated into the Positions of the Parties, as well as the testimony of the students.

**POSITIONS OF THE PARTIES:**

**For the Petitioner**

The District argues that the uncontroverted evidence presented during the hearing clearly established that Mr. Ajayi, without justification, grabbed A.H., pulled him out of his seat, twisted his arm and pushed him. This violent and disturbing incident leaves no doubt that Mr. Ajayi is unfit to be a teacher. Additionally, the incident clearly showcased the Respondent's poor classroom management skills, short temper and complete lack of judgment and this type of behavior by a teacher has absolutely no place in a school setting.

The District strongly argues that the inappropriate physical contact with A.H. was not a recent development and approximately five (5) months before the March 27, 2014 incident, the Respondent was counseled about his inappropriate physical touching of other students.

In November, 2013, the Respondent met with Ms. Ervin on two separate occasions over a three-day period to address student complaints; namely that Mr. Ajayi grabbed and twisted one student's arm, that Mr. Ajayi grabbed another student by his neck and then "yoked" him up. Indeed, Mr. Ajayi was specifically advised by his Principal to refrain from touching students and to send students to

the office or contact the office to call for building security. Yet, just a few months later, Mr. Ajayi ignored this directive when he again engaged in reckless and inappropriate behavior in the incident with A.H. in March 2014.

The District references the testimony of students A.H., H.A. and L.S. in defense of its position that those students corroborate the District's position that Mr. Ajayi was the aggressor and assaulted A.H. and, as a result, the tenure charges were filed.

In fact, after Principal Ervin's investigation she concluded and testified,

*"Although there is some discrepancy over who threw what and what was thrown, the physical contact is pretty much throughout. Teacher grabbed student and tried to push him out of the room."* Tr. 2[1]

The District asserts that they have proven the tenure charges by a preponderance of the credible evidence. They acknowledge that *to "prevail in this case they must establish the truth of the charges by a preponderance of the credible evidence and they go on to define preponderance as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power."*

The District strongly argues that the preponderance of the credible evidence in the record establishes that charges One through Five must be sustained.

Mr. Ajayi is guilty of conduct unbecoming a teaching staff member by grabbing A.H., twisting his arm and pushing him on March 27, 2014. The District acknowledges that while unbecoming conduct is not specifically defined in the statute or regulations, case law from the Commissioner of Education and the

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TR 1 is for February 23, TR 2 is for March 31 and TR 3 is for April 1, 2016. [1] TR 2, 55:20-25 and 56:1-2

court system, the touchstone of the charge is the teacher's fitness to discharge the duties and functions of his/her position. Indeed, *"unbecoming conduct encompasses many categories of inappropriate behavior by tenured teachers."*

*"Conduct unbecoming a public employee has defined as an elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the district, or which has the tendency to destroy public respect for municipal employees and confidence in the operation of municipal services."*

The District relies heavily upon the decisions by the Commissioner of Education and under the Teach NJ determinations, which have been effective since August of 2012. In fact, the District references that the Commissioner has often stressed that those persons who went into the teaching profession exercise a significant influence on those who teach and... must exhibit a high degree of exemplary behavior.

In the instant matter, there can be no doubt that Mr. Ajayi's actions on March 27, 2014, constitute conduct unbecoming, thereby warranting his removal from his tenured position. The testimony of A.H. establishes without reservation that he asked one of his classmates for a piece of candy. From there, the situation morphed to the Respondent approaching A.H. and asking him multiple times why he threw the candy. Yet the Respondent testified that he asked A.H. once why he threw the candy and then asked him at least three times to give him the piece of candy. At that point, despite A.H.'s denial of throwing the candy, the Respondent grabbed A.H.'s right arm and pulled him out of his chair causing

A.H.'s untied boot to come off. He also grabbed and twisted A.H.'s arm, pushed him and forced A.H. to the door.[2]

In fact, A.H.'s testimony made it specifically clear that he did not initiate any physical contact; rather, Mr. Ajayi became frustrated and became unnecessarily physical with A.H. Additionally, both A.H. and L.S. credibly testified that after A.H. denied throwing the object (whether it was candy or juice box), the Respondent got really impatient and angry and grabbed A.H. by his arm. It was at that point, as referenced above, the Respondent grabbed and twisted A.H.'s arm and pushed him toward the door.

On the other hand, Mr. Ajayi's version of the event simply was not credible. According to the Respondent's testimony, after A.H. refused to give him the object, A.H. stood up and said "Fuck. I didn't throw it" and then pushed Mr. Ajayi.[3]

The Petitioner contends that Mr. Ajayi did not produce any witnesses to corroborate his version of the events. Interestingly, even the investigator from the Institutional Abuse Investigation Unit (IAIU) and supervisor determined that Mr. Ajayi was the aggressor. Indeed, both wrote in the joint letter that statements received from those present during this incident determined that the teacher, Vincent Ajayi, had grabbed A.H. by his collar and arm for being disruptive in the classroom. Furthermore, there is absolutely no mention of any aggressive physical action taken by A.H. against Mr. Ajayi. See Respondent Exhibit Q (RVA-19 and RVA-20).

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[2] TR 1, 14:13-16, 16:10-18.
[3] TR 3 , 11:12-23

The Petitioner contends that even if it is determined that A.H. pushed Mr. Ajayi in the classroom on March 27, 2014, there was absolutely no need for Mr. Ajayi to grab and push A.H. The Respondent clearly had the opportunity and ability to step back and take proper administrative action, rather than to take physical action against a seventh grade student. There was no attack by A.H. Instead of backing away or calling the main office or security, Mr. Ajayi chose grab both of A.H.'s hands and push him.[4]

Moreover, Mr. Ajayi acknowledged that the March 2014, incident with A.H. was very similar to what transpired with R.H., which was documented in the November 2013 memorandum.[5] In the November 2013 incident with R.H., the Respondent grabbed the student by his neck when he refused to give Mr. Ajayi a basketball. (See District Exh. 8).

Based upon what had occurred since Mr. Ajayi's short time at Cleveland Elementary School, he has established a horrifying and inappropriate pattern of handling situations with dangerous physical contact. There is simply no rational defense for the Respondent's action, and it is inexcusable that he used physical force in grabbing A.H., twisting his arm and pushing him, especially since he was on notice to refrain from touching students.

Mr. Ajayi's actions on March 27, 2014, constitute corporal punishment. The District references N.J.S.A. 18A:6-1, which defines corporal punishment. Dealing with the instant matter, the Petitioner argues that,

*"The record demonstrates that none of the exceptions to the corporal punishment statute apply to the incident involving A.H. There was no attack by A.H. Mr.*

[4] TR 3, 12:8-10
[5] TR 3, 31:18-25; 32:1-7

*Ajayi, to the extent he wanted A.H. out of the classroom, could have and should have called the main office or a security guard for assistance. There was no emergent situation in the classroom requiring Mr. Ajayi to use physical force on A.H."*

The District references a Teach NJ decision in Franklin Township Board of Education and Dorrell Hilliman, DOE 65-3/13. In that case, Arbitrator Licata decided that even though the student initially threw a book, the teacher lost the ability to raise a self-defense argument when he threw books back at the student. Arbitrator Licata upheld the school district's request for the teacher's termination.

Mr. Ajayi's actions on March 27, 2014, constituted assault and battery. In regard to that argument, the District contends that to establish a *"tort of assault, a victim must show that the aggressor acted with intention to cause harm or offensive contact and that the victim was put in imminent apprehension."* As the record established, there can be no dispute that Mr. Ajayi's action on March 27, 2014, constituted an assault and battery upon A.H. when he grabbed A.H.'s right arm and pulled him out of his chair causing A.H.'s untied boot to come off. Clearly, Mr. Ajayi's actions were both an offensive and non-consensual touching, which placed A.H. in imminent apprehension. The weight of evidence therefore warrants sustaining Count III of the tenure charges and Mr. Ajayi's removal from his tenured teaching position.

The proper penalty is removal of Mr. Ajayi from his tenured position because unbecoming conduct is conduct which adversely affects the morale or efficiency of the agency to which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in

the operation of governmental services or which violates an implicit standard of good behavior.

The District contends that,

*"A finding of unbecoming conduct does not require that any specific rule or regulation has been violated but may be based primarily on a violation of an implicit standard of good behavior. In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident sufficiently flagrant."*

In support of this, the District references Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, o.b. 131 N.J. 326 (E.A. 1944).

The District argues that the instant matter does not involve an isolated incident with Mr. Ajayi; rather, it involves a pattern of unacceptable conduct that culminated in a violent incident which was witnessed by an entire class. Mr. Ajayi's attempt to characterize A.H. and other students as disciplinary problems cannot provide an excuse for the use of violence or corporal punishment.

The District contends that the statutes and case law are clear and that Mr. Ajayi as a teacher was to serve as a model of appropriate behavior during his daily interactions with students. The March 2014 incident, along with his pattern of improper physical contact with students at the Cleveland Elementary School, leaves no doubt, and no alternative, that Mr. Ajayi is not fit to serve as a teacher and must be removed from his position as a tenured teacher.

**For the Respondent**

The Respondent is *"charged in four (4) counts with conduct unbecoming a teacher / just cause and in one (1) count with engaging in a pattern of conduct constituting unbecoming conduct."* It is alleged in Four Counts (Counts One,

Two, Three and Five), that Mr. Ajayi used unnecessary and/or inappropriate physical contact in dealing with the students identified as A.H., F.K., and A.A., that he inflicted corporal punishment on those same children, that he committed assaults and batteries upon these students and that he violated N.J.S.A. 18A:6-1.

In response to those arguments, the Respondent contends that *"The District has grossly overstated its position in preparing the sworn tenure charges against the Respondent and it has taken what is essentially one allegation; that of inappropriate contact, and transformed it into four separate and distinct counts."*

The Respondent further contends, *"Additionally, this has been done in the hope of obtaining some compromise verdict from the finder of fact. Rather than considering such compromising coming to a final conclusion, it is respectfully urged that the Arbitrator contemplate merger of the nearly identical counts referenced and consider them only as one real allegation."*

The second observation to be highlighted in the defense of the Respondent is the failure of the District to establish one (1) of the four (4) allegations by the applicable standard under the law for all intents and purposes and amounts to a failure of proof as to all of the allegations involving inappropriate contact with Mr. Ajayi. Stated in another way, in the event that it is decided that the conduct that is alleged by the District was undertaken by Respondent in self-defense, defense of others, to quell a disturbance that was in large measure incidental to redirecting a student or students who were physically

acting out, all the charges describing assault of, unnecessary and/or punitive conduct by Respondent should not stand.

Moreover, the District has patently demonstrated its own uncertainty about and discomfort with the facts it seeks to rely upon to approve the allegations comprising its case. *"The shotgun approach adopted by Petitioner, whereby an attempt is put forth to buttress blanket allegations with unsupportable and unfocused evidence, belies the inherent weaknesses presented in the District's theory."* Accordingly, the Respondent contends that the District has failed to prove any of the allegations contained in Counts One, Two, Three or Five.

Count Four of the tenure charges filed against the Respondent allege a pattern of unbecoming conduct by Respondent. As to this charge, the District asserts a pattern of unbecoming conduct by Mr. Ajayi, erroneously relying upon a series of infractions which remain unproven and in most cases, unmentioned by witnesses.

As to the present incident viewed as a whole, there are insufficient proofs to substantiate any kind of pattern whatsoever. *"First, it should be noted that the other two (2) students allegedly involved in the March 2014 situation did not testify and consequently, there is no direct evidence from either F.K. or A.A. as to any inappropriate contact perpetrated by the Respondent. Second, A.H., during the course of his testimony concerning the present matter, either on direct or cross-examination, mentions nothing of any relevance as to any interaction Mr. Ajayi had with either F.K. or A.A. Third, the other two (2) eyewitnesses to the*

*March 27, 2014, allegations, H.A. and L.S. likewise did not testify to anything about Respondent touching F.K. or A.A."*

The Respondent argues that any effort by the District to establish a pattern of unbecoming conduct by relying upon incidents occurring prior to March 27, 2014, fails based upon the evidence and the testimony in the record, particularly testimony from students.

The Respondent argues that any matters which allegedly took place on November 19, 2013, and November 21, 2013, which are specifically cited in the Petitioner's complaint, neither of the purported victims (i.e. T.E. and R.H.) testified at the arbitration hearing. As such and given the totality of the District's proofs, there is no residuum of competent evidence to support any hearsay evidence admitted as to these students and/or the proof of Count Four.

The Respondent also contends that the internal investigation conducted by Principal Ervin was insufficient to say the least. She accepted the complaints by T.E. and R.H. at face value with little, if any, further inquiry. She then, in a rush to judgment, accused Mr. Ajayi of inappropriate contact without properly considering his Staff Incident Report at to T.E. (RVA-4) or the *"absolute absurdity of R.H.'s allegation that the Respondent inexplicably grabbed him because another student was bouncing a basketball."* (see RVA-18)

The Respondent argues that the incidents were so weak and lacking in substance that they did not even rise to the level of prompting formal administrative allegations against Mr. Ajayi. In fact, after Ms. Ervin advised the authorities of the facts surrounding the November 2013 student reports, the NJ

Division of Children and Families specifically found no reason to even take the initial step of conducting a formal inquiry as to either circumstance. (See RVA-19).

The Respondent contends that even giving the District the benefit of its evidence and all of the reasonable inferences to be drawn from that evidence, a pattern of unbecoming conduct cannot be established either by limiting the assessment of facts pertaining only to the March 27th incident or by expanding consideration of any legally sufficient evidence presented from November 2013 and synthesizing that with the later proofs of the March 27, 2014, encounter.

The Respondent also argues, as the District did, that the standard of proof in the instant matter is the preponderance of credible evidence. The Respondent contends that N.J.S.A. 18A:6-1 was not violated by the Respondent because *"At all times and under all circumstances of the present case he acted reasonably, without the use of unnecessary force and in compliance with both the letter and spirit of N.J.S.A. 18:A6-1."*

The Respondent argues that A.H. is presently a 15 year old student at Shabazz High School in Newark and was previously enrolled at Cleveland Elementary School where during the 7th grade he was taught Science by the Respondent. A.H. testified that he did not throw any candy or a juice box in the vicinity of the Respondent, yet the Respondent grabbed and twisted his arm and as he was holding A.H. he was moving A.H. toward the door forcing the student out of the room. A.H. testified that the Respondent let go of the student when a

Child Study Team member entered the classroom and took A.H. downstairs.[6] Contrast that with the testimony of the students.

Furthermore, A.H. denied touching Mr. Ajayi during the March 27th incident because he did not want to get in trouble again and learned his lesson.[7] In fact, A.H. denied that the Respondent asked him for the candy after he picked it up, and he is unsure whether he provided a written statement to Ms. Ervin concerning the March 27, 2014, incident. A.H. knew that if he ever put his hand on the Respondent again after the October 2013 assault, *"Mr. Ajayi could press charges on me and face a whole bunch of stuff, and face penalties including the possibility of expulsion from school."*[8]

The testimony of H.A., a 16 year old Ninth Grade student presently enrolled at American History High School in Newark who was formerly enrolled in Cleveland Elementary School, where she was a pupil in Mr. Ajayi's Science class. Her testimony indicates that someone threw a juice box at Mr. Ajayi and that Mr. Ajayi told A.H. to get out of the classroom and A.H. refused. She further testified that the Respondent grabbed A.H. by his arm and tried to take him out of the class. A.H. was swearing a little and subsequently AH pushed Mr. Ajayi away. She also testified that she was escorted to the office by the Vice Principal, Mr. Davis, and she spoke with Ms. Ervin.[9]

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[6] TR I, 15:11-16
[7] TR I, 21:5-14
[8] TR I, 36:16-37:15
[9] TR 2, 113:1-16

H.A. testified that Ms. Ervin prepared the written statement and she signed it.[10] She also testified that A.H. eventually left the room when the security guard took him outside.[11]

L.S., presently a 15 year old Ninth Grade at Bars High School in Newark, was previously a student at Cleveland Elementary School and was in Mr. Ajayi's Seventh Grade Science class. She testified that a piece of candy was thrown that hit Mr. Ajayi, who thought that A.H. had thrown it at him and grabbed his shirt. A.H. tried to get away, and Mr. Ajayi grabbed his wrist and twisted it.[12] She also testified that she was not sure what had happened,[13] and A.H. left the classroom after the incident by slamming the door and she thinks he went to the office.[14]

L.S. also testified that she never got a chance to speak to anyone about the incident because apparently A.H. told her mother what had occurred and her mother reported the incident to the school office.[15] Most importantly, L.S. testified that she never spoke to Ms. Ervin about the incident, although a written statement allegedly authored by L.S. and prepared by Ms. Ervin was submitted as evidence in the case and marked D-7. [16] Incredibly, L.S. testified that *"she did not review the statement submitted under her name until I think this month."*[17]

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[10] TR 2, 116:3-11
[11] TR 2, 119:12-19
[12] TR 2, 121:22-24
[13] TR 2, 123:2-4
[14] TR 2, 123:5-15
[15] TR 2, 123:20-24
[16] TR 2, 123:25-124:9
[17] TR 2, 126:16-127:8

Barbara Ervin, the then Principal of Cleveland Elementary School, testified that there were student complaints regarding physical incidents with the Respondent which were described as pulling, snatching, grabbing and pushing.[18] She also testified that the first two (2) times these matters were referred to the Department of Children and Families (DCF), who found that the alleged actions by the Respondent did not rise to anything beyond administrative meeting with the teacher and providing strategies.[19] A memorandum of those incidents (see Respondent D-8) was prepared and issued to the Respondent.

The Respondent has been a teacher in the Newark Public Schools for 15 years and prior to his suspension taught Science at Cleveland Elementary School. Prior to that he was a Science teacher at Samuel Berliner School and aside from the present situation has never been the subject of disciplinary charges. He testified that a list of students in jeopardy of failing was compiled by him prior to March 27, 2014 and A.H. is on that list. A letter was sent to the parents of all of the individuals on the list, and the Respondent signed it as did Ms. Ervin.

The Respondent testified that on March 27, 2014, his back was turned to the class, and something struck him in the back of his leg and he turned and saw that A.H. was picking up the object. He asked A.H. whether he threw the object and then asked him to hand him the object, which A.H. refused to do. The Respondent testified that he asked A.H. three times to give him the object but he refused to do so. At this point, A.H. stood up and said "Fuck, I didn't throw it" and

[18] TR 2, 29:6-17
[19] TR 2, 29:18-30:3

pushed the Respondent with both hands, and the Respondent fell back.[20] Fearing that A.H. would kick him and hurt him as he did before (referencing the October 2013 incident), the Respondent grabbed both of his hands.[21] A.H. at this point began to swing around and as he was not holding A.H. tightly he let him go. The situation escalated as A.H. struck the Respondent more than twice on his lower left side and, in response Mr. Ajayi again grabbed A.H.'s hand and turned him toward the door. A.H. became very aggressive; the Respondent did not want A.H. to hurt him again or hurt anyone else. In particular, the Respondent was concerned about the dangerous materials in the classroom.[22]

The Respondent was unable to summon help using the intercom system because it had been broken by a student and was inoperable for at least a two month period. However, he did send two emails requesting that it be repaired and those were introduced as RVA-1 and RVA-2. Mr. Ajayi also denied that there was a security guard stationed on the third floor and he was unable to summon help utilizing the cell phone because of the suddenness of the attack.

The Respondent testified, *"A.H. was a disruptive and angry student who disrupted his class almost on a daily basis; he would not stay in his seat, he would throw things at students and he would touch students inappropriately."*[23]

The October 23, 2013, incident was a serious behavioral issue that arose with respect to A.H. walking around the classroom and being told by the Respondent to go back to his seat. A.H. suddenly became aggressive,

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[20] TR 3, 11:16-25
[21] TR 3, 12:1-10
[22] TR 3, 13:9-14:10
[23] TR 3, 17:19-18:3

Additionally, after the October 2013 incident, which caused A.H. to be suspended for several days, he was cautioned by Principal Ervin as to what potential consequences could befall him should he put his hands on Mr. Ajayi again. Among those was not only an administrative punishment directly related to his continued attendance at Cleveland Elementary School, but also the possibility of criminal charges being filed. Put succinctly, A.H. does not want to face these consequences.

The Respondent contends that it could be argued that the received warning would be a strong reason for A.H. to not confront Respondent in the first place, but a look at the facts presented by the case quickly dissolves this position. A.H. was, by all measures, an undisciplined and disruptive student who was not in firm control of himself. He was constantly out of his seat, disturbing and touching other students in class, and even admitted that his misbehavior in class included being too talkative and getting into fights. He was not doing well academically as evidenced by the March 14 letter. It is likely that rather than assuming a submissive stance when he was confronted by Respondent after he picked up the thrown candy, he adopted an aggressive posture and impulsively assaulted the teacher in the same manner as he had done before. Any admonitions issued by the Principal were long forgotten by the time he assaulted the Respondent.

A.H.'s testimony must be viewed with a jaundiced eye given his strong motivations to lie, but even absent those motivations, his testimony fails to contribute to the desired result sought by the District. His testimony simply does

not make common sense. A.H. would have us believe that after leaving his seat to retrieve a piece of candy which he requested be thrown to him by another student, the teacher repeatedly accused him of throwing the candy and then, without provocation, grabbed and twisted his right arm. As the teacher was moving A.H. toward the door in this fashion, a Child Study Team member entered the room at which point Mr. Ajayi released A.H. who was then escorted to the office. A.H.'s denial that as part of the interaction with the teacher he was asked to turn over the object is incredible. The Respondent, a seasoned teacher, could not have been interested the escalating the incident to the threshold of physical aggression and beyond. Mr. Ajayi had been punched and kicked by A.H. only a few months before, and the Respondent had been sent at least one (1) memo admonishing him to act with care and circumspection in handling students, as he had done in the past. It is highly unlikely that the Respondent, an educator of 15 years with an excellent record, wanted to subject himself not only to be beaten up again but also the possible administrative sanctions. Rather, *"It is far more likely that the teacher was interested in getting his students back on task after he was struck by the candy. The incident surely would have come to a conclusion if A.H. had been more cooperative and given the object to the Respondent."*

A.H.'s denial that he ever touched the Respondent during the March 27th incident seems most unlikely given his prior assault on the teacher, his constant acting out in class, and the aggressive posture he assumed in the exchange with the Respondent. If A.H. truly wanted to avoid a confrontation, he would have

been more respectful, cooperative and demure when Mr. Ajayi asked him whether he tossed the candy. Instead, A.H. acted to goad the teacher into a more serious encounter.

Moreover, A.H.'s admission that he learned his lesson from the October 2013 incident does not ring true. As the record established, *"A.H. was a daily source of frustration for Mr. Ajayi and he was an integral part of the chaos which all too often define a Seventh Grade Science class, which was the focus of this incident."*

H.A. testified that despite identifying A.A. as the person who threw the object to A.H., she did not actually see A.A. make the toss. Her own words require a very careful review of her testimony. She stated, *"We have this thing of getting into groups in class and talking about what happens during class. My friend kept saying, A.A., A.A., A.A. actually did see it was her so it was her."* [24] She also testified that she only knows who had thrown the object from what other people told her.[25]

The Respondent contends that the impact of this astonishing testimony is that it calls into question all other parts of her testimony pertaining to the description of the event. *"We simply do not know, nor can we determine, with any degree of certainty, what portion or portions of her testimony are based upon what she herself observed or what other students may have told her. This doubt makes all of her statement under oath unreliable. In short, her testimony as a corroborating witness deserves little, if any, weight."*

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[24] TR 2, 117:3-6
[25] TR 2, 117:7-11

L.S. testified that she did not give a statement as to what had occurred and that it was her mother who had reported the information. Her mother had found out what had occurred from A.H. She also testified that she never drafted any statement or gave any written statement to Ms. Ervin and only saw a statement that she was supposed to sign, but she never was involved with the drafting of that statement and never signed the statement.

The Respondent argues that the investigation conducted by Principal Ervin was flawed to say the least. The Principal did everything in her power to make certain that the investigation turned out exactly as she wanted and that the conclusions she reached were not as a result of a full, fair and neutral inquiry, but rather nothing more than a rush to the judgment of finding that the Respondent committed the assault alleged without conducting any kind of real analysis of the facts presented.

Support for this argument can be found in the fact that Mr. Ervin testified that she had supervised A.H. since the Fourth Grade and he was not, in her opinion, an aggressive child, even as a Seventh Grader, as were some of the other students in the classroom. She had come to this conclusion despite the fact that A.H. had punched and kicked the Respondent once before and had been suspended from school as a result. She further mistakenly assumed that A.H. had learned his lesson from the first incident and that based upon the conversation she had with him after the initial assault in 2013, *"A second time he did not swing or hit the Respondent."* Giving the Respondent's uncontroverted testimony that A.H. was disruptive on a daily basis, and A.H.'s admission that he

was often involved in fights, Ms. Ervin's opinion as to the non-violent nature of A.H. is clearly erroneous, and her reliance upon that mistaken opinion in coming to an investigative conclusion is misguided.

Secondly, the fact that Ms. Ervin came to the final conclusion that she did before the inquiry even commenced and based upon pre-conceived notions is evident from the cross-examination conducted concerning the method in which statements were taken from student witnesses and a comparison of those statements. The undisputed facts in evidence show that Ms. Ervin received information from students and she alone selected and then placed that information on paper, utilizing her own words and placing her own spin on what the students told her. Needless to say, that does not make for an accurate description of an event by a witness.

It actually provided the Principal what she was looking for to document a case against the Respondent. Moreover, she refused to admit that the statements taken by her were, to put it mildly, inconsistent. She took no codified statements from A.H., F.K. or A.A. instead incorporating their versions into her description of the incident, a narrative which again did not fit the way the incident actually occurred.

Third, and most egregiously, Ms. Ervin submitted a written statement into evidence as attributable to a witness who, in fact, did not give that statement. Under oath Ms. Ervin stated that she spoke with L.S., a student witness, after the incident and even though that statement was unsigned, it was consistent with the information provided by L.S. At the arbitration hearing, L.S. testified that she

never spoke with Ms. Ervin, but rather the factual version of the incident reflected in her statement was provided by her mother. This certainly calls into question what the Principal testified to as to L.S., but based upon the legal principle of false in one, false in all.

Accordingly, the Respondent asks that Ms. Ervin's testimony should be discounted in its entirety.

Mr. Ajayi's testimony of what had occurred on March 27, 2014, makes the most sense of any testimony adduced at the hearing. He testified that after he was hit with an object, he asked for the object and A.H. refused to give it to him, and while he was standing A.H. adopted an aggressive posture as he had done in the past. He shoved the Respondent who fell back. As previously indicated, fearing that the matter would escalate and creating a danger to himself and other students in the classroom, especially in light of the chemicals, breakables and equipment present, the Respondent took hold of A.H.'s hands and tried to move him toward the door in an effort to eject him from the class. A.H. resisted and given the speed in which the situation had developed, the broken intercom, the unavailability of his own cell phone, this was the Respondent's best and only alternative. A.H. broke free and struck the Respondent at least twice in the left side and the Respondent's fear of being punched, kicked or worse, was realized. He again grabbed A.H. to protect himself, his students and to continue to remove A.H. from the class when the Child Study Team member entered and the incident came to a conclusion.

Under the statute, N.J.S.A. 18A:6-1, the Respondent had the absolute right to employ the minimum amount of force, which he did exert upon A.H. to not only quell the disturbance which the student created, threatening physical injury to others, but to protect himself and the rest of his class from personal injury.

Given the circumstances in the case in the instant matter, the Respondent's actions in taking control of the situation were more than reasonable as he utilized a minimal amount of force to halt the attack with no resulting harm to A.H., himself or anyone else. There is absolutely no indication that Mr. Ajayi's actions were retaliatory in nature. The Respondent argues that it has been held that the exertion of physical control over an insubordinate and insulant pupil in order to quell a disturbance is not unreasonable and not in violation of N.J.S.A. 18A:6-1. In support of that, the Respondent references the tenure hearing of Calabrese, Ridgefield, C.D. 304-82, 29 Oct. 82.

The Respondent contends that in the case at bar, his actions were reasonable and should not be held illegal. Additionally, the Respondent's lack of disciplinary history and his service to the District, including exemplary evaluations and certificates for attending a variety of different training programs, establish that this is not a case where the Respondent decided that he was going to retaliate against A.H.

For all of the above reasons, the Respondent argues that the District has failed to prove the tenure charges brought by preponderance of credible evidence. Petitioner's proof do not establish that the allegations contained in the tenure charges are more probable than not, nor does its evidence carry the

power to convince. Stated another way, the case against Respondent does not permit a finding of either conduct unbecoming a public school teacher or engaging in a pattern of such conduct grounded in probability supported by common experience and, hence, should fail.

The Respondent asks that he be returned to work with full back pay and all emoluments of employment.

**DISCUSSION AND OPINION**

Both parties insist that the fact pattern in evidence clearly establishes that their positon is correct concerning the instant matter. However, the unique facts of each case can and do control how a particular set of tenure charges filed against a teacher will be adjudicated. The facts in evidence clearly and unequivocally establish that both parties have flawed positions. The most damaging position for the Respondent is the November 21, 2013, memo from Principal Ervin concerning student complaints. In that document, Mr. Ajayi was admonished for putting his hands on students. (see RVA-18/ D-8) Principal Ervin stated,

*"...Please refrain from touching your students since you have not established a rapport that will allow you any kind of physical contact. Effective immediately, you are to send students to the office as you have done since the beginning of the school. In addition, you are to contact the office to send security for students that refuse to leave as the Principal, Vice Principal, Chief Innovative Office, Guidance Counselors and Social Workers and all three Security Guards have escorted students from your class in the past without incident."*

Yet, despite that admonition, a situation occurred five months later, on March 27, 2014, dealing with the Respondent putting his hands on AH.

The major flaw in the Petitioner's position is the improper investigation conducted by Principal Ervin. Even though the Principal interviewed some of the students who were in the classroom at the time of the incident, the students did not submit any written statements. Principal Ervin indicated in her testimony that many times our students do not read and write well. Therefore, she asked them what occurred and she wrote down everything they told her.[26] Unfortunately, from what was said to what was written down, there was a gap based upon the testimony of those students, which will be discussed below.

The most egregious of the interviews conducted by Principal Ervin was the interview with student L.S. That document was introduced but was unsigned. The student testified on March 31, 2016, and the incident occurred on March 27, 2014, almost two years before her testimony.

L.S. testified that she never met with Principal Ervin and, in fact, A.H. told her mother about the incident and her mother reported it to the school officials.[27] Therefore, Exhibit D-7, which is the witness statement submitted by Principal Ervin on March 27, 2014, can't be utilized in these proceedings because, as testified to by L.S. she never gave the information to the Principal.

The introduction of D-7 does a lot of damage to the credibility of Principal Ervin because she tried to introduce a document that was fraudulently obtained. There is no signature on the document, and as L.S. testified, she never met with the Principal. Therefore, the only way the students' version of what occurred

[26] TR 2, 69:2-7
[27] TR 2,, 124:1-20

must come from the testimony in the record as testified to at the hearing and recorded by the court reporter.

While Principal Ervin is well meaning, she is not an investigator; there was nothing introduced to show that she is a trained investigator and, more importantly, she still remembers A.H. as a very nice, non-aggressive fourth grade student. Unfortunately, we are dealing with a seventh grade situation where, based on the October 2013 incident, he was aggressive. She admonished him about his aggressiveness and warned him about the potential consequences of his continued aggressive behavior. It is apparent that while he believed he was paying attention to Principal Ervin's admonitions, what happened on March 27, 2014, clearly establishes he ignored what she told him might occur if he continues with his errant behavior. Nevertheless, A.H. testified *"that he was disruptive in class and did get into a lot of fights in the classroom."*[28]

Petitioner Exhibit 8, introduced as D-8, which is a November 21, 2013, memo from Principal Ervin to the Respondent. The Respondent was assaulted by a student and, yet, no legal action was taken against the student. The record is devoid of the Respondent filing a grievance or a police report about the incident. The record is also devoid as to any legal action Principal Ervin took against A.H. Nevertheless, another situation occurred of a physical nature approximately five (5) months after the memo from Principal Ervin to the Respondent. I have a difficult time accepting the Respondent's argument that his action in the instant matter was nothing more than self-defense. He is the responsible adult, the teacher in charge of that class. Even though the record

[28] TR 1, 29:1-4

clearly and unequivocally establishes that the intercom was not working, he could have used his cell phone, he could have asked for assistance from the Child Study Team members whose office was next to his classroom, or he could have sent a student to the office to request assistance in the room. Even though it is probably unpopular and not a good idea to have a student walking through the corridors, in that existing emergent situation, that was a viable option, but Mr. Ajayi did not take advantage of any options other than of a physical nature. If Mr. Ajayi was so concerned about the safety of other students and about how difficult A.H. was in his classroom, there is nothing in the record to establish that he had A.H. removed or recommended for assistance by the Child Study Team, or recommended that A.H. have counseling. If that did occur, it is not in the record, and most importantly, it should be in the record.

Referencing the October 23, 2013, incident, the Respondent had an obligation to pursue the matter because he was assaulted by a student. The record is unclear and, in fact, there is no record as to why he did not pursue any legal action against A.H. or request of the Principal for legal action to be taken against A.H. That has to be on Mr. Ajayi. Mr. Ajayi had an opportunity back in October of 2013 to begin to address the aggressiveness of A.H. and he failed to do so. That failure escalated into the March 27, 2014, incident.

The testimony of the students in the record is varied at best and, in fact, there is no clear, consistent testimony as to what actually occurred in Mr. Ajayi's Science classroom in Cleveland Elementary School on March 27, 2014, except the physical altercation between Mr. Ajayi and A.H.

A review of the testimony in the record shows the following:

A.H. testified that he asked another student in the class to throw him a piece of candy which the student did and that candy ultimately hit Mr. Ajayi and landed at his foot. He went to pick it up and that is when the altercation with Mr. Ajayi occurred. *"Mr. Ajayi came over to my seat and said that I threw it. I said I didn't throw it." He put his arms like this, his hand on my arm and flung me on my chair. That is when I went back to my seat to get my stuff so I could go downstairs and tell them he just did this.* [29] He also testified that a Child Study Team member came in and took him to the Principal's office.[30]

H.A. testified that there was a juice box thrown at Mr. Ajayi, but it did not hit him.[31] "*Mr. Ajayi thought it was A.H. who threw a juice box and told A.H. to get out of the class. A.H. said no because he did not throw the juice box. Mr. Ajayi got really impatient and grabbed A.H. by his left arm and tried to take A.H. out of the classroom.*"[32] Additionally she stated that *"A.H. was standing at our table and he grabbed him by his left arm and kept pushing him towards the door."* [33] She also testified that the security guard came into the room to see what had been occurring and escorted A.H. out of the room.[34]

L.S. testified that a piece of candy had been thrown and hit Mr. Ajayi in his head.[35] "*He thought A.H. had thrown the candy and he kind of got mad at A.H. and grabbed his shirt and like lifted him up and stuff. Then A.H. tried to get*

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[29] TR 1, `14:5-12
[30] TR 1, 14:1-21
[31] TR.2, 110:3-6
[32] TR 2, 110:14-24
[33] TR 2, 111-23-25
[34] TR.2, 119:12-19
[35] TR.2, 122:13-20

*away. He grabbed his wrist and then A.H. tried to get away again and he twisted here."* [36] Furthermore, she testified that A.H. slammed the door when he left and she guessed he was going to the office.[37]

Mr. Ajayi testified that an object was thrown and hit him, but he never identified whether it was a piece of candy or a juice box. He did testify that he asked A.H. if he threw the object and A.H. said no. He then asked him three times to give him the object and A.H. refused to do so.[38] Furthermore, Mr. Ajayi testified that two (2) Child Study Team members came into the room when they heard the commotion and they took A.H. out of the classroom to the Principal's office.[39]

Clearly, the above record shows that while there is no consistency as to the genesis of what had occurred that led to the physical altercation between the Respondent and A.H., the common denominator is that the Respondent put his hands on A.H. and began to push him towards the door. However, whether it was a juice box or a piece of candy, an object was thrown and it hit the Respondent. Mr. Ajayi asked A.H. if he threw it, and the response was *"no, I did not."* He asked A.H. for the object and A.H. refused to give it to him. At that point in time, A.H. was being uncooperative and was challenging the Respondent's authority. He pursued the matter by refusing to give the object, whether it was a juice box or a piece of candy to the Respondent. The Respondent, as previously indicated, had options but chose not to utilize those

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[36] TR 2, 121:18-24
[37] TR.2, 123:7-13
[38] TR.3, 11:1-15
[39] TR.3, 36:12-23

options, and the next thing the record establishes is that a physical confrontation occurred. The record establishes from A.H., L.S. and H.A. that there was a physical confrontation and none of them could corroborate the Respondent's testimony that he fell back as he testified to. The Respondent testified that the aggressor in this entire matter was A.H. but the student testimony belies that comment.

A.H. testified that Mr. Ajayi never asked him for the object that had been thrown.[40] None of the other students testified as to whether or not Mr. Ajayi asked A.H. for the object that was thrown (we are addressing a piece of candy and in A.H.'s version it was a Reese's Peanut Butter Cup), but they do recall Mr. Ajayi asking A.H. if he threw the object. The person who threw the piece of candy, who has been identified as A.A. was not a witness at the arbitration hearing. That person was also a student in Mr. Ajayi's seventh grade Science class at Cleveland Elementary School.

We have in the record varied testimony as to how the altercation occurred. Mr. Ajayi testified that A.H. was the aggressor, and students testified that Mr. Ajayi became mad and upset that something had been thrown at him and he wanted A.H. out of his classroom. The alleged verbalization between A.H. and the Respondent was not clearly identified by the students who testified. Therefore, the students were not aware if Mr. Ajayi asked A.H. for the piece of candy on three separate occasions and if that led to Mr. Ajayi asking A.H. to leave the class.

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[40] TR.1, 34:13-16

A.H. testified that he wanted to leave the class, but he wanted to get his stuff and Mr. Ajayi would not let him get his stuff. That contradicts his statement when Mr. Ajayi asked him to leave the class. We do have in the record that Mr. Ajayi was reprimanded and admonished by Principal Ervin for touching students. That is clear, that is concise, and that is not refuted. The November 21, 2013, (see RVA 18/D8) memo from Principal Ervin to Mr. Ajayi was never challenged by Mr. Ajayi. He accepted at face value all of the words in that document which include, *"Twice in the last three days, we have met to discuss complaints from students."* Those complaints dealt with Mr. Ajayi grabbing a student and twisting her arm, and another student telling the Principal that he yoked him up when he refused to give him his basketball that another student was bouncing. That definitely shows the Arbitrator that Mr. Ajayi has a temper and that temper has to be controlled.

Moreover, the Respondent's argument that because the two (2) students, R.H. and T.E., did not testify all references to them cannot be utilized by the arbitrator. However, the legal argument of voir dire is now a component of the matter at bar. The November 21, 2013, (see RVA-18/D-8) memorandum from Principal Ervin to the Respondent was never challenged by Mr. Ajayi. The only logical conclusion to be drawn from his lack of action is that he accepted and agreed upon all of the words in that exhibit including the admonition from Ms. Ervin. Accordingly, the Respondent's argument about R.H. and T.E is set aside.

However, there are some documents in the record that establish that Mr. Ajayi had training on how to deal with these specific instances, but apparently he forgot what was addressed in the training sessions.

RVA-157 is part of the Respondent's documents, and it is a professional development document which indicates that on April 21, 2004, Mr. Ajayi attended a program entitled Non-Violent Crisis Intervention Training. The purpose of this workshop is to provide techniques and methods to diffuse explosive behavior and handle threatening or challenging situations. Mr. Ajayi was trained in how to deal with the situation on October 23, 2013, and March 27, 2014, and he failed in both instances. He resorted to physical confrontation. With this program, it is probably designed not to allow that to occur.

Additionally, RVA-162 is another professional development training certificate that Mr. Ajayi received for a training program, dealing with challenging behavior in young children, understanding and preventing and responding effectively. The purpose of that program was to identify challenging behaviors in children and learn effective strategies and techniques to prevent and respond to these behaviors in the classroom. That was dated March 25, 2004. Again, Mr. Ajayi did not utilize what he learned at that training session.

Finally, RVA-167, dated November 17, 2003, was another training program which was to deal with the implementation of the IEP maintaining a balanced curriculum. The purpose of that was to enhance the ability to create positive educational environments that are effective for teaching and learning in

the classroom. What happened on the October 2013 and March 2014 incidents clearly was violative of this program.

While an argument can be made that no IEP was presented in the documentation with this case, it is important to review the testimony of Principal Ervin about the Samuel Berliner School. *"The Samuel Berliner School is a special needs school that addresses behavioral problems of children. Students are evaluated and classified based upon academic and/or behavioral needs. That is a school where students whose behavior has exceeded what can be handled in a general education school. They are placed in Samuel Berliner for multiple disruptions, and it is the next step before we do an out-of-district placement or anything like that. It is a school for children who are consistently disruptive, consistently physical and consistently keeping other kids from learning."*[41]

Mr. Ajayi's previous assignment was a school dealing with disruptive children, and Principal Ervin interviewed Mr. Ajayi for the position at Cleveland Elementary School and she accepted him to be a member of her teaching staff knowing full well what his background was and apparently wanted that type of a background in her classroom. There is nothing in the record to suggest that she did not want that type of academic background and/or school environment for one of her teachers.

She also testified that part of her responsibilities were to observe on a daily basis the educational program that was occurring in each classroom and when she would go into Mr. Ajayi's classroom, she observed students calling out,

[41] TR.2, 102:1-25

walking around, not participating in class, instruction that did not pull the students into the lesson. Generally, a disruptive classroom.[42] The record establishes that Mr. Ajayi was having a difficult time addressing the needs of A.H. within that classroom and in fact had a difficult time addressing the needs of a student on January 27, 2014, (see RVA-170) who could not control herself when she came into the classroom and ultimately ended up by pulling the intercom ear piece and receiver causing them to snap. That resulted in the intercom being inoperable, and the record also reflects on February 7 and 24, 2014, Mr. Ajayi did make a request for the intercom to be repaired and that did not occur.

As required by statute, Principal Ervin referred the March 27, 2014, incident to the Department of Children and Families (DCF). They conducted an investigation and on May 7, 2014 submitted their findings. They determined that no adjudicated findings have been made. The DCF Institution Abuse Investigation Unit review herein is solely investigative. They also indicated *"[T]he appropriate licensing or supervising authority may take additional action as a result of this investigation."* As a result of that investigation, the Newark Public Schools Talent Office/Employee Services Division conducted an internal investigation of the March 27, 2014, incident. In the report dated April 27, 2014, and signed by Michelle Takyi, Manager of Compliance and Tenure, it was determined that even though the matter had been referred to DCF and they returned a finding of not established, the internal investigation conducted by Mr. Takyi showed that Mr. Ajayi did not follow school policy and that based upon the March 27, 2014,. incident, tenure charges should be pursued against Mr. Ajayi.

[42] TR.2, 26:6-25

A state agency made the investigation as required by statute and determined that based upon the evidence in the record, the students *"are not abused children as defined by statute. Therefore, the charges against Mr. Ajayi were determined not to be established."* The definition of not established from the Department of Children and Families (see Exh. RVA-21) states, *"There is not a preponderance of the evidence that the child is an abused or neglected child by definition, but evidence indicates that the child was harmed or placed in harm."* That alone was the basis for the District to pursue the tenure charges because they believe that A.H. was harmed.

The documentation in the record establishes that there is no clear concise testimony to determine who was the aggressor in the March 27, 2014, incident. However, the record is clear that Mr. Ajayi has had a problem with students in the past while he was at Cleveland Elementary School. There is nothing in the record to substantiate that he was in violation of District policies or that there was any inappropriate physical contact with students while he was at the Samuel Berliner School. Nevertheless, at Cleveland Elementary School there were at least three incidents of him inappropriately touching students and being physical with students. Even after receiving an admonition in November of 2013, he continued with his errant ways as evidenced by the March 27, 2014, incident. Corporal punishment is not allowed in the State of New Jersey and in accordance with N.J.S.A. 18A:6-1, Mr. Ajayi may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell disturbance, threatening physical injury to others; (2) to

obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil; (3) for the purpose of self-defense; (4) for the protections of persons or property.

I don't find that any of those above-mentioned standards have been met by Mr. Ajayi. I can't reach the conclusion that it was self-defense based upon the testimony of the student eye witnesses. The Respondent was annoyed that he had been hit by an object, which by the testimony of A.H., H.A., and L.S. was not deliberately thrown at Mr. Ajayi. Think of the enormity of that incident.

Mr. Ajayi, the responsible adult entrusted with the care of children, lost his temper was irate and became physical with A.H. There was no threatening physical injury to others; there was no possession of a need to obtain a weapon or other dangerous object, and the protection of persons or property because he was in a Science lab is far-fetched. The entire case that Mr. Ajayi presents is circumstantial at best. What the Respondent does not address is that once he touched A.H., the student resorted to self-defense.

Therefore, it is appropriate to review the charges to determine if Mr. Ajayi was in violation of what is expected of a classroom teacher and if he was in violation of conduct unbecoming or other just cause.

**Charge Number One**: Mr. Ajayi is accused of failing to exercise self-restraint and controlled behavior and using unnecessary and inappropriate physical contact in dealing with a student. Mr. Ajayi is accused of conduct unbecoming or other just cause warranting his dismissal.

Mr. Ajayi did not exercise self-restraint. The question is should that require his termination or is there another appropriate remedy? The District has met its burden of proof in Charge Number One, and it is sustained.

**Charge Number Two:** Mr. Ajayi is accused of inflicting corporal punishment upon A.H. The Petitioner is accusing Mr. Ajayi of inappropriate and unprofessional conduct, and they were sufficiently flagrant and egregious to warrant termination.

The District has met its burden of proof in Charge Number Two, and it is sustained.

**Charge Number Three:** Mr. Ajayi is accused of committing an assault and battery upon A.H. and he is accused of inappropriate and unprofessional conduct and placed A.H. at risk of physical and emotional harm, and he is accused of egregious conduct that warrants his termination.

The District has met its burden of proof in Charge Number Three and it is sustained.

**Charge Number Four:** Mr. Ajayi is accused of acts of misconduct described above, jointly and severable, which demonstrates a series of infractions, constituting a pattern of conduct unbecoming and/or just cause warranting Mr. Ajayi's dismissal and reduction in salary.

The District has met its burden of proof in Charge Number Four, and it is sustained.

**Charge Number Five:** Mr. Ajayi is accused of violating N.J.S.A. 18A:6-1.

The Board repeats what they have previously indicated on the other charges.

The District has met its burden of proof in Charge Number Five, and it is sustained.

There is no question that Mr. Ajayi has had inappropriate physical contact with students since he has been at Cleveland Elementary School. He started at Cleveland Elementary School in September 2013, and in October 2013 he was admonished by the Principal on two separate occasions of inappropriately touching students and actually grabbing a student and twisting her arm behind her back. No action was taken against Mr. Ajayi at that time. One has to wonder, why not? Why was there no action taken against Mr. Ajayi at that moment or why was that incident not sent to DCF as was the March 2014 incident.

This is not a simple matter where Mr. Ajayi states that it was self-defense. How could it be self-defense if we are dealing with a 15 year old student who was at the arbitration hearing the first day and did not appear to be a 250 pound student? I have no idea why Mr. Ajayi was saying it was self-defense. Mr. Ajayi was remembering what had occurred in October 2013 and was fearful. There is no report that he was fearful. There is no report to the Newark Police Department that he was fearful for his life or fearful for his safety or fearful for his well-being. There is nothing to that effect. We have a situation where Mr. Ajayi had been trained on how to deal with this type of incident and ignored that training.

Mr. Ajayi's pattern of conduct since October 2013 put him in harm's way. Discounting the incidents with F.K. and R.H there are still two (2) incidents of physical contact with the same student. Had the October 2013 or March 27, 2014, incidents been a stand-alone a different result would have been obtained.

For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award:

## AWARD

The District has met its burden of proof in all five charges. Mr. Vincent Ajayi is guilty of corporal punishment and conduct unbecoming a teacher and shall forfeit his teaching position in the State-Operated School District, City of Newark.

Dated: May 31, 2016

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 31st day of May, 2016, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

210-16

STATE OF NEW JERSEY

COMMISSIONER OF EDUCATION

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IN THE MATTER OF THE TENURE HEARING OF

FELICIA A. PUGLIESE

AND

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

Docket No. 272-9/12

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Hearings were held in the above-entitled matter on November 20, 2012, December 5, 2012, and January 3, 2013 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witness and to present evidence and arguments. The Arbitrator issued an Award and Opinion, dated February 15, 2013, upholding the tenure charges against Respondent and granting the Petition of the State Operated School District of the City of Newark, Essex County.

criteria using all of the arguments and proofs previously submitted, as augmented by the subsequent written submissions of counsel for Respondent and for the District.

After the parties submitted briefs and reply briefs to the Arbitrator following the Appellate Division decision, the Arbitrator reviewed the evidentiary record in conformity with a mandate of the Appellate Division decision. The Arbitrator has complied with the instructions of the Appellate Division and of the Commissioner of Education, having revisited the record of the instant case, and reevaluated the testimony and other evidence as if the matter had been addressed solely under the previous tenure statute. The following Opinion and Order reflect this reconsideration.

## APPEARANCES

For Petitioner, State Operated School District of the City of Newark, Essex County:

Brenda C. Liss, Esq., of Riker, Danzig, Scherer, Hyland, and Perretti, Esqs.

For Respondent, Felicia A. Pugliese:

Richard A. Friedman, Esq., of Zazzali, Fagella, Nowak, Kleinbaum and Friedman, Esqs.

## OPINION

In the original Award issued in this matter on February 15, 2013, I discussed the Respondent's inability to demonstrate that the District's imposition of tenure charges terminating her employment had been arbitrary and capricious, the standard imposed by the new TeachNJ statute. Following the Appellate Division's remand of the instant matter to the Commissioner of Education for clarification and the Commissioner of Education's subsequent referral of the case back to this Arbitrator for reconsideration pursuant to the Appellate Division's decision, the undersigned Arbitrator reviewed the record and applied the standards in effect prior to the implementation of the TeachNJ statute. Under the prior statute, the District unequivocally bears the burden of demonstrating by a preponderance of the evidence that an Employee's teaching performance as been ineffective or inefficient in two successive school years. The District has met that burden in the instant case.

The evidentiary record submitted by the District established by a preponderance of evidence that the Respondent was chronically unable to control her class after she received an assignment to teach in a setting other than the more structured computer learning center where she had previously been assigned. The record further established by a preponderance of evidence that Respondent was chronically unable to research social studies topics, assemble and transmit appropriate curriculum related materials, formulate

lesson plans addressing the various skill and ability levels of her students, or consistently deliver to her students meaningful and engaging instruction covering the curriculum tailored to reach the various levels of students within each class. That many of the students in Respondent's classes suffered from manifest deficiencies in their prior educational preparation was also established by the evidentiary record. This circumstance has been incorporated into the Arbitrator's analysis.

Although the individual characteristics of her students may have presented formidable challenges to Respondent and thus complicated adequate performance of her duties, the District's negative evaluation of her performance relied, in a large measure, on her inability to organize her lessons or to formulate effective strategies for addressing the multiple student skill levels within her assigned classes. Respondent was not measured solely, or even primarily, on what her students learned given their individual characteristics and learning skills; she was not required to bring her students up to grade level understanding of the social studies curriculum. Respondent was judged on what material she presented to her students in order to motivate them to grasp the subject matter at each stage of the Social Studies Curriculum and how she presented the material.

After receiving satisfactory ratings during the years she taught language arts in a computer-based instructional setting to students whose classes came for a single period while their classroom teachers were afforded a preparation period, Respondent was reassigned to teaching in a full classroom setting, where she was required to prepare lessons for multiple levels of learners within each class. The evidentiary record established that this additional teaching burden, rather than the nature of the subject matter, was the primary cause of Respondent's failure to perform satisfactorily.

After reconsideration of the record, the Arbitrator concludes that the District has established persuasively by a preponderance of the evidence that the District has satisfied its burden of demonstrating that, despite multiple supportive interventions by District personnel, including Master Teachers, in repeated interactions and evaluations over a two-year interval, including during administration of a Professional Improvement Plan designed to address her weaknesses, the Respondent's performance did not improve significantly, nor did she adequately convey the subject matter in a meaningful way to her students, or demonstrate any foreseeable likelihood that her performance would improve with additional support. At issue is whether the procedural and substantive affirmative defenses interposed by Respondent invalidate the tenure charges and preclude terminating Respondent's employment.

Counsel for Respondent argued at the original hearings, and in the briefs filed after the Appellate Division decision remanded the matter for reconsideration, that Respondent had been illegally assigned to the classroom duties for which she was evaluated as ineffective because she was not rated "Highly Qualified" as required by the No Child Left Behind Act. Counsel further asserted that Respondent was not afforded a statutorily mandated Professional Improvement Plan (PIP) for the full ninety-day interval required by the then applicable statute, nor was she afforded an opportunity to participate in the formulation of this plan. In addition, Counsel asserted that the resources afforded to Respondent in connection with her Professional Improvement Plan were inadequate, as they were neither individualized nor created or provided solely for Respondent's benefit. On the basis of these procedural defects, Counsel contends that the decision to terminate Respondent's tenure and employment was unjust, improper, and illegal.

Respondent asserted that, based on her licensure, her assignment as a social studies departmentalized teacher was illegal, and thus any less than satisfactory performance ratings that she received for work performed in this assignment could not form a legitimate basis for tenure charges. Respondent further asserted that her assignment to teach social studies to elementary students violated both her licensure and the legal requirements established by the No Child Left Behind statute (NCLB), because Respondent had to be rated Highly Qualified to teach social studies in a departmentalized elementary

school setting. This argument did not demonstrate a valid basis to invalidate the disputed assignment.

Teachers at the high school level must be certified as "Highly Qualified" to teach in their area of specialization, as defined by state statute and by No Child Left Behind (NCLB). Therefore, assigning a teacher in a departmentalized high school setting to teach outside of the area in which the teacher is subject matter certified and has been deemed Highly Qualified is patently improper, and such an assignment would preclude negative evaluations based on sub-standard performance in such an assignment. Respondent asserted that a similar prohibition governs at the elementary school level. This is not the case. Moreover, Respondent could properly have been assigned under her licensure to teach all elementary core subjects, including social studies, in a non-departmentalized elementary school setting.

According to the testimony, the student population Respondent was assigned to teach in her social studies classes required focused assistance in reading and absorbing social studies lessons and assignments, some at rudimentary levels. These deficiencies in reading and comprehending written social studies materials were within the Grievant's area of expertise to address. Grievant's skill and experience as a language arts teacher could have enhanced her ability to help her students understand appropriate social studies-related course materials, tailored to meet their reading comprehension levels, which

should have been selected by Respondent from resources provided by the District.

The elementary school level Social Studies Curriculum requires that a teacher possess a general knowledge of history, government, sociology, and other related topics sufficient to understand and implement the curriculum. Respondent argued that she was improperly and illegally assigned to teach elementary school social studies because she was a sociology major in college, rather than a history, government, or social studies major. Although sociology is arguably only a minor component of the elementary school level social studies curriculum, nothing in the evidentiary record of the instant case outweighed the District's assertion that a former sociology major can grasp and convey the social studies curriculum intended for transmittal to elementary school students. Gaining command of such material may be less challenging for a former history or government major, but neither the NCLB law nor New Jersey statute then in effect expressly limited Highly Qualified designations for teaching social studies to those majors. Therefore, the nature of the material to be presented did not disqualify the social studies assignment in which Respondent was evaluated as complying with the legal standards applicable under state statute before the implementation of TeachNJ. Neither does the No Child Left Behind Act mandate such a result. Consequently, the nature of the subject matter she was assigned to teach in 2010-11 and 2011-12 does not mandate dismissal of the tenure charges.

Credible testimony by the Building Principal and other District witnesses, which was not effectively rebutted by Respondent, established persuasively that Respondent was invited to participate in the formulation of her Professional Improvement Plan, or to add input concerning the parameters of the PIP, but elected not to avail herself of this opportunity. Consequently, this aspect of the alleged District's defective procedure for assisting Respondent must be discounted.

In addition, Respondent contended that the truncated length of the mandated ninety calendar-day PIP interval, which was at most eighty-seven days long, was fatally deficient. Different interruptions may arise during a ninety-day PIP interval-- including teacher absences, intervening spring or winter recess, or other variables--that reduce actual classroom teaching time and student contact during the ninety calendar-day PIP interval. That several of the days during Respondent's PIP interval were devoted to standardized testing or to packing up classrooms in anticipation of the school year ending and the school closing, as Respondent asserted, did not invalidate the interval for several reasons. Students may also be focused on non-academic activities at other times during the school year; for example, in preparation for a holiday seasonal assembly, on field trips, or rehearsing for a dramatic production. The statutory ninety calendar-day plan length is intended to provide a long enough interval for a deficient teacher to absorb and integrate advice and suggestions, to address her deficiencies with expert assistance and support, and to

demonstrate significant observable improvement in teaching performance before the expiration of the interval.

Moreover, the truncation of the ninety-day PIP interval by three days in the instant case was attributable to Respondent's refusal to meet with school administrators formally to accept and discuss tenure charges because her Union representative was not available at work on those days. Respondent was certainly entitled to Union representation, and no adverse inference can be, or has been, drawn from her insistence on waiting until such representation was available. Nevertheless, an employee cannot unilaterally precipitate an entitlement to an additional year's employment simply by delaying the meeting at which tenure charges are to be delivered or a PIP is to commence until fewer than ninety days remain in the school year. Ceding such leverage to an individual teacher would be untenable and contrary to the intent of the statute establishing the requirement of remedial assistance through a Professional Improvement Plan. Consequently, if the PIP was properly created, and if the school administration provided the requisite support materials, evaluations, feedback, and opportunity for Respondent to demonstrate improvement, the loss of three days would not invalidate an otherwise proper PIP interval.

Respondent did not demonstrate significant improvement in her performance during the eighty-seven day interval. Thus, the three extra days would not have altered the outcome. However, the District failed to provide

tailored support for Respondent throughout the PIP interval, as the testimony established that no Master Teacher or other supporting expert assisted Respondent in improving her classroom performance after mid-May of the 2011-12 school year. The evidentiary record established that no remedial help was provided to Respondent after May 9, 2012, creating a potentially material defect in administering the PIP as required under pre-TeachNJ standards.

Although it was unlikely that Respondent would have been able to improve her ability to identify resources, implement multi-level lesson plans, and control her classroom to provide focused and appropriate activities and lessons for her students to an acceptable level even with such additional coaching, the District's failure to provide substantial assistance for almost half the PIP interval constituted a significant defect in the PIP process.

Respondent has not established as affirmative defenses that she was illegally assigned to the classroom duties for which she was evaluated as ineffective, or that she did not have an opportunity to participate in the formulation of her Professional Improvement Plan, or that the length of the plan was fatally deficient. Thus, the critical factors determining the outcome of this reconsideration of the prior record using the pre-TeachNJ standards are whether Respondent was deprived of remedial support to which she was legally entitled throughout the PIP interval and whether such defect materially affected the outcome of the instant case.

The District has the burden of demonstrating not only that Respondent was unsatisfactory as a teacher, but also that a meaningful Performance Improvement Plan, personalized to address Respondent's weaknesses, had been developed, implemented, and staffed by qualified support personnel. The District's failure to provide supervision and supplemental support after May 9, 2012 potentially eroded the essential purpose of the PIP. However, if Respondent believed additional direct assistance by the Master Teacher or other support resources provided by District officials would have been helpful in improving her performance, Respondent could have demanded more assistance from the Master Teacher and from her Principal or reached out for other District support services after May 9, 2012. The record did not establish to the Arbitrator's reasonable satisfaction that Respondent clearly requested such additional assistance and was rebuffed. No grievance was filed, nor did she enlist her Union's assistance to rectify this situation.

In evaluating the total context of the continued sub-standard caliber of Respondent's teaching performance throughout the PIP interval, the Arbitrator cannot ignore the help Respondent received during her Professional Improvement Plan in determining the weight to be afforded the insufficient level of remedial assistance provided Respondent after May 9, 2012. The preponderance of the evidence demonstrated to the Arbitrator's reasonable satisfaction that the limited interactions between Respondent and the Master Teacher assigned to assist in improving Respondent's performance and other

resources provided by the District did not significantly impair Respondent's ability to demonstrate satisfactory teaching during the PIP interval. Given Respondent's election not to participate in crafting the Professional Improvement Plan and her inability to improve her performance during the 2012 PIP interval, the District's failure to provide more adequate assistance after May 9, 2012 was not a material defect in the Professional Improvement Plan invalidating the tenure charges solely on the basis of diminished Master Teacher interaction or insufficient provision of other support resources provided to Respondent after May 9, 2012. Therefore, the District met its minimum burden regarding the PIP. A different conclusion might apply in the case of a teacher who demonstrated discernible improvement before remedial help was diminished or discontinued.

This conclusion did not shift the burden to demonstrate non-compliance to Respondent, but recognizes that Respondent showed no discernible improvement during the first half of the PIP, when the District provided her at least the minimum required level of remedial assistance. The District established by a preponderance of the evidence that Respondent chronically and persistently failed to respond to the support that was offered before or during the PIP interval or to show any discernible improvement in her classroom performance during the first half of the PIP interval. Thus, absent any clearly articulated demand for more help from Respondent or any noticeable improvement in her teaching, the perfunctory support afforded to

Respondent during the second half of the Professional Improvement Plan interval did not invalidate the District's compliance with the PIP requirement then in effect.

The District demonstrated by a preponderance of the evidence, as required by then applicable statute, that Respondent's pedagogical skills--particularly effective lesson planning, classroom control, and coordinated presentation of multiple levels of curriculum-related tasks—consistently failed to satisfy minimum standards of teaching competence in her classes during two school years. The shortcomings repeatedly cited, and persuasively demonstrated, by the District as evidence of Respondent's teaching inefficiency involved her persistent inability to control her class or to craft and deliver lessons suitable for the multiple learning levels of students in her classes. The District has met its burden of evaluating Respondent's performance under the pre-TeachNJ standards, demonstrating by a preponderance of the evidence that Respondent was an unsatisfactory teacher in 2010-11 and 2011-12. Although Respondent has argued that a less stringent penalty, consistent with progressively severe discipline, is more appropriate than termination, the evidentiary record did not justify returning to the classroom, to the detriment of the District's students, a teacher whose pervasive shortcomings have been amply demonstrated.

## ORDER

Based on the Arbitrator's reconsideration of the evidence and arguments submitted by the parties in the instant matter, applying the standards for deciding tenure charges in effect under the statutes and regulations in effect prior to the implementation of the TeachNJ statute, Petitioner State Operated School District of the City of Newark has demonstrated by a preponderance of the relevant evidence that the tenure charges brought by the District against Respondent Felicia Pugliese should be sustained. I so order.

June 8, 2106
Princeton, NJ

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 8th day of June, 2016 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

211-16

| | | |
|---|---|---|
| MARGARET WICKS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured teacher employed in respondent's school district since 1990 – appealed the determination of the respondent Board to withhold her salary and adjustment increments for the 2013-2014 school year. This action was taken following an investigation of a June 2013 parental complaint that resulted in a letter of reprimand for unbecoming and unprofessional conduct. Petitioner had previously received a letter of reprimand in 2012 for engaging in inappropriate behavior toward another teacher in the presence of students. Petitioner contended that she received exemplary performance reviews for the 2012-2013 school year, and that the Board's action was arbitrary, capricious, unreasonable, and contrary to legal precedent. The Board asserted that petitioner's increments were appropriately withheld pursuant to *N.J.S.A.* 18A:29-14. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary decision; the Board properly considered petitioner's reprimands in determining to withhold her salary increment; the petitioner bears the burden of proving that the withholding of her increment was arbitrary, capricious or unreasonable; and petitioner's increment was withheld based on a reprimand in 2011-2012 and another in 2012-2013, both for conduct that occurred in the classroom and was deemed to be unbecoming and unprofessional. The ALJ concluded that the Board's actions were not arbitrary, capricious or unreasonable. Accordingly, the ALJ granted respondent's motion for summary decision, denied petitioner's cross-motion, and dismissed the petition.

Upon independent review and consideration, the Commissioner rejected the ALJ's Initial Decision and remanded the matter to the OAL for a hearing on the merits. In so doing, the Commissioner noted that the petitioner's motion for summary decision was strictly based on a legal issue and did not suggest that there were no material facts in dispute. In light of the relief sought in this case, the factual dispute regarding the alleged conduct that resulted in the increment withholding is not insubstantial in nature, but rather is a genuine issue of material fact that precludes the disposition of this matter by summary decision.

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

June 9, 2016

OAL DKT. NO. EDU 1574-15
AGENCY DKT. NO. 11-1/15

| | | |
|---|---|---|
| MARGARET WICKS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Margaret Wicks, and the Farmingdale Board of Education's (Board) reply thereto.

This matter involves a claim by the petitioner – a tenured teaching staff member – that the Board's decision to withhold her increment for the 2013-14 school year was arbitrary, capricious and unreasonable. In granting summary decision to the Board, the Administrative Law Judge (ALJ) found that the petitioner did not present sufficient evidence in opposition to the Board's motion to undermine the integrity of the Board's investigation. Therefore, the ALJ found that the petitioner has not demonstrated that the Board's decision to withhold her increment was arbitrary, capricious or unreasonable. Upon a comprehensive review of the record, and for the reasons that follow, the Commissioner remands the matter to the OAL for further proceedings.

Pursuant to *N.J.S.A.* 18A:29-14, a local board of education may withhold an employee's salary increment for inefficiency or other good cause. *Probst v. Board of Education of the Borough of Haddonfield*, 127 *N.J.* 518 (1992). The recommendation and decision to

withhold an employee's increment is "a matter of essential managerial prerogative which has been delegated by the legislature to the board." *Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n.*, 79 *N.J.* 311, 321 (1979). Moreover, a board of education's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App Div 1960). Therefore, when a school employee challenges a salary increment withholding, the employee bears the burden of proof "of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives." *Kopera*, *supra*, at 297. In evaluating whether the increment withholding is reasonable, the issues to be determined are: (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind their expertise. *Kopera*, *supra*, at 296-297.

Although it is well established that the petitioner bears the burden of demonstrating that the Board's decision was arbitrary, capricious or unreasonable, when there are facts in dispute the employee is entitled to a hearing on the merits in order to attempt to satisfy the burden. Under *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995), when a motion for summary decision is filed, the judge is obligated to conduct a thorough review of the record with all of the evidence viewed in the light most favorable to the non-moving party to determine whether there exists a genuine issue of material fact. *Brill*, *supra*, 142 *N.J.* at 540. The documents that were attached to the petitioner's certification in opposition to the Board's motion for summary decision clearly illustrate that there are genuine issues of material fact. Specifically, the petitioner's certification included two rebuttal memos that the petitioner submitted to the Board outlining the factual disputes regarding the alleged conduct that led to the

petitioner's increment withholding.[1] The Commissioner is not persuaded by the Board's assertion that there are no material facts in dispute simply because nothing of probative value was recited in the so-called letters of rebuttal submitted by the petitioner. Therefore, in light of the relief sought in this case, the factual dispute regarding the alleged conduct resulting in the increment withholding is not of an insubstantial nature but rather is a genuine issue of material fact that precludes the disposition of this matter by summary decision.[2]

Accordingly the Initial Decision is rejected; and this matter is remanded to the OAL for a hearing on the merits.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/09/16

Date of Mailing: 6/09/16

[1] By a letter dated April 30, 2012, the petitioner disputed the Board's findings that were contained in a letter of reprimand concerning the petitioner's interaction with another staff member in the classroom. In another letter dated September 17, 2013, the petitioner disputed the Board's findings in connection with a complaint made by a parent that alleged inappropriate classroom behavior by the petitioner. The Board determined to withhold the petitioner's increment based on her failings and shortcomings as a teacher in consecutive school years.

[2] The Commissioner is mindful that the petitioner also filed a cross motion for summary decision with her opposition to the Board's motion. The cross motion by the petitioner was strictly based on a legal issue as to whether an increment can be withheld based on allegations relating to an incident that occurred prior to the immediately preceding school year. The cross motion for summary decision did not suggest that there were no material facts in dispute.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division in accordance with the applicable Appellate Division rules.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 01574-15
AGENCY DKT. NO. 11-1/15

**MARGARET WICKS,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE, MONMOUTH COUNTY,**
Respondent.

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**Stephen Hunter**, Esq., for petitioner (Detzky, Hunter & DeFillippo, attorneys)

**Francis J. Campbell**, Esq., for respondent (Campbell & Pruchnik, LLC, attorneys)

Record Closed: April 19, 2016 Decided: April 25, 2016

BEFORE **ROBERT BINGHAM II**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Margaret Wicks appeals the decision of the Farmingdale Borough Board of Education ("respondent or the Board") to withhold her salary and adjustment increments for the 2013–14 school year after an investigation of a parental complaint.

The Commissioner of Education transmitted this contested matter to the Office of Administrative Law (OAL), where it was filed on February 3, 2015. The Board filed a motion for summary decision and Wicks filed a cross-motion for summary decision. A conference was held on April 18, 2016, at which time it was confirmed that neither oral arguments nor further submissions were required.

## FACTUAL DISCUSSION

Margaret Wicks is a tenured teacher who has been employed within the Farmingdale School District ("the District") since 1990.[1] She has primarily taught math and science in the second through eighth grades. (Certification of Margaret Wicks, dated July 31, 2015 ("Certification"))

During the 2011–12 school year, the Board reprimanded Wicks by letter dated April 19, 2012, for "inappropriate behavior toward a member of the faculty in the presence of students and in front of another teacher."[2] (Exhibit R-A.) It stated, "demonstrating anger towards a colleague, particularly in front of students, crosses a bright line that should never be crossed by a school teacher." (Ibid.) It further advised Wicks "to use better judgement and diplomacy in dealing with circumstances that may cause you to be upset about issues involving students or members of the faculty," and concluded as follows:

> This letter will be placed in your personnel file as a reprimand for professional misconduct. This type of behavior cannot occur again or I will recommend further action, which could have a negative financial impact on your earnings.
>
> [Ibid.]

[1] The District "is a K–8 one-building school district with approximately twenty-five professional staff, and a single administrator serving as both Superintendent of Schools and Principal." (Petition of Appeal ("Petition"), Exhibit A).

[2] The alleged incident occurred on March 26, 2012.

By letter dated April 30, 2012, Wicks submitted a rebuttal for inclusion in her personnel file. (Certification, Exhibit F.)

During the 2012–13 school year, Wicks was assigned as a second-through-fifth grade science teacher and an eighth-grade math teacher. (Petition, ¶ 3.) On June 12, 2013, the mother of two of Wicks' students complained about Wicks during a Board meeting, and by letter dated June 18, 2013, she detailed her allegations of inappropriate actions by Wicks during the 2012–13 school year. (Certification, Exhibit D.)[3] Yet, on June 20, 2013, superintendent and principal Cheri-Ellen Crowl ("Crowl") prepared Wicks' 2012–13 Teacher Evaluation and rated her "exemplary" in two of the ten major areas of evaluation and "commendable" in the remaining eight areas.[4] Crowl recommended that Wicks be reappointed and receive a salary increment. (Certification, Exhibit A.)

However, on or about June 27, 2013, the Board reviewed the mother's complaint. (Certification, Exhibit D.) Also, Crowl conducted an investigation and concluded, in part, that Wicks would have to "maintain an appropriate classroom management style."[5] (Ibid.) Based upon the investigation, Crowl revised her evaluation of Wicks' performance and recommended the withholding of her increments. Specifically, Crowl recommended that the Board withhold Wicks' salary and adjustment increments, starting with the first paycheck in the 2013–14 school year, due to her "failings and shortcomings" in consecutive school years as related in this [reprimand] letter." (Ibid.) On August 28, 2013, the Board voted to withhold Wicks' salary and

[3] Some of the allegations included: 1) Wicks ate in class in front of students; 2) Wicks issued unreasonable reprimands to students for minor infractions; 3) Wicks failed to review tests with students; and 4) Wicks yelled at students, making them uncomfortable. (Ibid.)

[4] The evaluation key lists five rating levels: exemplary, commendable, satisfactory, needs improvement and unacceptable. By definition, "exemplary" means "the performance is unique and extraordinary and shall serve as a model for colleagues," and "commendable" means "the performance exceeds expectations and is highly effective."

Wicks' "commendable" ratings were most notably in the areas of communication techniques/qualities; classroom/student management; interpersonal relationships; professional growth; and personal qualities/characteristics. In the evaluation, the superintendent recommended that Wicks be reappointed and receive a salary increment. (Certification, Exhibit A.)

[5] The investigation included interviews with some of the students, school faculty and staff members, and Wicks. (Ibid.)

adjustment increments for the 2013–14 school year. Wicks was so advised by Letter of Reprimand/Notice of Board Action, dated August 31, 2013, which concluded:

> This reprimand follows a reprimand that was given to you last year. Your failings and shortcomings as a teacher in consecutive school years as related in this letter constitute the reasons why I recommended withholding your salary increment and adjustments for the coming school year.
>
> [Ibid.[6]]

On September 17, 2013, Wicks submitted a rebuttal letter describing her disagreement with the August 2013 reprimand. (Certification, Exhibit C.) Wicks and the Farmingdale Teachers Association ("the Association") filed a grievance over the Board's denial of her increments with the Public Employment Relations Commission (PERC). On October 31, 2014, PERC ordered restraint of the arbitration sought by Wicks and the Association.[7] Wicks then filed the instant appeal seeking rescission of the Board's decision withholding her increments in the 2013–14 school year.

Based upon the parties' submissions, and for purposes of deciding respondent's motion for summary decision and petitioner's cross-motion for summary decision only, I **FIND** the above as **FACT**.

The Board asserts that Wicks' increments were appropriately withheld based upon deficiencies in her classroom performance and conduct during in the 2011–12 and 2012–13 school years, which the Board may legally consider in determining whether to withhold a teacher's increment. Wicks contends that she had exemplary performance ratings for the 2012–13 school year, and that the Board's action based upon two letters of reprimand, in the 2011–12 and 2012–13 school years, was arbitrary,

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[6] This letter went into great detail describing the allegations made against Wicks and addressing each allegation with details of the investigation. Each allegation was followed by facts gleaned from the interviews, the standard that Wicks should have followed, and the ways in which the Wicks failed to meet such standards. (Ibid.)

[7] PERC concluded that its task was limited to determining whether Wicks' increment was withheld for reasons predominantly related to her teaching performance. (Petition, Exhibit A.)

capricious, unreasonable, and against legal precedent. She asserts that she thus is legally entitled to the requested relief (reinstatement of her increment) or, should her motion be denied, at least an evidentiary hearing.

## LEGAL ANALYSIS AND CONCLUSION

Summary decision is appropriate "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). A material fact precludes summary decision if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary-judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987). Failure of the opponent to make such a showing entitles the moving party to summary judgment. Brill, supra, 142 N.J. at 529.

Pursuant to this standard, neither party here has presented a genuine issue of material fact. Wicks argues that her Certification establishes a genuine issue of material fact, but it actually merely outlines the issuance of the reprimands after positive evaluations, rather than states specific material facts in dispute. As discussed more fully below, it is not the Board's burden to prove by a preponderance of credible evidence that the allegations against Wicks are true. That would essentially convert an increment-withholding action into a tenure case and accordingly shift the burden of

proof to the Board. Newsome v. Dumont Bd. of Educ., EDU 11390-06, Initial Decision (November 27, 2007), aff'd, Comm'r (January 4, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Instead, there is no reasonable dispute to the facts set forth in the above Factual Discussion.

Based upon the above undisputed material facts, the questions presented here are whether the Board properly considered Wicks' reprimands in deciding to withhold her salary and adjustment increments for the 2013–14 school year, and whether the Board's withholding of her increments, based upon those reprimands, was arbitrary, capricious, or unreasonable.

1. The Board properly considered Wicks' reprimands in making its decision to withhold her salary increment for the 2013–14 school year.

Salary increments are controlled by N.J.S.A. 18A:29-14, which provides, in pertinent part:

> Any Board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the Board of education. It shall be the duty of the Board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him.
>
> [Ibid.]

An increment is not a statutory right but "a reward for meritorious service to the school district." N. Plainfield Educ. Ass'n v. N. Plainfield Bd. of Educ., 96 N.J. 587, 593 (1984). The statute was intended to vest local school boards "with the ability to withhold increments" from those who had "not performed well during the previous year." Probst v. Haddonfield Bd. of Educ., 127 N.J. 518, 526 (1992). A local board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J.

Super. 288, 294 (App. Div. 1960). The pertinent issues become the accuracy of the underlying facts, and the reasonableness or unreasonableness of the Board's conclusion based upon those facts, considering the Board's expertise. Id. at 296–97. Accordingly, Wicks has the burden of proof to demonstrate that the Board's decision was arbitrary and capricious. Gnatt v. Bd. of Educ. of the Manalapan–Englishtown Reg'l Sch. Dist., 92 N.J.A.R.2d (EDU) 589.

Wicks argues that the Board's decision to use incidents that occurred in the 2011–12 school year as part of the basis for withholding her salary increment for the 2013–14 school year was arbitrary, capricious and unreasonable and in violation of prior Commissioner of Education precedent. In support of that argument, Wicks relies upon Giorgio v. Bd. of Educ. of the City of Bridgeton, Cumberland Cty., EDU 8136-06, Initial Decision (January 3, 2008), adopted, Comm'r (February 19, 2008), <http://njlaw.rutgers.edu/collections/oal/>, and Pruitt v. Bd. of Educ. of Englewood, Bergen Cnty., Commissioner of Education No. 262-93 (October 25, 1993), affirmed with clarification, State Board of Education No. 67-93 (August 2,1995).

However, Wicks' reliance upon Giorgio and Pruitt is misplaced. In each of these cases, it was held that where a school board wishes to withhold an increment of a twelve-month employee, it must vote to do so prior to the commencement of the employee's twelve-month term. These cases address the timing of the school board's decision to withhold a teacher's increment. Here, instead, the issue is whether the Board may consider reprimands for a teacher's alleged conduct, in the last two school years, in making a determination with respect to the teacher's increments.

In the case of Guyet v. Caldwell-West Caldwell Bd. of Educ., 1989 S.L.D. 53, a tenured teaching staff member employed by the Caldwell-West Caldwell Board of Education filed a Petition of Appeal to challenge the action of the board in withholding his increments for 1988–89 school year on the basis of arbitrariness, capriciousness, bad faith, and contravention of N.J.S.A. 18A:29-14. Guyet argued that the alleged incidents of unprofessional conduct during the 1986–87 school year were unrelated to the alleged 1987–88 incidents and the Board should therefore be prohibited from

utilizing them as a basis for its withholding action for 1988–89.[8] The Board argued that all incidents were related as a pattern of unprofessional conduct. The administrative law judge (ALJ) concluded that the pattern of Guyet's conduct over two academic years was indeed unprofessional and, therefore, related. Accordingly, the ALJ determined that all of the cited conduct was properly considered in the decision to withhold Guyet's increment.

Here, even if the Board considered Wicks' conduct in 2011–12 in making its decision to withhold her increment, such action is consistent with the holding in Guyet. To that end, Wicks was reprimanded in the 2011–12 school year for inappropriate behavior toward a member of the faculty in the presence of students and in front of another teacher. In the 2012–13 school year she was reprimanded after a parent complained that she ate in class in front of students, issued unreasonable reprimands to students, failed to review tests with students, and yelled at students. Both of the reprimands were for conduct that occurred in the classroom and that was "unbecoming and unprofessional for a member of the Farmingdale faculty." (Exhibit R-A.) The Board concluded that there was a recurrence of objectionable conduct in the 2012–13 school year, and the character of such conduct was reasonably similar to the objectionable conduct in the 2011–12 school year. Thus, the Board properly considered Wicks' reprimands in deciding to withhold her increments, notwithstanding her positive evaluations.

2. The Board's decision to withhold Wicks' salary increment for the 2013–14 school year was not arbitrary, capricious or unreasonable.

Wicks also argues that the Board's decision to withhold the salary and adjustment increments for the 2013–14 school year was arbitrary, capricious and unreasonable, even if the Board did not take the 2011–12 conduct into consideration.

[8] The alleged unprofessional behavior was presented to the board as follows: September 1987—telling an off-color joke to an eighth-grade class; December 1986—sharing the content of a parent conference with a class; March 1987—speaking derogatorily about a colleague with a student teacher; and December 1987—dismissing a drama class before the scheduled time and leaving the class unattended due to poor student behavior.

She alleges that the Board ignored her receipt of exclusively "exemplary" and "commendable" evaluative ratings as part of her 2012–13 evaluation.

Wicks has the burden of proof to demonstrate that the Board's decision was arbitrary and capricious. In Newsome, supra, EDU 11390-06, Initial Decision (November 27, 2007), adopted, Comm'r (January 4, 2008), <httpp://njlaw.rutgers.edu/collections/oal/>, Newsome, a teacher employed by the Dumont Board of Education, appealed the withholding of a salary increment for the 2006–07 school term. It was alleged and found by the ALJ that, during his classes in the 2005–06 school year, Newsome had disciplined students by requiring that they sit on a chair inside a storage closet. The ALJ further found that, during the same time period, he had used demeaning and derogatory names toward those students being disciplined.

Newsome claimed that the Board's decision to withhold his salary increment on the basis of those facts was arbitrary, capricious, and unreasonable. The ALJ noted that the determination to be made was whether the district had a reasonable basis for its factual conclusion. The school district had no duty to prove by a preponderance of credible evidence that the allegations against him were true. Such a requirement would convert an increment-withholding action into a tenure case and accordingly shift the burden of proof to the board. The ALJ concluded, "while petitioner claimed the students were trying to get him in trouble, he failed to present any competent or credible evidence to support his contention." Newsome focused on attacking the credibility of the students and failed to present evidence that the action of the Board in withholding his increment was arbitrary, capricious and unreasonable.

Similarly, Wicks has not demonstrated that the Board's decision was arbitrary, capricious and unreasonable. First, it is noted that Wicks was given the benefit of a positive evaluation in spite of her reprimand in the 2011–12 school year. And in the 2012–13 school year, the parent's complaint was made just days before Crowl had issued Wicks' evaluation. Crowl promptly launched an investigation that included interviews with Wicks' students, as well as school faculty and staff. Significantly, Wicks

was also given the opportunity to interview with Crowl and tell her side of the story regarding each allegation. After the investigation, Crowl issued a letter of reprimand, which discussed in detail each of the allegations, Crowl's investigatory findings, and the manner in which Wicks should have handled each situation. So, although Wicks received "exemplary" and "commendable" ratings as part of her 2012–13 evaluation on June 20, 2013, it was not unreasonable for Crowl to revise her evaluation of Wicks' performance and to amend her recommendation based upon the outcome of her investigation.

Related misconduct and deficiencies by a teacher occurring in consecutive school years may properly be considered by a board of education in a decision concerning the teacher's salary and adjustment increments. Here, the Board's decision was made after a detailed investigation of parental complaints that included input from Wicks. In opposing the Board's summary-decision motion, Wicks does not present sufficient evidence to genuinely undermine the integrity of the Board's investigation, and she has not demonstrated that its decision to withhold her increments was arbitrary, capricious, or unreasonable.

Accordingly, I **CONCLUDE** that the Board properly considered Wicks' reprimands in both the 2011–12 and 2012–13 school years, and its decision to withhold her salary and adjustment increments for the 2013–14 school year was not arbitrary, capricious, or unreasonable.

## DECISION AND ORDER

Based upon the above points and authorities, respondent's motion for summary decision is **GRANTED** and petitioner's cross-motion for summary decision is **DENIED**. Accordingly, petitioner's Petition of Appeal is hereby **DISMISSED**.

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

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

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

April 25, 2016
DATE

**ROBERT BINGHAM II**, ALJ

Date Received at Agency: 4/25/16

Date Mailed to Parties: 4/25/16

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# APPENDIX

## EXHIBITS

**For Respondent**

Exhibit A Letter of reprimand to Mrs. Wicks from Mrs. Cheri Crowl, CSA, dated April 19, 2012, and letter of rebuttal to Mrs. Crowl from Margaret E. Wicks, dated April 30, 2012 (3 pages)

**For Petitioner**

Petition of Appeal:

Exhibit A PERC Decision, dated October 30, 2014 (19 pages)

Brief in Support of Petitioner's Cross-Motion:

Exhibit A Commissioner of Education Final Decision, dated February 19, 2008 (4 pages)

Exhibit B State Board of Education Decision, dated August 2, 1996 (5 pages)

Exhibit C PERC Decision, dated October 30, 2014 (19 pages)

Certification of Margaret Wicks, dated July 31, 2015:

Exhibit A Total Performance Evaluation, Mrs. W. Wicks, dated June 20, 2013 (2 pages

Exhibit B Letter from Carly Immen to Farmingdale Board of Education, dated June 18, 2013 (2 pages)

Exhibit C Letter of rebuttal from Margaret Wicks to Board of Education, Mrs. Crowl, dated September 17, 2013 (5 pages)

Exhibit D Letter to Mrs. Margaret Wicks from Mrs. Cheri E. Crowl, CSA, dated August 31, 2013 (5 pages)

Exhibit E Total Performance Evaluation, Mrs. W. Wicks, dated June 14, 2012 (4 pages)

Exhibit F Letter of rebuttal to Mrs. Crowl from Margaret E. Wicks, dated April 30, 2012 (1 page)

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2-12-16

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| IN THE MATTER OF THE TENURE HEARING | : | |
| OF CHRISTINE GILLESPIE, | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT | : | DECISION ON REMAND |
| OF THE CITY OF NEWARK, | : | |
| ESSEX COUNTY. | : | |

SYNOPSIS

This case dates back to 2003, when the petitioning Board filed tenure charges of incapacity and excessive absenteeism against respondent, a tenured teacher, and sought to terminate her employment with the district. The matter was transmitted to the Office of Administrative Law, but the tenure hearing was delayed for several years due to the pendency of a related workers' compensation case. The case was restored to the active list in January 2011. Thereafter, respondent failed to appear at a hearing scheduled for June 10, 2011. Respondent subsequently submitted a written explanation of her failure to appear, and the Commissioner found that the facts surrounding her absence did not warrant summary decision by default. The case was remanded to the OAL in August 2011 for fact finding and legal recommendations, with a directive from the Commissioner that respondent provide the OAL and petitioner with specific contact information for communicating with Ms. Gillespie, and that: "...*respondent will not be excused if she fails to reply to notices, pleadings and communications sent to the phone numbers and addresses that she provides*." The matter was eventually put on the inactive list pending resolution of the workers' compensation case, and reactivated in May 2015. Subsequently, OAL sent a notice to the parties that the remand hearing was scheduled for November 4, 2015. Respondent once again failed to appear, and also failed to offer any explanation of her non-appearance; shortly thereafter, OAL sent a Failure to Appear notice to the Commissioner, indicating that the case was being returned to the transmitting agency for appropriate disposition. The Commissioner remanded the matter back to the OAL for an *ex parte* hearing and Initial Decision on the merits of the tenure charges.

On remand, an *ex parte* hearing was held on March 1, 2016; Ms. Gillespie again failed to appear. The ALJ subsequently issued an Initial Decision, finding, *inter alia*, that there is ample proof in the record that respondent's absences were excessive, and she has, in fact, been out of work since September 1998; whether her absences were in whole or in part the result of actual medical problems, the undisputed facts show that respondent has been unavailable to teach for well over 15 years. The ALJ concluded that respondent is guilty of excessive absenteeism, absence without leave and unbecoming conduct, and the evidence in the record provides just cause for the termination of her employment. Accordingly, the ALJ dismissed respondent from her tenured position as a teacher in Newark schools.

The Commissioner concurred with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. Accordingly, the respondent was dismissed from her tenured position, and the matter was transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

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

June 9, 2016

OAL DKT. NO. EDU 20524-15
(EDU 9195-11 ON REMAND)
AGENCY DKT NO. 67-2/03

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF CHRISTINE GILLESPIE, | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT | : | DECISION ON REMAND |
| OF THE CITY OF NEWARK, | : | |
| ESSEX COUNTY. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] This case involves tenure charges brought by the Board against the respondent, Christine Gillespie, a tenured teacher in the State-Operated School District of the City of Newark.[2] The tenure charges filed against the respondent allege excessive absenteeism, absence without leave/abandonment of her position, and/or incapacity pursuant to *N.J.S.A.* 18A:6-11 *et seq.* and *N.J.S.A.* 18A:7A-39 *et seq.*[3] The Administrative Law Judge (ALJ) found that the respondent was guilty of excessive absenteeism, absence without leave and unbecoming conduct, and recommended that the respondent be removed from her tenured position.

[1] The Initial Decision was mailed to the parties on April 27, 2016; accordingly, exceptions were due on May 10, 2016. Without requesting permission to file late exceptions, on May 11, 2016, the respondent submitted untimely exceptions. The proposed exceptions were not considered herein because they were untimely filed. It should also be noted that the respondent did not appear at the March 1, 2016 hearing conducted at the OAL.

[2] The protracted and tumultuous history of this matter was fully explained in the Initial Decision and will not be repeated here.

[3] The tenure charges in this case were filed well before the enactment of the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, *P.L.*2012, *c.*26 (C.18A:6-117 *et al.*).

Upon a comprehensive review of the record in this matter, the Commissioner is in accord with the ALJ's determination that the Board has established that respondent is guilty of excessive absenteeism, absence without leave and unbecoming conduct. The Commissioner also fully concurs with the ALJ's fact-finding analysis and conclusions as to the truth of the Board's allegations, and finds the characterization of respondent's behavior to be fully supported by the record and consistent with applicable law. It has been found that excessive absenteeism can constitute "incapacity," "unbecoming conduct," and/or "other just cause" and thus can warrant dismissal. *See, State-Operated School District of Jersey City, Hudson County v. Vincent Pellecchio*, 92 *N.J.A.R.*2d (EDU) 267. Further, a tenured teaching staff member can be dismissed for excessive absenteeism even if the absenteeism occurs for legitimate reasons, such as long-term poor health. Id. at 270. The details and the history of respondent's excessive absenteeism and unbecoming conduct are extensively outlined in the Initial Decision and need not be repeated here. However, the extent of the respondent's excessive absenteeism is quite evident based on the fact that the respondent has been absent from the District without any medical support or authorization since October of 2001.

Turning to the appropriate penalty in this matter, the Commissioner recognizes that the factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404, 422 (App. Div. 1967). Again, in light of the respondent's absence from the District since 2001, the Commissioner finds that the respondent is unfit to discharge the duties and functions of her

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 20524-15
AGENCY DKT. NO. 67-2/03
ON REMAND
OAL DKT. NO. EDU 09195-11

**IN THE MATTER OF THE TENURE HEARING OF CHRISTINE GILLESPIE, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY**

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**Cherie Adams**, Esq., for petitioner (Adams, Gutierrez & Lattiboudere, attorneys)

No appearance on behalf of the respondent

Record Closed: March 1, 2016 Decided: April 26, 2016

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

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 30, 2002, the District filed tenure charges against respondent Gillespie alleging excessive absenteeism, absence without leave/abandonment of position and/or incapacity as a teacher. Respondent answered the charges on January 7, 15 and 16, 2003. The tenure charges and respondent's answer were considered by State District Superintendent Marion Bolden pursuant to N.J.S.A. 18A:7A-42(a)(3), as then in effect, in lieu of a board of education. The State District Superintendent

determined that there was probable cause to credit the evidence in support of the tenure charges and further determined the charges and evidence were sufficient to warrant the dismissal or the reduction of salary of Christine Gillespie. Since Christie Gillespie was absent at the time without leave and without pay, she was not suspended in connection with the Certification of the charges. This is documented in the Certificate of Determination filed with the charges with the Commissioner. A Certificate of Determination was signed on February 25, 2003, and forwarded with the charges to the Department of Education for hearing pursuant to N.J.S.A. 18A:6-16. The Commissioner subsequently transmitted the matter to the OAL on or about April 2, 2003, for a hearing pursuant to N.J.S.A. 14B-1 et seq. On or about September 17, 2003, respondent Gillespie's counsel submitted a letter requesting an adjournment of the tenure matter until after November 2003. The District consented to the request. On January 26, 2004, a copy of the Order of Inactivity placing the matter on the Inactive list pending the disposition of a pending Workers' Compensation case was entered. On June 24, 2005, respondent's counsel submitted a letter again requesting that the tenure matter be placed on the inactive list until the Workers' Compensation case was concluded. Respondent was copied on counsel's correspondence. An Order of Inactivity was signed July 21, 2005. On July 24, 2006, a letter was sent to all counsel apprising them that the Order of Inactivity had expired and asking counsel whether the tenure matter should be scheduled for a hearing or returned to inactive status.

On August 14, 2006, counsel for the District submitted a letter enclosing a copy of an Order of Dismissal from the Workers' Compensation Court for lack of prosecution in connection with respondent's Workers' Compensation case and asking to activate the tenure case. Counsel for the District also requested that the court establish a timeline for submissions to permit petitioner to file a Motion for Summary Decision. On August 15, 2006, respondent's counsel submitted a letter again requesting that the tenure matter remain on the Inactive list due to the fact that the Workers' Compensation case had been reinstated. Respondent was again copied on this correspondence. On September 6, 2006, a letter to all counsel enclosing copies of an Order of Inactivity, signed September 1, 2006, was distributed. On February 12, 2009, counsel for the District again submitted a letter enclosing a copy of an Order of Dismissal from the

Workers' Compensation Court, dated December 5, 2008. Subsequently, the matter was returned to the OAL docket and scheduled for hearing.

On June 16, 2009, the District submitted a Motion for Summary Decision. On or about January 12, 2011, respondent filed a brief in support of a Motion to Dismiss for lack of jurisdiction to entertain the tenure proceeding. A hearing was scheduled in January 2011. When respondent failed to appear for the hearing, the court rescheduled the hearing for February 4, 2011. At the hearing on February 4, the court heard the parties' arguments in support of their respective motions and instructed them to respond to each other's motions. The District filed its response to respondent's motion on February 22, 2011; respondent, however, failed to respond to the District's Motion for Summary Decision. At a status conference on February 23, 2011, respondent informed the court that she failed to reply to the District's motion because she believed that the court lacked jurisdiction to hear the tenure proceeding. The court renewed its instruction to respondent to respond to the District's motion; respondent did not do so, instead submitting a supplemental letter brief dated February 28, 2011, renewing her argument that the court lacked jurisdiction. The District did not reply or respond to respondent's supplemental brief.

On April 27, 2011, an opinion was issued denying respondent's Motion to Dismiss on grounds of jurisdiction and denied the District's Motion for Summary Decision due to the existence of factual issues. The Court scheduled a hearing for June 10, 2011, and noticed all parties. Respondent failed to appear. Respondent submitted correspondence denying that she had notice of the hearing. The Commissioner remanded the case back to the OAL for further proceedings and directed Ms. Gillespie to provide the OAL with a specific contact address for future notices. Ms. Gillespie complied with this request and all subsequent notices were sent to that address.

The tenure case was once again scheduled to be heard on December 14, 2011. The Court then attempted to schedule a hearing for May 9, 2012, to address the merits of the tenure charges but adjourned the hearing when respondent once again requested the Court to place the tenure proceeding on the OAL's Inactive list pending

the disposition of her pending Workers' Compensation case and her appeal of the denial of her Motion to Dismiss. On or about May 5, 2012, respondent filed a Motion to Stay pending an Appeal filed in Superior Court. An Order of Inactivity was issued on May 18, 2012, and another on September 18, 2013, upon respondent's request due to a pending Workers' Compensation matter.

On January 6, 2014, the Appellate Division panel affirmed the April 27, 2011, written opinion/decision. On May 12, 2015, a letter to the parties was sent indicating that the Order of Inactivity had expired. Based upon the advice of the District's Workers' Compensation counsel that the Workers' Compensation matter had been dismissed for lack of prosecution, a tenure hearing was scheduled for November 4, 2015. Ms. Gillespie confirmed that there was no Workers' Compensation case pending but failed to appear at that hearing and the OAL transmitted the matter to the Commissioner for his review.

As a result of the respondent's failure to appear, on November 9, 2015, the Office of Administrative Law submitted Notice of Return – Failure to Appear indicating that this case was being returned to the transmitting agency for appropriate disposition.

On December 22, 2015, the Office of Controversies and Disputes advised the parties that on December 17, 2015, the Acting Commissioner of Education remanded the case back to the Office of Administrative Law for a hearing with a new docket number, OAL Docket No. EDU 20524-2015. Respondent did not provide any explanation for the failure to appear. The Commissioner did not excuse the failure to appear, but rather sent it back for an ex parte hearing that would enable the OAL to render an Initial Decision on the merits of the tenure charges. Respondent was copied on this correspondence. On January 22, 2016, the Office of Administrative Law issued a new Notice of Hearing for March 1, 2016. Ms. Gillespie was copied on this correspondence. The hearing was conducted. Once again, Ms. Gillespie failed to appear. The District presented its proofs in support of the charges to the Court to permit the rendering of an initial decision in this matter. This post-hearing submission includes proposed findings of fact and conclusions of law in connection with same.

The following are proposed findings of fact based upon the evidence submitted to the Court in this matter and are now adopted as the uncontested facts of the case:

1. Ms. Gillespie was first employed as a teacher in the District on September 8, 1966. (Ex. 1.)

2. Ms. Gillespie's has been consistently absent from her teaching duties since September 1998. Ms. Gillespie attended only three (3) days of school during the 1998-99 school year and never returned to work after September 4, 1998. (See Ex. 1; Testimony of H. Breton.)

3. Ms. Gillespie filed a claim for Workers' Compensation benefits based upon an incident on September 4, 1998. She was ultimately awarded temporary benefits pending evaluation and treatment through September 22, 2000. (Ex. 5.)

4. During the 1999-2000 school year, Ms. Gillespie was compensated by the insurance company from 9/4/99 through 3/31/00 and no time was deducted, based on the Division of Workers' Compensation Court Order dated March 8, 2000. (Ex. 5.)

5. Pursuant to the Division of Workers' Compensation Court Order dated September 13, 2000, Ms. Gillespie was compensated by the insurance company from 7/9/00 through 8/31/00. (Ex. 5.)

6. Pursuant to the Division of Workers' Compensation Court's Order in September 2000, Ms. Gillespie was compensated by the insurance company through 9/22/00. (Ex. 5.)

7. However, Ms. Gillespie continued to be absent from her teaching duties after September 22, 2000. (See Ex. 1; Testimony of H. Breton.)

8. As evidenced in the medical certificates, following November 2000, Ms. Gillespie's medical condition(s) that prevented her from reporting to work were largely unknown and varying.

9. During the 2000-01 school year, Ms. Gillespie was absent for the school year, totaling over 185 days; of those 69 days were approved sick time based on the Employee's Medical Certificates.

10. During the 2001-02 school year, Ms. Gillespie was absent over 185 days; 27 days were approved sick time based on the Employee's Medical Certificates.

11. During the 2002-03 school year, Ms. Gillespie was absent over 185 days.

12. During the 2003-04 school year, Ms. Gillespie was absent 190 days.

13. Ms. Gillespie has failed to return to work at any point and continues to be absent from her position to the present day.

14. On October 5, 1998, former Principal William Demetroulakos sent a letter to Ms. Gillespie explaining that her presence for only three (3) days during the opening month of September "created havoc" among the first-grade students she was assigned to teach. In the letter he asked Ms. Gillespie to advise him when she planned on returning to school. At the time of the letter, Ms. Gillespie had not provided proper medical certification and was considered AWOL. (Ex. 2, 3.)

15. A letter, dated September 30, 1998, was submitted by the parents of Branch Brook School's first-grade class attesting to the adverse impact created by not having their first-grade teacher, Ms. Gillespie, present more than three (3) days in the first month of school in 1998. There was no representation as to when she would be able to return either. The letter was signed by thirty (30) parents. Ms. Gillespie did not return to work at all that year. (Ex. 4.)

16. Ms. Gillespie filed a claim for Workers' Compensation benefits based upon an incident on September 4, 1998. She was ultimately awarded temporary benefits pending evaluation and treatment through September 22, 2000. However, Ms. Gillespie continued to be absent from her teaching duties after September 22, 2000. (Ex. 5.)

17. As evidenced in the medical certificates, following November 2000, Ms. Gillespie's medical condition(s) that prevented her from reporting to work were largely unknown and varying. On November 14, 2000, Ms. Gillespie's absence due to pharyngitis was approved from October 24, 2000, through November 6, 2000. (Ex. 6.) On November 16, 2000, Ms. Gillespie was further absent until November 27, 2000, and this leave was approved by the District on December 19, 2000. (Ex. 7.) On December 21, 2000, the medical certificate, which was approved by the District on December 22, 2000, showed that Ms. Gillespie was

absent from November 27, 2000, through December 3, 2000, for a major depression disorder. (Ex. 8.) From December 31, 2000 through February 28, 2001, she remained out for depression and anxiety; the medical certificate was approved by the District on February 2, 2001. (Ex. 9.) On March 8, 2001, one last medical certificate was issued by Ms. Gillespie seeking sick time from March 8, 2001, until May 1, 2001; on March 14, 2001, the District denied this request due to Ms. Gillespie's unavailability of sick days. (Ex. 10.)

18. On May 11, 2011, the District sent Ms. Gillespie a letter indicating that she had not been back at work as of March 14, 2001, and therefore, considered on unauthorized leave – AWOL. (Ex. 11.)

19. On September 27, 2001, the medical certificate was disapproved from September 4, 2001, through October 15, 2001, for lack of medical support. (Ex. 13.) Then, on October 11, 2001, Ms. Gillespie's absences from September 24, 2001, through October 6, 2001, were approved for "otitis externa." Later, on October 23, 2001, a medical certificate was approved from October 9, 2001, through October 23, 2001, for a sinus infection. (Ex. 14.) No further medical documentation has been provided since that time to support the continued absences.

20. On January 11, 2002, the District, once again, advised Ms. Gillespie that she was considered AWOL. (Ex. 15.) No documentation was provided to justify the continued absences. Accordingly, Ms. Gillespie was absent without leave. Ms. Gillespie's absence without leave interfered with the continuity of the District's educational program as she did not perform any teaching duties.

21. Ms. Gillespie's absences had a detrimental impact on students in the district as the District had to continue to secure replacements during periods of absence, including when respondent was a classroom teacher and when she provided home instruction; she was not available for those assignments. (See Ex. 1, Testimony of H. Breton.)

22. On or about December 30, 2002, the District filed tenure charges against Ms. Gillespie under N.J.S.A. 18A:6-11 based upon allegations of excessive absenteeism, absence without leave/abandonment of position and/or incapacity.

(Ex. 16.) These charges were then served upon Ms. Gillespie, who filed a 160-page response.

23. The tenure charges and Ms. Gillespie's response were considered by the State District Superintendent, Marion Bolden, pursuant to N.J.S.A. 18A:7A-39 in lieu of a board of education, and a Certificate of Determination was signed on February 25, 2003, forwarding the charges to the Department of Education for hearing pursuant to N.J.S.A. 18A:6-16. (Ex. 17.) The charges were filed with the Commissioner of Education for hearing.

24. As reflected in the Certificate of Determination filed with the Commissioner of Education, Ms. Gillespie was not suspended upon certification of the charge as she was already absent and without leave; thus, she remained in an unpaid status. (Ex. 17, ¶ 7.)

25. Upon the filing of an Answer to the charges, the tenure matter was transmitted to the Office of Administrative Law on April 2, 2003, for further proceedings in accordance with N.J.S.A. 18A:6-16.

26. The tenure charges were scheduled for hearing on several occasions, but were adjourned at the request of counsel for Ms. Gillespie due to the pendency of a Workers' Compensation proceeding involving Ms. Gillespie. (Ex. 18.)

27. On or about January 26, 2004, an Order of Inactivity was issued placing the tenure charges on the inactive list pending disposition of a pending Workers' Compensation case.

28. After a prolonged period of years, during which the Workers' Compensation case was being litigated, the tenure proceeding remained dormant.

29. On August 14, 2006, Cherie L. Adams, counsel for the Newark Public Schools, submitted a letter enclosing a copy of an Order of Dismissal from the Worker's Compensation Court in connection with Ms. Gillespie and asking to activate the tenure case. Ms. Adams also requested that a timeline be established in the tenure case to permit Petitioners to file a Motion for Summary Decision.

30. On August 15, 2006, respondents former counsel, Mr. Eugene Liss, submitted a letter requesting that the tenure matter remain on the inactive list due to the fact

the that the Workers' Compensation case was reinstated. Ms. Gillespie was copied on this correspondence.

31. On February 12, 2009, Cherie L. Adams, counsel for the Newark Public Schools, again, submitted a letter enclosing a copy of an Order of Dismissal from the Worker's Compensation Court, dated December 5, 2008, in connection with Ms. Gillespie. The matter was returned to the OAL docket and scheduled for hearing.

32. The tenure matter was rescheduled for a hearing January 13, 2011. However, respondent failed to appear at that hearing and another hearing was scheduled for February 4, 2011. In connection with the new February hearing date, the parties submitted motions in January 2011. At the February 4, 2011, hearing, the parties were instructed to respond to each other's motions. Petitioner filed its response to respondent's motion on February 22, 2011. Respondent failed to respond to the motion for summary decision and at the February 23, 2011, status telephone conference. Gillespie stated that she did not respond because she believes that there is a lack of jurisdiction. Ms. Gillespie submitted an additional letter brief, dated February 28, 2011, regarding jurisdiction and did not respond to the petitioner's motion.

33. On or about April 27, 2011, an Order was submitted in connection to the Motion to Dismiss by respondent and Motion for Summary Decision by petitioner denying both motions. The ALJ found that fact issues required determination and referred it for hearing.

34. On May 9, 2011, the District received the May 3, 2011, Notice of Hearing scheduling the case for June 10, 2011, at 9 a.m. Again, Ms. Gillespie failed to appear at the June 10 hearing.

35. As a result, on June 21, 2011, the Office of Administrative Law submitted a Notice of Return – Failure to Appear indicating that this case was being returned to the transmitting agency for appropriate disposition. Respondent was indicated to address her explanation to the Department of Education. (Ex. 19.)

36. On June 29, 2011, Christine Gillespie submitted a letter to the Office of Controversies and Disputes, Department of Education with an explanation as to

why she did not appear at the June 10 hearing. The District responded on July 8, 2011. (Ex. 20.).

37. On July 13, 2011, Ms. Gillespie filed a Notice of Appeal and Civil case Information Statement with the New Jersey Judiciary Superior Court-Appellate Division. Ms. Gillespie was appealing the April 27, 2011, decision denying her motion to dismiss for lack of jurisdiction.

38. On August 4, 2011, the Office of Controversies and Disputes advised the parties that on August 3, 2011, the Acting Commissioner of Education remanded the case back to the Office of Administrative Law for a hearing with a new docket number, OAL Docket No. EDU 09195-2011. (Ex. 20, 21, 22.) Respondent Gillespie was instructed to provide a current address to which all notices would be sent. (Ex. 21, p. 3.) Ms. Gillespie provided same and all notices have been sent to this address. (Ex. 23.)

39. The tenure case was once again scheduled to be heard on December 14, 2011. However, this date was adjourned until May 8, 2012. On or about May 5, 2012, Ms. Gillespie filed a Motion to Stay pending the Appeal filed in Superior Court.

40. An Order of Inactivity was issued on May 18, 2012, and another on September 18, 2013, upon respondent's request due to a pending Workers' Compensation matter.

41. On December 18, 2013, the parties appeared before the Appellate Division panel to argue Ms. Gillespie's appeal. On January 6, 2014, the panel affirmed the April 27, 2011, written opinion/decision.

42. On May 12, 2015, a letter was sent to the parties indicating that the Order of Inactivity had expired. A response was requested in connection to same within ten (10) days of receipt. (Ex. 24.) As such, the District contacted Joseph Biancamano, Esq., counsel on behalf of the District for the Worker's Compensation matter, who advised that the matter had been dismissed for lack of prosecution. The District notified the Office of Administrative Law (Ex. 25). Respondent Gillespie responded and acknowledged in her letter that there was no current workers compensation petition. (Ex. 26, p. 4.) Accordingly, a tenure hearing was scheduled for November 4, 2015. (Ex. 27) This Notice went out on June 9, 2015, and was copied to Ms. Gillespie's current address. (Ex. 27.) Ms.

Gillespie failed to appear at that hearing. As a result of the Failure to Appear by Respondent, on November 9, 2015, the Office of Administrative Law submitted Notice of Return –Failure to Appear indicating that this case was being returned to the transmitting agency for appropriate disposition. (Ex. 28.) Respondent was instructed to address her explanation to the Department of Education. Respondent failed to submit any explanation.

43. On December 22, 2015, the Office of Controversies and Disputes advised the parties that on December 17, 2015, the Acting Commissioner of Education remanded the case back to the Office of Administrative Law for a hearing with a new docket number, Docket No. EDU 20524-2015N. (Ex. 29.) Ms. Gillespie was copied on this correspondence. (Ex. 29.) At no time did respondent Gillespie provide any explanation for the failure to appear. The Commissioner did not excuse the failure to appear, but rather sent it back for an ex parte hearing so that an initial decision on the merits of the tenure charges could be rendered. (Ex. 29.) Respondent was copied on this correspondence.

44. On January 22, 2016, the Office of Administrative Law issued a new Notice of Hearing for March 1, 2016. Ms. Gillespie was copied on this correspondence. Once again, Ms. Gillespie failed to appear at the scheduled hearing on March 1, 2016. The District attended, presented documentary evidence and testimony from a District witness, Homere Breton.

## LEGAL ARGUMENT

**THE DISTRICT HAS PROVEN THE TENURE CHARGES AND THE UNCONTROVERTED FACTS DEMONSTRATE THAT RESPONDENT IS GUILTY OF UNBECOMING CONDUCT, INCAPACITY AND OTHER JUST CAUSE DUE TO CHRONIC AND EXCESSIVE ABSENTEEISM AND ABANDONMENT OF HER TEACHING POSITION.**

## I. THE COURT IS ENTITLED TO CONSIDER THE EVIDENCE PRESENTED BY THE DISTRICT AT THE EX PARTE HEARING AS UNREFUTED CONSISTENT WITH IN RE TENURE HEARING OF IRANDOKHT TOORZANI.

Respondent Gillespie has failed to appear at scheduled tenure hearing dates on multiple occasions, despite having been provided notice of the hearing date at the address she supplied to the Department of Education. She did not appeal from the Commissioner's decision of December 17, 2015, which remanded the matter to the OAL for an ex parte hearing. The hearing was set for March 1, 2016, yet she failed to appear despite receiving notice of same. Accordingly, consistent with In the Matter of the Tenure Hearing of Irandokht Toorzani, EDU 9713-11, Comm'r Decision No 49-12 (Feb 8, 2012), this court was entitled to conduct an *ex parte* hearing and accept proofs from the petitioner District in support of the tenure charges. Moreover, pursuant to N.J.A.C. 1:1-14.4(d), the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision. Ibid. (District required determination on its tenure charges and ALJ was well within authority to take *ex parte* proofs and render Initial Decision on the charges based upon the ex parte proofs).

## II. RESPONDENT WAS CHRONICALLY AND EXCESSIVELY ABSENT FROM HER TEACHING STAFF POSITION THEREFORE WARRANTING HER DISMISSAL FROM THE DISTRICT.

N.J.S.A. 18A:6-10 is entitled "Dismissal and reduction in compensation of person under tenure in public school system." In pertinent part, said statute provides that:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is . . . under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . .
>
> * * *
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause.

"A survey of the relevant case law indicates that chronic or excessive absenteeism has been found to constitute both 'incapacity' and 'unbecoming conduct,' within the meaning of N.J.S.A. 18A:6-10 such as to warrant dismissal from employment.'" State-operated School District if Jersey City v. Pellecchio, 92 N.J.A.R.2d (EDU) 267. "It has also been held that chronic and excessive absenteeism amounts to 'just cause' under N.J.S.A. 18A:6-10 such as to warrant dismissal from employment." Pellecchio, supra, 92 N.J.A.R.2d (EDU) 267 (citing Trenton Board of Education v. Williamson, EDU 7335-85 (Apr. 14, 1986), aff'd, Comm'r (May 28, 1986)).

In In the Matter of the Tenure Hearing of Reilly, 1977 S.L.D. 403, the Commissioner of Education affirmed the dismissal of a teacher on the basis of incapacity and conduct unbecoming despite the claim that most of the absences were in connection with a physical ailment. See also Malley v. Bd. of Educ. of Pequannock Twp., EDU 1858-86 (Nov. 19, 1986), aff'd, Comm'r (Dec. 29, 2986), aff'd, State Bd. of Educ. (April 1, 1987).

Moreover, as set forth Pellecchio, supra., excessive absenteeism may warrant dismissal of a tenured teacher even if the absence were excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled and even if the teacher's classroom performance was sufficient. Bd. of Ed. of the City of Camden v. Rucker, 94 N.J.A.R.2d (EDU) 350 took it one step further and determined that chronic or excessive absenteeism may be found to warrant dismissal even in situations where the individual was entitled to days off under contract. Disciplinary action in fact may be taken against a teacher due to excessive absenteeism even if the cause of the absenteeism is the result of work-related injuries. Kochman v. Bd. of Educ. of the Borough of Keansburg, 94 N.J.A.R.2d (EDU) 154, aff'd, State Bd. of Educ., aff'd, 95 N.J.A.R.2d (EDU) 212, A-1510-93T2 (App. Div. May 5, 1995)); See also, Board of Educ. of the Twp. of Irvington v. Pearson, 97 N.J.A.R.2d (EDU) 329.

The point at which the absenteeism is judged to be excessive falls within the reasonable judgment and discretion of the local school district. Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980). In sum,

excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute incapacity, unbecoming conduct, and/or just cause within the meaning of N.J.S.A. 18A:6-10, so as to warrant dismissal from employment.

Respondent's attendance was a repeated problem in that she has been consistently absent since September 1998. (Ex. 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.) She did not provide any authorization for her absences and was considered AWOL since October 23, 2001. (See Ex. 15.) Ms. Gillespie attended only three (3) days during the 1998-99 school year and never returned to work after September 4, 1998. On October 5, 1998, respondent's former Principal, William Demetroulakos, sent a letter to respondent explaining that her presence for only three (3) days during the opening month of September "created havoc" among the first grade students she was assigned to teach. (See Ex. 2.) In the letter he asked respondent to advise him when she planned on returning to school. At the time of the letter, respondent had not provided proper medical certification and was considered AWOL. (See Ex. 3.)

A letter was submitted by the parents of Branch Brook School's first-grade class attesting to the adverse impact created by not having respondent present more than three (3) days in the first month of school in 1998 (see Ex. 4). There was no representation as to when she would be able to return either. The letter was signed by thirty (30) parents. Since that time, respondent has never returned to work.

As evidenced in the medical certificates, following November 2000, respondent's medical condition(s) that prevented her from reporting to work were largely unknown and varying. On November 3, 2000, respondent's absence due to pharyngitis was approved from October 24, 2000, through November 6, 2000. (See Ex 6.) On November 16, 2000, respondent was further absent until November 27, 2000. (See Ex. 7.) On December 21, 2000, the medical certificate showed that respondent was absent from November 27, 2000, through December 3, 2000, for a depression disorder. (See Ex. 8.) From December 31, 2000, through February 28, 2001, respondent remained out for depression and anxiety. (See Ex. 9.)

As of February 28, 2001, no further authorization was provided until September 2001. (See Ex. 10, 11.) Although she eventually did respond to the status of her varying medical conditions, it was not before the District sent respondent correspondence that she had not returned to work and was considered AWOL. (See Ex. 11.)

On September 24, 2001, the medical certificate was disapproved from September 4, 2001 through October 15, 2001, for lack of medical support. (See Ex 13.) Then, on October 9, 2001, respondent's absences from September 24, 2001, through October 6, 2001, were approved for "otitis externa." (See Ex. 12.). Later, from October 9, 2001, through October 23, 2001, she was out for a sinus infection. (See Ex. 14.) No further documentation was provided since that time. On January 11, 2002, the District advised respondent that she was considered AWOL. (See Ex. 15.) No documentation has been provided to justify the continued absences at any point from October 2001 forward to the present time.

The above uncontroverted facts demonstrate that the number of respondent's absences were excessive. In fact, she has been out of work since September 1998. Each year since that time, respondent has missed over 180 days of school and has been unavailable to provide instruction to children. It is also equally clear that the impact of the absences on the continuity of instruction was significant and adverse. Respondent was also on notice that her attendance was unacceptable that that she was absent without authorization.

In light of the foregoing, there are sufficient grounds to remove respondent from her tenured position as a teacher with the District due to her prolonged history of absences which adversely impacted the continuity of instruction of her students. Whether the absences are in whole or in part the result of actual illnesses or even a work-related injury, the undisputed facts show that respondent has been unavailable to teach for well over 15 years. Moreover, since at least 2001, these absences have been without any medical support or authorization. As such, respondent is guilty of excessive absenteeism, absence without leave and unbecoming conduct as a teacher,

and the evidence on the record provides just cause for the termination of her employment with the District.

## CONCLUSION

In light of the foregoing, the tenure charges filed against respondent is sustained. Therefore I **CONCLUDE** the appropriate penalty is dismissal of respondent from her employment as a teacher in the District.

## ORDER

It is **ORDERED** that Christine Gillespie is **DISMISSED** from her position as a teacher with the City of Newark.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

April 26, 2016

DATE

**JEFFREY A. GERSON**, ALJ

Date mailed to the Agency April 26, 2016

Date mailed to the Parties APR 27 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

## APPENDIX

## WITNESSES

For Petitioner:

Cherry Adams, Esq.

Homere Breton

For Respondent:

None

## EXHIBITS

For Petitioner:

1. Teacher's Time and Attendance Time Sheets, including AWOL time period, 1998-2002
2. Letter from William Demetroulakos, Principal of the Branch School to Ms. Gillespie dated October 5, 1998
3. Letter from Donald N. Johnson, Director of Employment Services/AAO, to Ms. Gillespie dated October 12, 1999
4. Letter submitted by the parents of Branch Brook School's first grade class
5. Workers' Compensation Order dated September 22, 2000
6. Employee's Medical Certificate dated November 3, 2000
7. Employee's Medical Certificate dated November 16, 2000
8. Employee's Medical Certificate dated December 4, 2000
9. Employee's Medical Certificate dated January 4, 2001
10. Employee's Medical Certificate dated March 1, 2001
11. Letter from Yolanda Pena, senior personnel technician, dated May 11, 2001, to Ms. Gillespie regarding being considered on unauthorized leave – AWOL
12. Employee's Medical Certificate dated September 24, 2001
13. Employee's Medical Certificate dated September 2, 2001
14. Employee's Medical Certificate dated October 2001
15. Letter from Yolanda Pena, senior personnel technician, dated January 11, 2002

16. Statement of Charges, Statement of Evidence and Appendix of Exhibits filed with the District on December 30, 2002
17. Certificate of Determination filed by the State-Operated School District of the City of Newark with the Commissioner of Education dated February 25, 2003
18. Hon. Jeffrey Gerson, ALJ's Order and Decision re: Motion to Dismiss by Respondent and Motion for Summary Decision by Petitioner dated April 27, 2011
19. Office of Administrative Law – Notice of Return Failure to Appear (hearing on June 10, 2011) dated June 21, 2011
20. Letter from M. Kathleen Duncan to Cherie Adams and Christine Gillespie indicating that matter is being remanded to the OAL pursuant to the Commissioner's decision dated August 4, 2011
21. Letter from Kathleen Duncan to Christine Gillespie re: Remand to the OAL dated August 4, 2011
22. Office of Administrative Law – Notice of Filing (remand of EDU 03399-03) dated August 4, 2011
23. Letter from Christine Gillespie to Laura Sanders, Acting Director and Chief Administrative Law Judge dated August 12, 2011
24. Letter from Honorable Jeffrey Gerson, ALJ to Christine Gillespie and Cherie Adams, Esq. re: Expired Order of Inactivity dated May 12, 2015
25. Letter from Cherie Adams to Honorable Jeffrey Gerson, ALJ re: Request that matter be placed on the Inactive list due to the dismissal of the Workers' Compensation case for lack of prosecution dated June 3, 2015
26. Letter from Christine Gillespie to Joseph Biancamano, Esq. re: no action pending in Workers' Compensation Court since September 2014, dated May 12, 2015.
27. Office of Administrative Law – Notice of Hearing, OAL Dkt. No. EDU 09195-11 dated June 9, 2015
28. Office of Administrative Law – Notice of Return for Failure to Appear (OAL Dkt. No. EDU 09195-11) dated November 9, 2015
29. Letter from Kathleen Duncan to Cherie Adams and Christine Gillespie re: Remand to the OAL dated December 17, 2015
30. Letter from Kathleen Duncan to Christine Gillespie re: Remand to the OAL – Commissioner's Decision attached dated December 15, 2015

31. Office of Administrative Law – Notice of Filing (Remand of EDU 09195-11) dated December 22, 2015

For Respondent:

None

213-16

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

In November 2015, *pro se* petitioner appealed the determination of the respondent Board that his child, N.P., did not reside within the school district, and was therefore not entitled to a free public education in Burlington Township schools for the 2015-2016 school year. The matter was transmitted to the OAL as a contested case. Subsequently, the Board filed a motion to dismiss, certifying that N.P. does, in fact, reside within Burlington Township. The petitioner opposed the dismissal, and oral argument was scheduled for April 26, 2016, at which time the parties jointly stipulated to the following facts: N.P. resides in Burlington Township with her father, B.P., and has resided there throughout the 2015-2016 school year; the Board conceded that N.P. is and has been domiciled within the Burlington Township School District throughout the current school year; and no reimbursement is or will be due from B.P. to the Board for N.P.'s attendance for 2015-2016.

The ALJ found, *inter alia*, that: the parties now concur that N.P. has resided with, and continues to reside with B.P. within the school district for the 2015-2016 school year; accordingly, B.P. has no obligation for tuition reimbursement for N.P.'s attendance in Burlington Township Schools for the current year; and the parties concurred that there is no further dispute in this matter. The ALJ concluded that dismissal of the appeal is warranted as there is no longer any controversy regarding petitioner's residency appeal relative to the 2015-2016 school year. Accordingly, the ALJ ordered the matter dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

June 10, 2016

213-16

OAL DKT. NO. EDU 19136-15
AGENCY DKT. NO. 331-10/15

| | | |
|---|---|---|
| B.P., on behalf of minor child, N.P., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that N.P. was and remains entitled to attend school in the Burlington Township School District for the 2015-2016 school. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/16
Date of Mailing: 6/10/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSAL**
OAL DKT. NO. EDU 19136-15
AGENCY DKT. NO. 331-10/15

**B.P. ON BEHALF OF N.P.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,**
Respondent.

---

**B.P.**, petitioner, pro se

**David M. Serlin**, Esq., for respondent

Record Closed: April 27, 2016 Decided: April 28, 2016

BEFORE **ROBERT BINGHAM II**, ALJ

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner B.P. challenges the residency decision of the Board of Education of the Township of Burlington, Burlington County (respondent or the Board), disallowing his minor child, N.P., from attending public school within respondent's school district. On

November 23, 2015, B.P. filed a residency appeal with the Department of Education, Bureau of Controversies and Disputes and the Board filed its answer on November 30, 2015, denying that N.P. resides in Burlington Township. The Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on December 1, 2015, for determination as a contested case pursuant to N.J..A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to –15.

On April 4, 2016, the Board filed a motion to dismiss, certifying now that N.P. does reside within Burlington Township, and petitioner opposed. Oral argument was scheduled for April 27, 2016, at which time the parties jointly stipulated the facts set forth below.

## FACTUAL DISCUSSION

The parties jointly stipulate and, accordingly, I **FIND** as **FACT** the following. First, N.P., a minor, resides in Burlington Township with B.P., her father, and has resided with him throughout the 2015-16 school year. Second, the Board thus concedes that N.P. is and has been domiciled within the Burlington Township School District (the District) throughout the 2015-16 school year. Third, no reimbursement is or will be due from B.P. to the Board for N.P.'s attendance at Fountain Woods, a public school within the District, for the 2015-16 school year.

## LEGAL ANALYSIS AND CONCLUSION

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of

Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

Also, dismissal is appropriate where no contested issues remain, no further relief is sought, and the case is moot for lack of a justiciable controversy. N.J.A.C. 1:1-3.2, -19.2; Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999), <http://njlaw.rutgers.edu/collections/oal/>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

Here, the parties now concur that N.P. has resided with, and continues to reside with her father, B.P., within the District, for the 2015-16 school year. Accordingly, B.P. incurs no obligation for tuition reimbursement for N.P.'s attendance at Fountain Woods, a District school, for the 2015-16 school year. Thus, the parties agree that there are no remaining issues to be resolved and there is no further dispute in this matter.

Therefore, I **CONCLUDE** that dismissal is warranted because there no longer exists any controversy regarding petitioner's residency appeal relative to the 2015-16 school year, and petitioner seeks no further relief.

## DECISION AND ORDER

Therefore, this matter should be dismissed and I hereby **ORDER** that this case be and hereby is **DISMISSED WITH PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 28, 2016
DATE

**ROBERT BINGHAM II**, ALJ

Date Received at Agency: 4/28/16

Date Mailed to Parties: 4/28/16

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214-16

| | | |
|---|---|---|
| T.G., ON BEHALF OF MINOR CHILDREN, T.S. AND T.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in August 2015, seeking a determination that T.S. and T.S. were entitled to a free public education in Hamilton Township schools. Respondent Board contended that a residency investigation concluded that petitioner and her children are domiciled in the City of Trenton and, accordingly, counterclaimed for tuition. The matter was transmitted to the Office of Administrative Law (OAL) and scheduled for a hearing on January 4, 2016. Petitioner failed to appear on the scheduled date, and requested that the hearing be rescheduled. Petitioner again failed to appear on the rescheduled date of April 14, 2016, despite having received appropriate notice of the hearing, and offered no explanation for her absence.

The ALJ ordered the within petition dismissed for failure to appear and prosecute on the rescheduled hearing date of April 14, 2016, pursuant to *N.J.A.C.* 6A:22-5.1 and *N.J.A.C.* 6A:22-6.2. Further, the ALJ assessed tuition against petitioner for the period of ineligible attendance of the two children, in the total amount of $46,999 (rounded to the nearest dollar), and authorized the respondent school district to remove T.S. and T.S. in accordance with applicable law and the regulations of the New Jersey Department of Education.

Upon review, the Commissioner concurred with the ALJ findings and conclusions, and adopted the Initial Decision as the final decision in this matter. The petitioner was directed to reimburse the Board in the amount of $46,998.62, plus $73.13 for each day beyond April 14, 2016 that T.S. and T.S. remain enrolled in the District's schools.

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

June 10, 2016

214-16

OAL DKT. NO. EDU 13582-15
AGENCY DKT. NO. 222-8/15

| | | |
|---|---|---|
| T.G., ON BEHALF OF MINOR CHILDREN, T.S. AND T.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that because petitioner failed to appear at the April 14, 2016 OAL hearing without providing an explanation – after the court rescheduled the hearing following petitioner's previous failure to appear at the January 4, 2016 OAL hearing – the petition of appeal is dismissed with prejudice.

The Commissioner also agrees with the ALJ's assessment of tuition – pursuant to *N.J.S.A.* 18A:38-1b – against petitioner for the period of ineligible attendance by her minor children in Hamilton Township, in accordance with the Board's counterclaim seeking tuition. Therefore, the Board is entitled to tuition reimbursement in the amount of $46,998.62[2] ($13,238 plus $73.13 per day for 137 days for the younger T.S. and $13,723 plus $73.13 per day for 137

[1] The Commissioner was not provided with a transcript of the April 14, 2016 hearing at the OAL.

[2] The ALJ found that the petitioner owed the Board $46,999 by rounding the calculation to the nearest dollar. The Commissioner has calculated the exact amount owed.

days for the older T.S.) for the entire 2014-2015 school year and from the start of the 2015-2016 school year through April 14, 2016 – plus $73.13 per child for each day beyond April 14, 2016 that the minor children remain in Hamilton Township's schools.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed. Petitioner is directed to reimburse the Board in the amount of $46,998.62 – plus $73.13 for each day beyond April 14, 2016 that T.S. and T.S. remain enrolled in the District's schools – for tuition costs incurred during the time period that the minor children were ineligible to attend school in Hamilton Township.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/16

Date of Mailing: 6/10/16

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

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 13582-15

AGENCY DKT. NO. 222-8/15

**T.G., ON BEHALF OF MINOR CHILDREN T.S. AND T.S.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF HAMITLON, MERCER COUNTY,**

Respondent.

---

**T.G.,** petitioner, pro se

**Christopher B. Patron,** Esq., for respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: March 22, 2016 Decided: May 2, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter, having come before the Office of Administrative Law (OAL) upon referral by the Commission of Education of a Petition of Appeal filed by petitioner, T.G., on behalf of minor children T.S. and T.S. seeking an Order reversing a Final Determination of Ineligibility entered on June 19, 2015 by respondent, the Board of Education of the Township of Hamilton, Mercer County, and the OAL having scheduled a hearing on January 4, 2016, and petitioner failed to appear; and the matter having

rescheduled said hearing to April 14, 2016 at the request of petitioner on January 19, 2015, and have confirmed said dates and having provided notice to the parties:

It is **ORDERED** as follows:

1. The Petition of Appeal filed by petitioner under OAL Docket Number EDU 135852-2015 is hereby dismissed for failure to appear and prosecute on said rescheduled hearing date of April 14, 2016, pursuant to N.J.A.C. 6A:22-5.1 and N.J.A.C. 6A:22-6.2.

2. Tuition is hereby assessed against petitioner for the period of ineligible attendance, including the pendency of this appeal, of students T.S. and T.S., based upon the claim for tuition made by respondent in its answer filed on August 27, 2016, the proofs entered into the record on April 14, 2016, and the following, attached documents, of which the OAL has taken judicial notice as public records:
    a. The 2014-2015 school year consisted of 180 student days as evidenced on Exhibit R-1, attached, respondent's formally approved 2014-2015 Pupil/Teacher Calendar.
    b. The 2015-2016 school year consisted of 137 student days through and including April 14 as evidenced on Exhibit R-2, attached, respondents formally approved 2015-2016 Pupil/Teacher Calendar.
    c. The annual tuition for middle school students, which included younger student T.S. during the 2014-2015 school year, was $13,238, as evidenced in the April 30, 2015 residency hearing transcript and Exhibits thereto, including the December 17, 2014 Initial Notice of Ineligibility, filed with respondent's answer herein.
    d. The annual tuition for high school students, which included elder student T.S. during the 2014-2015 school year, was $13,723, as evidenced in the April 30, 2015 residency hearing transcript and Exhibits thereto, including the December 17, 2014 Initial Notice of Ineligibility, filed with respondent's answer herein.

e. The per diem tuition for high school students which included both students T.S. during the 2015-2016 school year, is $73.13, pursuant to the records of the respondent school district, the approved tuition per the state Department of Education, and representation of counsel at the hearing in this matter.

f. Tuition is therefore assessed pursuant to N.J.A.C. 6A:22-6.2 for the period of ineligibility, commencing on September 1, 2014, and continuing through the period for which the within appeal filed by petitioner has been pending, in amount of $46,999, consisting of the following components:

i. $13,238 for the entire 2014-2015 school year on behalf of younger student T.S. in middle school;

ii. $10,019, representing 137 days at $73.13 per say, on behalf of younger student T.S, for 2015-2016 in high school;

iii. $13,723 for the entire 2014-2016 school year on behalf of elder student T.S. in high school; and

iv. $10,019, representing 137 days at $73.13 per say, on behalf of elder student T.S. for 2015-2016 in high school;

g. This amount may be reduced and enforced as a judgement through the Superior Court of New Jersey, pursuant to N.J.A.C. 6A:22-6.2(a)(2).

h. The referenced documents are attached to this decision and made hereof.

3. In light of the dismissal of the petitioner of appeal, respondent is authorized to remove students, T.S. and T.S. in accordance with applicable law and the regulations of the New Jersey Department of Education.

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

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

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

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

5/2/16
DATE

**SARAH G. CROWLEY**, ALJ

Date Received at Agency: May 2, 2016 (emailed)

Date Mailed to Parties: May 2, 2016 (emailed)

/mel

## APPENDIX

## WITNESSES

For Petitioner:

None

Respondent's Witnesses:

None

## EXHIBITS

For Petitioner:

None

For Respondent

R-1 Hamilton Township Public School Calendar 2014-2015

R-2 Hamilton Township Public School Calendar 2015-2016

215-16

OAL DKT. NO. EDU 118-16
AGENCY DKT. NO. 370-12/15

C.D., on behalf of minor children, A.W. and J.D.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the first settlement payment was due May 15, 2016. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/16

Date of Mailing: 6/10/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 00118-16
AGENCY DKT. NO. 370-12/15

**C.D., on behalf of minor children, A.W. and J.D.,**

Petitioner,

v.

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

Respondent.

---

**C.D.,** on behalf of minor children, **A.W.** and **J.D.**, petitioner, pro se

**Stephen J. Christiano**, Esq., for respondent

Record Closed: May 2, 2016 Decided: May 3, 2016

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

On December 30, 2015, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on March 2, 2016 but was adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on May 2, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

May 3, 2016

DATE

**JEFFREY A. GERSON**, ALJ

Date Received at Agency: MAY 5, 2016

Date Mailed to Parties: MAY 5, 2016

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Stephen J. Christiano, Esq.
179 Eagle Rock Avenue
West Orange, NJ 07052
(973) 736-1636
Attorney for Respondent

**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
**OAL DOCKET NO. EDU 118-2016**

**C.D., ON BEHALF OF MINOR CHILDREN, A.W. AND J.D.,**

**Petitioner,**

**v.**

**SETTLEMENT AGREEMENT**

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

**Respondent.**

The parties hereby stipulate as follows:

1. The petition is withdrawn with prejudice.
2. Petitioner's son and brother shall be permitted to attend school in respondent's district, so long as petitioner maintains a bona fide residence at 391 Northfield Avenue, and satisfies all school residency requirements for her son and brother.
3. Petitioner agrees to pay tuition to respondent in the amount of $3,600. Payments shall be made in monthly installments of $100, with the first payment due May 15, 2016. Succeeding payments shall be made on the fifteenth day of each month thereafter until the amount of $3,600 is paid in full. Any payment not made within 30 days of its due date shall cause petitioner to be held in default, which shall allow respondent to enter judgment against petitioner in the amount of $12,865.91, less payments previously made.

4. Checks or money orders for the tuition payments shall be made payable to the West Orange Board of Education and mailed/delivered to the office of Stephen J. Christiano, Esq., 179 Eagle Rock Avenue, West Orange, NJ 07052.

5. This settlement resolves all claims petitioner may have against respondent.

Candy Debro, Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

By: _____
President

**BOARD OF EDUCATION**
**WEST ORANGE, NEW JERSEY 07052**
**TELEPHONE: 973-669-5400 ext. 95463**
**FAX : 973-324-1289**

**STEPHEN J. CHRISTIANO**
**BOARD ATTORNEY**

**179 EAGLE ROCK AVENUE**

April 26, 2016

Hon. Jeffrey A. Gerson, ALJ
New Jersey Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: C.D. o/b/o A.W. and J.D. v. Board of Education of West Orange Twp.
OAL Docket No. EDU 118-2016

Dear Judge Gerson:

Enclosed is the fully-executed settlement agreement in the above. Also enclosed is a certified extract of the minutes from the Board of Education's meeting of April 25, at which the settlement was approved by the Board.

Very truly yours,

Stephen J. Christiano
Board Attorney

Encs.

Cc: Candy Debro, *Pro Se*

**EXTRACT FROM THE MINUTES OF A MEETING**
**OF THE WEST ORANGE PUBLIC SCHOOLS**
**BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ**
**AS RECORDED IN THE OFFICIAL MINUTE BOOK**

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular session on April 25, 2016 at 8:07 P.M., at West Orange High School, 51 Conforti Avenue, West Orange, NJ.

The following members of the Board of Education were present:

Mr. Charles, Mrs. Lab, Mrs. Mordecai, Mr. Robertson, Mr. Schwarzbaum

Recommend approval Settlement Agreement for Student #1203013 and Student #1505061 as stipulated in closed session.

ROLL CALL: Ayes: Mr. Charles, Mrs. Lab, Mrs. Mordecai, Mr. Robertson, Mr. Schwarzbaum

Abstain: None

**CERTIFICATE**

I, John Calavano, Board Secretary, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on April 25, 2016, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 27th day of April, 2016.

John Calavano
Board Secretary

216-16

OAL DKT. NO. EDU 11309-14
AGENCY DKT. NO. 11-1/14

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| O.V., ON BEHALF OF MINOR CHILD, A.V., | : | |
| RESPONDENT. | : | |

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

Upon review, it is noted that the settlement makes reference to monthly payments intended to start on June 21, 2015. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms. Additionally, to the extent that Paragraph 12 of the settlement agreement provides for strict confidentiality, the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/16
Date of Mailing: 6/10/16

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 11309-14

AGENCY DKT. NO. 11-1/14

**BOARD OF EDUCATION**
**OF THE TOWNSHIP OF HAMILTON,**
**MERCER COUNTY,**
Petitioner,

v.

**O.V., ON BEHALF OF MINOR CHILD, A.V.,**
Respondent.

---

**Michael A. Pattanite, Jr.,** Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, LLC, attorneys)

**O.V., on behalf of minor child, A.V.,** respondent, pro se

Record Closed: April 18, 2016 Decided: May 6, 2016

BEFORE **ELIA A. PELIOS**, ALJ:

Petitioner, Board of Education of the Township of Hamilton, Mercer County, maintains that the respondent, O.V. on behalf of a minor child, A.V., owes tuition for his son's attendance in petitioner's schools from April 1, 2013 through June 30, 2013. The matter was transmitted to the Office of Administrative Law (OAL) on September 8, 2015, for a hearing.

On October 28, 2015, an executed settlement agreement was received, and on April 18, 2016, the Board Resolution authorizing the settlement was received, which is attached and fully incorporated herein.

Additionally, during a conference call held between the parties and the undersigned on April 13, 2016, the undersigned questioned a correction made by hand to the date by which agreed upon payments would end identified in paragraph 4 of the settlement agreement (J-1). The correction was not initialed by the parties but both acknowledged during the call that the correction reflects their intent in correcting a typographical error and was made at the time of execution. This discussion providing explanation was memorialized in a confirming letter (J-3) sent by counsel for the petitioner with copy to the respondent and received by the undersigned on April 18, 2016. Based on representations made during the call and its written memorialization without subsequent objection I am satisfied and **FIND** that the correction described reflects the intent of the parties at the time of execution of the settlement agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as confirmed by the representations of both counsel.

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

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

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

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

May 6, 2016
DATE

**ELIA A. PELIOS**, ALJ

Date Received at Agency: 5/10/16

Date Mailed to Parties: 5/10/16

/nd

## APPENDIX

## LIST OF EXHIBITS

**Jointly submitted:**

J-1 Settlement Agreement, received October 28, 2015

J-2 Certificate of Minutes of the Board of Education, Hamilton Township Public Schools, dated May 19, 2015

J-3 Confirming Letter Addressing a Handwritten Correction in the Settlement Agreement

SETTLEMENT & MUTUAL RELEASE AGREEMENT

This Settlement and Mutual Release Agreement ("Agreement") is made on this day of May 12, 205 by and among and the HAMILTON TOWNSHIP BOARD OF EDUCATION (hereinafter "Board") and OTTO VILLATORO (hereinafter "Respondent") on behalf of the minor A.V., in reference to OAL Docket No.: EDU 11309-2014S and Agency Ref. No. 11-1/14.

**NOW THEREFORE** the undersigned parties hereby agree as follows:

1. This agreement and release of claims relates to the Board's determination that the Respondent, minor, A.V., was ineligible to attend Hamilton Township School District free of charge.

2. As fully set forth in the Petition filed before the New Jersey Office of Administrative Law, docketed as EDU 11309-2014S and Agency Ref. No. 11-1/14 tuition is owed from April 1, 2013 through June 20, 2013, the time that A.V. attended Reynold's Middle School while ineligible.

3. The Board has agreed to accept the amount of $1,500.00 to resolve the claim.

4. The Respondent has agreed to pay the sum of $1,500.00, over 15 months through equal $100.00 payments beginning on June 21, 2015 and ending on September 21, 2016.

5. The Respondent agrees that the payment will be received by the Board by the 21st of each month.

6. The payment will be made to: Hamilton Township Board of Education, c/o Kathryn Attwood, Business Administrator, 90 Park Avenue, Hamilton, New Jersey 08690.

7. The Respondent acknowledges that the full amount sought in the Petition before the New Jersey Office of Administrative Law is $3593.40. The Board is accepting a reduced amount by the Respondent's agreement to strict adherence to the terms of payment as set forth above.

8. If Respondent defaults, and does not perform any of the conditions set forth above, Respondent consents to the entry of judgment for the entire amount of $3593.40 less any payments made, and to include all attorney's fees expended in

connection with the collection efforts necessitated by the default plus statutory prejudgment and post judgment interest.

9. The Board waives any and all rights to seek back tuition or any other payments from Respondent arising from his minor child, A.V.'s attendance in the District. More specifically, but not by limitation, the parties mutually agree to RELEASE, WAIVE AND FOREVER DISCHARGE each other from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to A.V's attendance within the District from the period of time specifically stated within the enrollment in District, including but not limited to: (a) compensatory education; (b) reimbursement of any medical, behavioral, or education evaluations; (c) transportation; (d) any claim of improper placement, supervision, monitoring and/or implementation of educational programming; and/or (e) attorney fees and expert witness fees. By way of further illustration, this mutual Release and Waiver also includes, but is not limited to, any claim concerning and/or alleging a denial of FAPE, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering& personal injury, property damage reimbursement, prevailing party status, attorney's fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education (inclusive of N.J.A.C. 6A:46-1 et seq. and NJ.A.C. 6A:14 et seq.), the New Jersey Law Against Discrimination, 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., the American with Disabilities Act. 42 U.S.C. §12101 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988.

10. This Agreement constitutes the full and complete agreement of the parties and may not be changed or modified absent mutual agreement of the parties. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest.

11. This Agreement shall be governed by and construed in accordance with New Jersey law.

12. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party. In the event the Agreement is required to be disclosed in any litigation, including an action to enforce the Agreement, the party or parties involved shall make every effort to have it disclosed to the court *in camera* and subject to an appropriate protective order maintaining the confidentiality of the Agreement to the fullest extent possible.

13. The parties hereby verify, affirm and represent that they understand the contents of this Agreement and are entering into it voluntarily and with a full understanding of its meaning.

Otto Villatoro, o/b/o A.V.

Michael A Pattanite, Jr., Esq.
Attorney for the Board

**Board of Education**
**HAMILTON TOWNSHIP PUBLIC SCHOOLS**
**90 Park Avenue**
**Hamilton, NJ 08690**

2015 APR 16 A 10:51

# CERTIFICATE

I, Katherine Attwood, Board Secretary of the Board of Education of the Township of Hamilton, in the County of Mercer, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the Board of Education of said School District duly called and held on May 18, 2015, has been compared by me with the original minutes as officially recorded in my office in the Minute Book of said Board of Education and is a true, complete and correct copy thereof and of the whole of said original minutes so far as the same relate to the subject matters referred to in said extract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said Board of Education this 19th day of May 2015.

Katherine Attwood

Katherine Attwood
Board Secretary

2016 APR 18 A 10:51

## Agenda Item Details

| | |
|---|---|
| Meeting | May 27, 2015 - Regular Business Session Meeting @ 6:30 Administration Building |
| Category | F. Curriculum & Instruction |
| Subject | 22. APPROVED 5/18/15 - Residency Settlement Agreement (pg 51) |
| Access | Public |
| Type | Action |
| Recommended Action | Upon the recommendation of the Interim Superintendent that the Board of Education accepts the Residency settlement agreement on A.V. effective May 18, 2015 as per Confidential C & I Enclosure 21. |

## Public Content

## Administrative Content

Confidential Enclosure-A.V. 18MAY15 (pg 51).pdf (472 KB)

## Executive Content

av ov agreement.pdf (503 KB)

2015 MAY 18 A 10:51

That the Hamilton Township Board of Education accepts the Residency settlement agreement on A.V. with approval effective May 18, 2015.

217-16

OAL DKT. NO. EDU 3152-15
AGENCY DKT. NO. 27-2/15

| | | |
|---|---|---|
| A.S., on behalf of minor child, M.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL, DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the payment amount is due within thirty (30) days after the execution of the Agreement. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/16

Date of Mailing: 6/10/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 3152-15
AGENCY DKT. NO. 27-2/15

**IN THE MATTER OF A.S. ON BEHALF OF MINOR CHILD, M.S., SOMERSET HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, SOMERSET COUNTY.**

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**A.S.**, petitioner, pro se

**Derlys M. Gutierrez**, Esq., for respondent (Adams, Gutierrez and Lattiboudere, LLC)

Record Closed: March 31, 2016 Decided: May 12, 2016

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 4, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 12, 2016
DATE

Susan Scarola
**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: May 18, 2016

Date Mailed to Parties: May 18, 2016

/cb

**The Somerset Hills School District**
**PUBLIC INPUT & ACTION MEETING MINUTES – MARCH 16, 2016**

## FINANCE

Mr. Baker moved Finance Resolution #10, seconded by Mrs. Coons. Finance Resolution #10 was approved by a roll call vote of 10-0.

Action Resolution 10. Approve Settlement Agreements
Resolved, that the Somerset Hills Board of Education approve the settlement agreements for the following students:

| Student ID |
|---|
| |
| # 2017381 |

Certified True & Correct

Nancy Lee Hunter
Board Secretary

**ADAMS GUTIERREZ & LATTIBOUDERE, LLC**
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
The Somerset Hills School District Board of Education

| | |
|---|---|
| A.S. on behalf of minor child, Me.S.<br><br>Petitioner,<br><br>v.<br><br>SOMERSET HILLS SCHOOL DISTRICT BOARD OF EDUCATION<br><br>Respondent. | OFFICE OF ADMINISTRATIVE LAW<br><br>AGENCY DKT. NO.: 27-2/15<br>EDU DKT. NO.: 3152-2015S<br><br>**SETTLEMENT AGREEMENT AND GENERAL RELEASE** |

This Settlement Agreement and General Release ("Agreement") dated January 21, 2016 is entered into by and between Anthony Sardis on behalf of his daughter, Me.S. ("Petitioner") residing at 110 Boulderwood Drive, Bernardsville, New Jersey 07924, and the Somerset Hills School District Board of Education ("SHSD") with its principal office at 25 Olcott Avenue, Bernardsville, NJ 07924 in order to resolve and settle any and all outstanding issues involved among Petitioner and SHSD (the "Parties") in the above-referenced matter.

**WHEREAS,** Me.S. is a minor child who enrolled in the Somerset Hills School District for the 2014-15 school year using address 110 Boulderwood Drive, Bernardsville, New Jersey 07924; and

**WHEREAS,** a dispute arose with respect to verification of Petitioner's domicile within the school district pursuant to N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1; and

**WHEREAS,** a Board Hearing was held on January 21, 2015 to address Me.S.'s eligibility to attend SHSD pursuant to N.J.S.A. 18A:38-1(a); and

**WHEREAS,** following the presentation of the Parties' proofs, the Board of SHSD determined that Me.S. was not eligible to attend SHSD free of charge under N.J.S.A. 18A:38-1(a); and

**WHEREAS,** Petitioner filed a Petition of Appeal before the Commissioner of Education bearing Agency Docket No. 27-2/15 and OAL Docket No. 3152-2015S challenging the Board's residency determination; and

**WHEREAS,** Respondent filed an Answer and Cross-Claim for tuition; and

**NOW THEREFORE,** the parties having a desire to amicably settle the matter, hereby agrees as follows:

1. The parties have reached this compromise to avoid the expense and inconvenience of litigation. It is understood that the execution of this Agreement does not constitute an admission of liability by Petitioner or SHSD, their respective present and former board members, officers, employees, agents and servants, said liability being expressly denied by either Petitioner or SHSD.

2. Petitioner and SHSD mutually agree that no party under this Agreement shall be deemed a "prevailing party".

3. Within thirty (30) days of the execution by both parties to this Agreement, Petitioner shall pay SHSD a total of eight-thousand and forty-eight dollars **($8,048.00)** representing fifty-percent (50%) of the total cost of tuition for Me.S.

4. In consideration of the settlement of the above-captioned matter, Petitioner releases and waives his right to take any action against SHSD, its Board Members, and its Attorneys, including, but not limited to, administrative actions, civil actions, ethic complaints, complaint investigations, or any other action that could have been asserted in a state or federal court proceeding that relate directly or indirectly to Petitioner's allegations and/or claims asserted in this residency appeal, through the date of full execution of this Agreement, except to enforce the terms of this Agreement.

5. In consideration of the settlement of the above-captioned matter, SHSD shall release Petitioner from any and all claims and liability, including, but not limited to, any and all claims for attorneys' fees, money damages, civil liability, or any other equitable legal relief, except to enforce the terms of this Agreement.

6. The terms of this Agreement shall be kept confidential to the fullest extent permitted by law. Petitioner shall not disclose the terms of or existence of this Agreement to any third party, except his attorney or accountant as necessary to implement same or as required by law.

7. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

8. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues contained herein as of the date of this agreement.

9. This Agreement shall be governed by the laws of the State of New Jersey. The parties reserve the right to enforce this Agreement in a court of competent jurisdiction.

10. This Agreement shall be construed as if it were drafted by both parties contemporaneously.

11. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. The parties agree that they have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they have had the opportunity to consult with a representative of their choice and that they reviewed the Agreement in detail with their counsel representative or expressly waived the right to have this Agreement reviewed by counsel, and fully understand its terms, requirements, limitations, and their duties and responsibilities under this Agreement. The parties further state that they are fully satisfied with the representation provided by their respective counsel.

13. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

14. This Agreement is subject to approval of the Somerset Hills School District Board of Education and is without prejudice to all parties if the terms are not approved. In the event that SHSD fails to approve the Agreement, the parties retain all rights and shall resume the proceeding before the Administrative Law Judge assigned to this matter on the earliest possible date. The parties will make reasonable efforts to request and participate in a settlement conference prior to the hearing to the extent permitted by the court.

15. Upon full execution of this Agreement, an Administrative Law Judge shall incorporate this Agreement into a Decision and Final Order dismissing the Petition of Appeal bearing Agency Docket No. 27-2/15 and OAL Docket No. 3152-2015S with prejudice.

2/26/16

Anthony Sardis, individually and on behalf of Me.S. Date

March 1, 2016

Robert Baker, Board President Date
Somerset Hills School District Board of Education

218-16

LOURDES VIDAL-TURNER AND C. DEBRA WILLIAMS,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

The petitioners in this case had been employed under tenure as supervisors by the respondent Board when their positions were eliminated in a reduction in force (RIF), effective July 1, 2015. Petitioners were ultimately reassigned as teaching staff members based on their tenure and seniority, but were moved from twelve-month supervisor positions to ten-month staff positions and their salaries were reduced from $149,000 to approximately $110,000. Petitioners challenged the salary determination for their new titles, contending that they were transferred from twelve-month positions to ten-month positions, and consequently their new salary should be based on a prorating of their former twelve-month salary over ten months, which would result in an annual salary of $124,167. The Board asserted that the RIF was implemented for the purpose of saving money during an economic crisis, and that petitioners' salaries were appropriate to their new titles of guidance counselor and English teacher, respectively. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:28-9, a local board of education has the authority to reduce its teaching force for reasons of economy; the goal of a RIF is to reduce the budget by reducing staffing costs; tenured staff are not protected in a RIF, but such employees are placed on a rehire list; in the instant matter, the State-Appointed Fiscal Monitor for the Atlantic City School District – acting on behalf of the respondent Board – implemented a RIF in response to a budgetary crisis; the petitioners herein were effectively fired from their eliminated supervisor positions and rehired as teaching staff members in new titles, rather than reassigned or transferred; consequently, there is no basis to use petitioners' former supervisor salaries in determining their current salaries, as their prior positions were eliminated and they were subsequently rehired as staff members; to do otherwise would undermine the RIF statute and its overriding goal of providing school districts with the authority to control their budgets in times of fiscal crisis. The ALJ concluded that: the petitioners' supervisor positions were eliminated in a legitimate RIF; petitioners were rehired as teaching staff members; and their current salaries are appropriate to the titles under which they are now employed. Accordingly, the ALJ granted summary decision in favor of the Board and denied petitioners' motion for summary decision.

The Commissioner concurred with the ALJ's conclusion that the Board acted within its authority when it RIF'd petitioners for financial reasons in accordance with *N.J.S.A.* 18A:28-9, and that their current salaries are appropriate to the teaching staff positions which the petitioners now hold. However, the Commissioner disagreed with the ALJ's finding that the petitioners were fired and rehired; rather, petitioners were RIF'd and reassigned to new positions based on seniority, in accordance with *N.J.S.A.* 18A:28-11. Accordingly, the Initial Decision of the OAL was adopted as the final decision, as modified above, and the petition was dismissed.

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

Issued 6/16/16

OAL DKT. NO. EDU 16976-15
AGENCY DKT. NO. 284-9/15

| | | |
|---|---|---|
| LOURDES VIDAL-TURNER AND C. DEBRA WILLIAMS, | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Board's reply thereto.

In their exceptions, petitioners argue that the ALJ failed to consider the legal authority they cited in support of their argument that although the Board was permitted to reduce their gross yearly compensation, it should have been prorated on a $10/12^{th}$ basis to conform their 12-month salary to a 10-month position. Specifically, petitioners argue that this matter is similar to *Rocco DiMaggio v. Board of Education of the City of Trenton, Mercer County*, Commissioner Decision No. 219-99, decided July 8, 1999 and *William Buckley v. Board of Education of the City of Trenton, Mercer County*, Commissioner Amended Decision No. 247+-99, decided September 16, 1999, in which DiMaggio and Buckley were reassigned from 12-month positions to 10-month positions as a result of a reduction in force (RIF), and the school board was permitted to reduce their annual salaries to a prorated amount. Petitioners also cite *Frank D'Alonzo v. Board of Education of the Township of West Orange, Essex County*,

Commissioner Decision No. 162-85, decided May 13, 1985, *aff'd* State Board September 4, 1985, and *Richard Stolte v. Board of Education of the Township of Willingboro, Burlington County*, 1981 *S.L.D.* 770, for the proposition that petitioners' salaries should have remained the same following their reassignment.

Petitioners also contend that the ALJ erred in finding that petitioners were effectively fired and rehired in new titles. Instead, petitioners argue that they were subjected to a RIF, and as such, their tenure and seniority rights apply in this matter. Petitioners point out that they could not possibly have been "fired and rehired" because the Board would have had to file tenure charges against them prior to firing them, pursuant to the TEACHNJ Act, *N.J.S.A.* 18A:6-117 *et seq.* As such, petitioners argue that the ALJ erred in finding that there was no basis to apply the petitioner's prior salaries to their new positions.

In reply, the Board argues that the ALJ appropriately concluded that petitioners were subject to a legitimate RIF and were not entitled to their former supervisor salaries after being bumped into the new titles of guidance counselor and English teacher. The Board asserted that it "has the legal ability to commensurately reduce the employees' salary onto the lower salary guide at a step that corresponds with their seniority rights and level of experience." (Board's Reply at 2) The Board points out that the reduction in salary for economic benefit is the purpose of the RIF, which would not be achieved if the salaries were not reduced. The Board argues that the Appellate Division has found that "seniority is not the same as salary and does not guarantee the tenured employee to maintain the level of salary." (*Ibid.*, citing *Edward Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, 322 *N.J. Super.* 522, 531 (App. Div. 1999)).

The Board further contends that the cases relied upon by petitioners – *i.e., Stolte* and *D'Alonzo* – are distinguishable from this matter since those cases involved transfers and the petitioners' seniority rights were not triggered because they did not suffer a loss of employment benefits. Finally, the Board emphasizes that it acted within its authority and in good faith when it implemented the RIF for economic reasons.

Upon review, the Commissioner concurs with the ALJ that the Board acted within its authority when it RIF'd petitioners for financial reasons, in accordance with *N.J.S.A.* 18A:28-9. However, the Commissioner agrees with petitioners that they were not fired and rehired, but rather RIF'd and reassigned to new positions based on their seniority, in accordance with *N.J.S.A.* 18A:28-11. Nevertheless, the Commissioner agrees with the Board that it had the authority to reduce petitioners' salaries onto a lower salary guide – at a step that corresponds with their seniority and level of experience – when it reassigned petitioners as part of a RIF from 12-month supervisor positions to 10-month positions as guidance counselor and teacher.

"When a school board deems it necessary to eliminate a position, 'seniority' is a right afforded to tenured employees entitling the employee to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available." *Carpenito*, *supra*, 322 *N.J. Super.* at 531. When a Board implements a RIF and reassigns tenured employees to new positions, "a reduction in a tenured staff member's salary/compensation and benefits is permissible." *DiMaggio*, *supra*. As such, "when an employee of a board of education is transferred for proper reason to a position which has a lesser salary expectation, that employee is entitled only to the salary in the new position according to his/her appropriate step on the salary scale."

*Claus Schwarzkopf v. Board of Education of the City of Camden and Charles Smerin, Superintendent of Schools*, 1985 *S.L.D.* 130, 135.

Accordingly, the Board acted within its authority when it reduced the salaries of petitioners as part of a RIF. Petitioners were reassigned from supervisor positions to titles with a lower salary expectation: guidance counselor and teacher. As such, the Board was permitted to reduce their salaries to the appropriate step on the salary scale, in accordance with their experience and seniority. Despite petitioners' contention, the Board was not required to maintain their supervisor salaries – or pay them the same rate on a prorated basis – following the RIF, when they were reassigned to positions on a lower salary scale. Such a requirement would render a RIF ineffective at addressing a school's financial situation.

Petitioners rely upon *DiMaggio* and *Buckley* for the proposition that the Board must maintain petitioners' rates of salary on a $10/12^{th}$ basis to conform their 12-month positions into 10-month positions. However, these cases may be distinguished from the instant matter, as Buckley and DiMaggio's positions were not reduced to positions with a lower salary expectation. DiMaggio was reassigned from job placement coordinator to teacher of auto mechanics/small engines, while Buckley was reassigned from job developer to teacher of industrial arts. All of the positions involved were on the same salary guide. By contrast, petitioners held the higher title of supervisor and were RIF'd to guidance counselor and teaching positions.

Additionally, the facts of the *D'Alonzo* matter cannot be compared to petitioners' situation. *D'Alonzo* involved a transfer of a high school assistant principal to an assignment as a junior high school assistant principal, without a reduction in salary. Such a transfer to another assignment within the same tenured position title, without a reduction in salary, is a valid transfer – rather than a RIF – and has no bearing on the instant matter. *See Williams v. Board of*

*Education of Plainfield*, 176 *N.J. Super.* 154 (App. Div. 1980), *certif. denied*, 87 *N.J.* 306 (1981). In the *Stolte* matter, the petitioner was transferred from an assistant principal position to a teaching position while maintaining his administrator salary, frozen at its previous level. Although the Board in *Stolte* kept his salary the same, there is no requirement that all Boards do the same in a RIF. It is clear that reductions in salary or compensation are permitted as part of a legitimate RIF.

Accordingly, the Initial Decision of the OAL – as modified above – is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/16

Date of Mailing: 6/17/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 16976-15
AGENCY DKT. NO. 284-9/15

**LOURDES VIDAL-TURNER AND**
**C. DEDRA WILLIAMS,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE**
**CITY OF ATLANTIC CITY**
Respondents.

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**Keith Waldman**, Esq., for petitioner

**Kim Belin**, Esq., for respondent Board of Education of the City of Atlantic City

Record Closed: March 29, 2016 Decided: May 5, 2016

BEFORE **W. TODD MILLER**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, tenured supervisors with the Atlantic City Board of Education (ACBOE), challenge their reduction in force ("RIF"). Petitioners were eventually "rehired" as teaching staff members after the RIF based upon tenure and seniority

rights. But they moved from twelve-month employees as supervisors to ten-month employees as staff members. Their salaries went from $149,000 to around $110,000.

Petitioners contend they were transferred from twelve-month employees to ten-month employees and, as such, their former salaries should be prorated by dividing it over ten months ($149,000x 10/12$^{th)}$ which equals $124,167.

The ACBOE contends the RIF was intended to be "reduction in force", with the overriding purpose of saving money during an economic crisis. Petitioners were not transferred into new titles. They were fired (i.e. RIF'd) and rehired. Petitioners' salaries are appropriate for their new titles as guidance counselor (Vidal-Turner) and English teacher (Williams). They should not be awarded prorated supervisor salaries while performing staff duties otherwise the purpose of the RIF would be nullified.

The Commissioner determined to treat the matter as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on October 23, 2015, to be heard de novo.

The parties agreed to file cross-motions for Summary Decision. For the reasons discussed below, Summary Decision is **GRANTED** in favor of the ACBOE.

## STIPULATED FACTS

1. Petitioner Lourdes Vidal-Turner (Vidal-Turner) was hired by Respondent Board of Education of Atlantic City, Atlantic County (Board) effective September 1, 1989, as a English as a Second Language Teacher (ESL). She currently possesses an Administrative Certificate with a Supervisor endorsement, an Instructional Certificate with a Teacher of ESL endorsement, and an Educational Services certificate with a Director of Student Personnel Services endorsement.

2. Petitioner C. Dedra Williams (Williams) was hired by the Board, effective September 1, 1994, as an English Teacher. She currently possesses an Instructional Certificate with an ESL endorsement, a Teacher of English endorsement, and an Administrative Certificate with a Supervisor endorsement.

3. Vidal-Turner was promoted by the Board, effective March 1, 2002, to the twelve-month position of Supervisor. In this position, Vidal-Turner was the Board's District Supervisor of the school district's ESL Teachers, Shelter Classroom Teachers, Bilingual Teachers, and World Language Teachers.

4. Williams was promoted by the Board, effective in or around July, 2007, to the twelve-month position of Supervisor. In this position, Williams supervised teachers of ESL, English, Social Studies, Media, and World Languages.

5. Vidal-Turner and Williams worked in these twelve-month Supervisor positions until the Board RIF'd their positions, until June 30, 2015.

6. During the 2014-15 academic year, Dr. Gary P. McCartney, the State-Appointed Fiscal Monitor for the Atlantic City School District (McCartney), proposed the school district engage in a RIF for financial reasons. McCartney recommended that the Board approve his recommended RIF. However, the Board voted to reject McCartney's recommendation. Pursuant to the powers a State-Appointed Fiscal Monitor possesses under New Jersey law, McCartney overrode the Board's vote an instituted a RIF, effective July 1, 2015.

7. As a result of the RIF, Vidal-Turner and Williams were RIF'd from their twelve-month positions as Supervisors for the 2015-16 academic year. Vidal-Turner was assigned to a ten-month Guidance Counselor position. Williams was assigned to a ten-month English Teacher position.

8. Effective July 1, 2015, the Board reduced Vidal-Turner's salary from $149,000/twelve-month year to $109,648/ten-month year, and reduced Williams's salary from $149,000/twelve-month year to $110,585/ten-month year.

## CONCLUSIONS

The pertinent statute N.J.S.A.18A:28-9 entitled "Reduction of force; power to reduce and reasons for reduction" provides:

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

The ACBOE, through the State-Appointed Monitor, approved a reduction in force in July 2015. Consequently, petitioners' positions were intended to be eliminated not transferred. After the RIF they were effective rehired or bumped down to new staff positions based upon their tenure and seniority rights.

The New Jersey Supreme Court has recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely `for reasons of economy. Impey v. Board of Educ. of Shrewsbury, 142 N.J. 388, 399 (1995). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. Id. at 399-40.

The ACBOE has authority to determine if a RIF should be implemented for reasons of economy. In Re Maywood Board of Education, 168 N.J. Super. 45 (App. Div. 1979); cert. denied 81 N.J. 292 (1979). Furthermore, the RIF is non-negotiable and non-grievable. Jamison v. Morris School District Board of Education, 198 N.J. Super. 411 (App. Div. 1985). The RIF statute, if properly executed, "trumps" a non-teaching staff member's contract rollover provisions contained in N.J.S.A. 18A:27-11. Therefore, so long as the RIF was performed in good faith and for economic reasons, a teaching staff member can be terminated. Substance, rather than the form of a change in

employment, is the controlling factor in making this determination, and if a position is replaced with an identical position but a different title, that action does not constitute a valid RIF. See Viemeister v. Prospect Park Bd. of Educ, 5 N.J. Super. 215, 218 (App. Div. 1949).

Courts have held that Districts have discretion in dealing with the management of the public schools.

> The School Law vests the management of the public school ... in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. Kenney v. Montclair BOE, 1 938 S.L.D 647 (1935), aff'd., St. Bd. at 653.

A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. Quinlan v. North Bergen BOE, 73 N.J. Super. 40, 46 (App. Div. 1962); see also Schinck v. Westwood BOE, 60 N.J. Super. 448 (App. Div. 1960). This presumption extends to a board's determination that, for reasons of economy, a tenured employee may be subject to a reduction in force. Jamison v. Morris Sch. Dist. BOE, supra. at 415. Actions of a board of education are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis. See Kopera v. West Orange BOE, 60 N.J. Super. 288 (App. Div. 1960). Bad faith has been explained as meaning improper or evil purpose or motive. Thompson v. Pleasantville BOE, 95 N.J.A.R. 2d (EDU) 278, 282 (citation omitted).

While a District has the power and authority to reduce the work force, pursuant to N.J.S.A. 18A:28-9, the courts have held that the Board's decisions are subject to review, to determine if the position was in fact abolished or merely transferred to another person in violation of the incumbent's tenure rights. See Viemister v. Prospect Park Bd. Of Ed., supra, at 215.

Here, the state monitor, acting on behalf of the BOE implemented a RIF due to a budgetary crisis. A RIF contains unique statutory features that override many other

areas of school law. The goal of a RIF is reduce the budget as it relates to staffing costs. The tenure does not protect staff members from being RIF'd but it does require the RIF'd employee to be placed on a special rehire list. N.J.S.A. 18A:28-12; N.J.A.C. 6A:32-5.1. In this instance, the RIF'd staff members were effectively fired and rehired in new titles to wit: guidance counselor and English teacher after being RIF's as supervisors. They were not reassigned or transferred by BOE under its general operational authority to manage staffing needs during ordinary times. N.J.S.A. 18A:27-1 et seq. So there is no basis to use the petitioners' former supervisor salaries at $149,000 x 10/12$^{th}$ and apply it to their current position, because their prior positions were eliminated. They were simply rehired as staff members. I so **CONCLUDE**. To rule as petitioner seeks would undermine the RIF statute and it overriding goal which provide school districts with "extraordinary authority" to control its budget in a time of crisis.

## STANDARD FOR SUMMARY DECISION

The OAL rules governing motions for summary decision are found at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding.

I **CONCLUDE** that there are no genuine issues of material fact and that summary decision is appropriate for this case. The parties situated most of the material facts and agreed to proceed summarily. The facts presented were sufficient for me to proceed summarily.

## ORDER

Based upon the foregoing, it is **ORDERED** that Summary Decision is **GRANTED** if favor of the ACBOE. Petitioner's Motion for Summary Decision, seeking an adjusted salary amount along with back pay and other emoluments is **DENIED**.

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

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

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

May 5, 2016
DATE

**W. TODD MILLER**, ALJ

Date Received at Agency: May 5, 2016

Date Mailed to Parties: 5/5/16

/jb

## DOCUMENTS CONSIDERED

**For Petitioner**:

Petition

Briefs dated March 15, 2016 and March 29, 2016, along with Certifications and Exhibits

**For Respondent**:

Answer

Briefs dated March 9, 2016 and March 28, 2016, along with Certifications and Exhibits

219-16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF STEPHEN MAX, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE CITY OF | : | DECISION |
| TRENTON, MERCER COUNTY. | : | |

## SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct and other just cause against respondent – a tenured teacher under the Board's employ – and sought to terminate his employment with the district. Neither respondent nor any attorney acting on his behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and overwhelmingly warrant the termination of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from his tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 6/13/16

AGENCY DKT NO. 122-4/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF STEPHEN MAX, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE CITY OF | : | DECISION |
| TRENTON, MERCER COUNTY. | : | |

For the Petitioner, Adam S. Herman, Esq.
No appearance by or on behalf of Respondent, Stephen Max

This matter was opened before the Commissioner of Education on April 29, 2016, through tenure charges of conduct unbecoming and other just cause certified by Lissa S. Johnson, Assistant Superintendent of the Trenton School District, together with supporting evidence against respondent, Stephen Max, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via overnight mail on April 28, 2016. The petitioner also served a copy of the tenure charges on the respondent's union representative.

On May 2, 2016, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail copy that was sent to

the respondent was returned as undeliverable; however, the notice sent via regular mail was not returned. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent is employed as a tenured teacher in the District. During the 2014-2015 school year, the respondent was absent from his employment for 23.5 days. The respondent reported to work on September 10, 2015, seven days after the 2015-2016 school year began. Between September 25, 2015 and November 20, 2015, the respondent called out from work on approximately 24 days. Finally, since November 20, 2015, the respondent has failed to report his absences, and has been AWOL from his teaching position.

Deeming the allegations to be admitted, and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that petitioner's charge of conduct unbecoming a teaching staff member has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from his tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/13/16

Date of Mailing: 6/13/16

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

220-16

**SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("this Agreement") is entered into by and between Angela Jones ("Jones") and the Camden City School District (the "District"). Together, Jones and the District may be referred to herein as "the Parties."

**WHEREAS**, Jones is a teacher of Special Education;

**WHEREAS**, the District certified tenure charges against Jones to the Commissioner of Education for unbecoming conduct and incapacity based on excessive absenteeism and lateness;

**WHEREAS**, the Parties mutually desire to resolve this matter and believe this resolution is in the public interest;

**NOW, THEREFORE, IT IS HEREBY AGREED** by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment and Consideration:

(a) Jones has submitted or will submit a disability retirement application ("application") to the Teachers' Pension and Annuity Fund ("TPAF") for processing which contains an effective retirement date of February 1, 2016. As such she will begin receiving retiree health benefits as of that date and the District will no longer be responsible for covering Jones with regard to health benefits. Jones will take all necessary actions to ensure this occurs.

(b) Jones shall provide the District with an irrevocable letter of retirement immediately, through its counsel, Brown & Connery, LLP, to be attached to this Agreement in a form mutually agreeable to the parties. The retirement will become effective as of June 30, 2016; or the date Jones' application is initially granted, denied or withdrawn, whichever date is sooner. An appeal of any decision of TPAF on her application will not postpone the effective date of her retirement from her position with the District as set forth in the irrevocable letter, attached as Exhibit A to this Agreement.

(c) If Jones' application is approved, her retirement will be effective February 1, 2016.

(d) If Jones' application is not approved, Jones agrees she will irrevocably retire from her position as a teacher with the Camden City School District

and that this retirement is not contingent in any way upon any specific action being taken by TPAF, subject to the terms in Section 2(b) above.

(e) In consideration for Jones' irrevocable letter of retirement and general release of claims and agreement not to sue in accordance with Sections 4 and 5 of this Agreement, the District will place Jones on an unpaid leave of absence until June 30, 2016 at the latest, pursuant to Section 2(b) above.

(f) The District will not be responsible for providing Jones with any pay whatsoever nor any benefits in accordance with Sections 2(a) and 2(c) above.

(g) The District agrees to comply with its obligations under the law with regard to Jones' application.

3. Dismissal of Tenure Charges: The District shall take all necessary actions with the Commissioner of Education or her designee to withdraw the tenure action against Jones bearing agency reference number 342-11/15.

4. General Release: Jones releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Jones has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Jones asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Jones is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

5. Covenant Not to Sue: Jones warrants she has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District other than her pending worker's compensation claim(s). Further, Jones agrees that she will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any

such legal proceedings be commenced on Jones's behalf, Jones agrees that she will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Jones agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that she shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, Jones agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

6. Claims Not Released: Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Jones is not waiving: (a) claims that were filed or could be filed under any state workers' compensation law; (b) any claim arising from a breach of this agreement; or (c) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Jones represents that she is not aware of any present basis for such claims other than those bases represented in her currently pending worker's compensation claim. The District reserves its right to assert any and all defenses to the above claims which Jones has not released. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 4, Jones agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 5, above.

7. Unemployment Disputes:

(a) Jones understands, acknowledges, and agrees that nothing in this Agreement shall limit the District's right to pursue any appeals, suits, disputes, or challenges to Jones' unemployment benefits compensation. Jones understands, acknowledges, and agrees that the District can freely appeal, file suit, dispute, or otherwise challenge Jones' receipt of, and application for, past, present, and future unemployment compensation.

(b) The District understands, acknowledges, and agrees that Jones can freely assert any and all defenses available to her in any appeal, suits, dispute, and/or challenge by the District for Jones' receipt of, and application for, past, present, and future unemployment compensation benefits.

8. Older Workers Benefit Protection Act: The releases in section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Jones specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that she understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which she is not otherwise entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement by delivering written notice to counsel for the District (as identified below), and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
**Brown & Connery, LLP**
360 Haddon Ave.
Westmont, NJ 08108

9. Not Eligible for Rehire: Jones acknowledges and agrees that her employment with the District will, in accordance with this Agreement, be irrevocably severed at some point and that she is ineligible for re-hire as an employee of the District. Jones agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Jones's employment, the District shall have no obligation to consider or review her application for employment.

10. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

11. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

12. No Contingencies: The effectiveness of this agreement shall not be contingent on any event not articulate herein, including but not limited to any applications Jones may file with the Teachers' Pension and Annuity Fund for retirement. Jones understands the District has no control over the approval or denial of any such applications and she cannot revoke this Agreement based upon same.

13. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

14. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

15. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

16. Individuals Bound: This Settlement Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

17. Arbitrator Approval: This Settlement Agreement and General Release is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6, and will become effective only upon approval of the Arbitrator. Counsel of the parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the tenure charges.

18. Breach: Jones understands that if she breaches any provision of this Agreement, the District will file an action to enforce this Agreement.

19. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Angela Jones:

Angela Jones
309 Brooke Avenue
Apt. H12
Magnolia, NJ 08049

With a copy to:

Amy L. Gillette, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:

Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 0810

20. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

**BY SIGNING THIS AGREEMENT, ANGELA JONES ACKNOWLEDGES:**

**A. SHE HAS READ IT;**

**B. SHE UNDERSTANDS IT AND KNOWS SHE IS GIVING UP IMPORTANT RIGHTS;**

**C. SHE AGREES WITH EVERYTHING IN IT;**

**D. HER ATTORNEY NEGOTIATED IT WITH HER KNOWLEDGE AND CONSENT;**

**E. SHE HAS CONSULTED WITH HER ATTORNEY ABOUT IT; AND**

**F. SHE SIGNS IT KNOWINGLY AND VOLUNTARILY.**

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties hereby execute this Agreement.

**Angela Jones**

**Date:** 2/19/16

**Paymon Rouhanifard**
**State District Superintendent**
**Camden City School District**
**Date:** 6/9/16

I have reviewed & approve this Settlement Agreement.

**Walter DeTreux**
**Arbitrator**

**Date:** 6/13/16

# EXHIBIT "A"

February 19, 2016

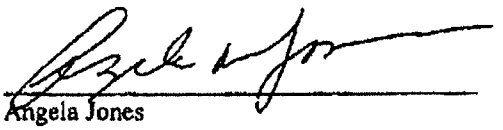
State Superintendent Paymon Rouhanifard
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard:

I, Angela Jones, am hereby submitting this irrevocable letter of retirement from my position as a Special Education Teacher with the Camden City School District. This irrevocable letter of retirement from my position will become effective on the date a decision is made with regard to my application for disability retirement with the TPAF or June 30, 2016, whichever is sooner.

I understand that if my pension application is denied by TPAF or if I withdraw such application, my irrevocable retirement from my position with the District will become effective immediately. I also understand that if my pension application is granted by TPAF, my retirement from the District will be effective February 1, 2016.

Sincerely,



Angela Jones

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

Allen S. Zeller* Matthew B. Wieliczko*
Cosmas P. Diamantis**
Amy L. Gillette
Christopher A. Gulla**
Michael J. Huntowski**
Dean R. Wittman

*Also Member of NY Bar
**Also Member of PA Bar
*Also Member of DC Bar

May 13, 2016

VIA EMAIL AND REGULAR MAIL

Tara L. Humma, Esquire
BROWN & CONNERY
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108

**RE: Camden City School District Tenure Charges**
**Against Angela Jones**
**Our File No: 1341-643A-15**

Dear Ms. Humma:

As you are aware, Zeller & Wieliczko, LLP represents Angela Jones with regard to the above referenced matter. As previously discussed, this letter will constitute an addendum to the Settlement Agreement between the Camden City School District and Ms. Angela Jones which was executed by Ms. Jones on February 19, 2016. This modification in limited part modifies and supersedes the Settlement Agreement and Release signed by Ms. Jones on February 19, 2016. A copy of same is attached hereto.

Whereas, it came to the attention of the District that Ms. Jones owed insurance premiums for the months of December 2015 and January 2016 in the amount of $1,135.88.

Whereas, Ms. Jones may have been entitled to a payout of accrued sick time at the time of the effective date of her TPAF retirement, if approved, or June 30, 2016, the end of the 2015-2016 academic year.

Now, therefore the Parties agree as follows:

Ms. Jones has agreed to forego any claim to a payout for any accrued leave time in exchange for the District not seeking recoupment of insurance premiums incurred by her but paid by the District during the months of December 2015 and January 2016 in the amount of $1,135.88.

The parties intend to be legally bound by this modification to the Settlement Agreement and Release as indicated by their signatures below.

Thank you for your attention to this matter.

Very truly yours,

Matthew B. Wieliczko, Esquire

MBW:jey
Enc.
cc: Ms. Angela Jones (w/enc., via email and regular mail)
Nancy Holmes, NJEA UniServ Rep., Region #4
(w/enc., via email only)
David Rosenberg, Esq., Assoc. Dir.,
NJEA Legal Services/Member Rights (w/enc., via email only)
Amy L. Gillette, Esquire

By their signatures below, the Parties acknowledge their understanding and consent and intend to be legally bound by this modification to the Settlement Agreement and Release.

ANGELA JONES

Date:

PAYMON ROUHANIFARD
State District Superintendent
Camden City School District

Date: 6/9/16

This Signature is per our Conversation that I do not owe BOE any Money.

22-1-16

**BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION**

**In the Matter of Tenure Charges**

**between**

**The Rockaway Township Board of Education, Morris County, NJ,**

**Petitioner,**

**and**

**James Dunckley,**

**Respondent.**

**Agency Docket No: 291-9/15**

**OPINION & AWARD**

**Dr. Andrée Y. McKissick**
**Arbitrator**

**APPEARANCES:**

**For the Petitioner:**
John G. Geppert, Jr., Esquire
Schwartz, Simon, Edelstein and Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981

**For the Respondent:**
Sanford R. Oxfeld, Esquire
Oxfeld Cohen, PC
60 Park Place, Suite 600
Newark, New Jersey 07102-5504

On September 18, 2015, the Board found probable cause to allow Sworn Tenure Charges as well as Sworn Statement of Evidence in support thereof against Respondent James Dunckley to warrant his dismissal. Thus, the Board certified and filed the Charges with the Commissioner of Education. On August 31, 2015, Respondent Dunckley was suspended but with pay.( See P-31) That is, his salary increment for the upcoming year will be withheld. The Respondent answered the Charges on October 7, 2015.

Subsequently, the Commissioner submitted the Tenure Charges to this Arbitrator on October 19, 2015.

The Sworn Tenure Charges allege that Respondent Dunckley engaged in conduct unbecoming of a teacher, in violation of the Board Policy, as well as State Law, by his inappropriate conduct exhibited towards his special education students. This conduct included acts of inappropriate touching of certain young females repeatedly.

During the four (4)-day hearing from December 14 and 15, 2015 and January 5 and 6, 2016, the Board presented fifteen (15) witnesses over a three (3)-day period. The Respondent presented approximately eight (8) witnesses. However, Respondent Dunckley did not testify in his own defense. Both Parties were afforded full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. Subsequently, the Parties submitted Post-Hearing Briefs on February 5, 2016. An extension was granted to the Arbitrator for submission on July 6, 2016.

## BACKGROUND INFORMATION COMMON TO ALL CHARGES

**Respondent, James Dunckley, commenced employment with the Board in the 1976-77 school year. He subsequently obtained tenure in his position. He is certified as a teacher of the handicapped and an elementary school teacher. Since September 1, 1996, Respondent has been assigned as an instructor of students with multiple handicaps at the Copeland Middle School. Over the years, he has been responsible for the education and welfare of many students. As a member of the professional staff, Respondent was obliged, among other things, to ensure the implementation and enforcement of all Board of Education policies and generally to safeguard and promote the well-being of the students entrusted to his care.**

**Respondent has a history of inappropriate and unprofessional conduct towards others. By way of example, without limitation, in 2012, an affirmative action complaint was filed against him by Donna Friedberger, a teacher who alleged Respondent engaged in harassing, threatening and hostile behavior toward her. It was resolved by Respondent agreeing to act in a**

**professional manner, and to cease communicating with the teacher to ensure he would not retaliate against her. But, because of Respondent's additional and ongoing failure to conduct himself in an appropriately professional manner, the District is now compelled to file the instant charges.**

**The present charges are the result of recurring complaints, made by minor female children who are or were students of Respondent. Respondent touched them inappropriately and repeatedly, without their consent, despite requests not to do so, and otherwise treated them inappropriately, causing them substantial anxiety, discomfort and disruption.**

**As more fully set forth below, following an initial complaint which was first brought to the District's attention by parents of various female students, in or about December 2009, Respondent was admonished to cease and desist from engaging in the offensive behavior. Nonetheless, Respondent continued in his reprehensible course of conduct into the present, resulting in further complaints of a similar nature involving additional female students. The similarities between the past and present occurrences are troubling. In both cases, the affected female students reported that Mr. Dunckley's unwelcome advances made them feel anxious and uncomfortable. In both cases, the girls who were targets of Mr. Dunckley's unwanted attention and physical contact, experienced anxiety, discomfort and disruption. Both the prior and present misconduct by Respondent, as more fully described below, was unbecoming of a teaching professional, and violative of numerous Board Policies, of which Respondent knew or reasonably should have known.**

## SPECIFICATION OF CHARGES

## CHARGE I

## CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "TA"

**The foregoing Background Information and the facts alleged therein, are incorporated by reference as if fully set forth herein. At all times relevant to the facts set forth below, TA, was a 13-year old girl and a student in Respondent's class at Copeland Middle School, located at 100 Lake Shore Drive, Rockaway Township, New Jersey.**

**Count 1**

**On a recurring basis since on or about December 2014, through April 10, 2015, during class and without TA's consent, Respondent more than once touched TA on her shoulders, on her leg above her knee, knee, back, and "in the area of [her] chest." Respondent also touched TA on her collarbone. Respondent's touching focused primarily on TA, and to a lesser extent upon a second female classmate, ALR (see Charge II, supra). When Respondent touched TA, it made her feel uncomfortable.**

**Count 2**

**Respondent called TA his "buddy," said she was "mature," and that TA was "different than other kids." Respondent's characterization of TA as "mature" and as his "buddy" were made to TA's mother in or about the beginning or middle of the 2014-2015 school year, during a telephone conversation about TA's grades and performance in class. This caused TA's mother to become concerned about exactly what Respondent's intention was by the use of the term "mature." TA's mother found Mr. Dunckley's statements to be very odd; she was taken aback by them and felt very uncomfortable with the conversation.**

**Count 3**

**When he touched her, Respondent typically asked TA if she was "OK." This made TA feel uncomfortable because there was no reason for Respondent to ask TA if she was OK.**

**Count 4**

**Despite repeatedly touching TA without her consent, Respondent throughout the 2014-2015 school year said, "I don't touch kids." On or about March 25, 2015, TA said to Respondent, "Don't touch me," whereupon Respondent "dropped whatever he was doing" and said he "didn't mean it like that." Respondent's overt and exaggerated pronouncement, in direct contravention of his actions was perplexing and made TA feel uncomfortable.**

**Count 5**

**TA informed Respondent, "I don't feel comfortable when you put your hand on me." Yet, two days later, Respondent touched TA's shoulder.**

**Count 6**

**Respondent's foregoing conduct eventually took its toll on TA. Her mother reports that, about a month or two before the 2014-2015 school year ended, TA began to "appear anxious, seemingly more quiet and began changing her dress wear for school in the way of being much more conservative." When TA's mother "confronted [TA] about this change in her, [TA], after initially saying nothing was wrong, told her mother that Mr. Dunckley had been touching her on several different occasions on her shoulder, arm and knee, and that this had made [TA] feel very uncomfortable with him and being in his class."**

**TA reported to her guidance counselor, Sonya Patel, that she "feels as if she is depressed" and was "feeling threatened/bothered by Mr. Dunckley."**

**On or about April 3, 2015, TA "broke down" at home and told her mom that she was feeling "too much pressure" and was "feeling a lot of anxiety." This caused TA's mother to notify the school, and caused the administration promptly to have TA moved to another class.**

**After she became aware of the incidents involving Respondent repeatedly and inappropriately touching TA without her consent despite TA**

**telling Respondent to stop, TA's mother, toward the end of the 2014-2015 school year, took TA to see a doctor due to her "anxious and changing behaviors." After being informed of the incident(s) in school with her teacher, the doctor informed TA's mother that the behavior change could most certainly be explained from her experiences with Mr. Dunckley.**

**The foregoing acts and omissions by James Dunckley, individually and cumulatively, constitute conduct unbecoming a teaching staff member and/or just cause warranting dismissal.**

## CHARGE II

## CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "ALR"

**The foregoing Background Information, Charge, Counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. At all times relevant herein, ALR, was a 13-year old girl, and a student in Respondent's Science and American History classes at Copeland Middle School.**

### Count 1

**On a recurring basis throughout the 2014-2015 school year, until he was placed on administrative suspension on April 10, 2015, during class and without ALR's consent, Respondent touched ALR on her arms, shoulders, knees and legs. For example, without limitation, Respondent would touch ALR's shoulders when she asked to go to the bathroom, asking her if she was okay. When Respondent touched ALR, it made her feel "uncomfortable and weird." ALR noticed that Respondent's inquiry sounded "sweeter than it should" leading her to believe that the touching was sexual in nature.**

### Count 2

**Despite repeatedly touching ALR without her consent, Respondent also repeatedly pronounced: "I don't touch kids!" ALR found this to be "weird" because Respondent was, in fact, touching her and others. She concluded that Respondent was trying to "hide something." This also made ALR feel uncomfortable.**

### Count 3

**When they watched movies in class, Respondent would sometimes sit "really close" to ALR and touch her shoulder. This caused ALR to "feel uncomfortable and weird."**

### Count 4

**When Respondent was at his computer and ALR's back was toward him, ALR felt "like he is staring at [me]" such that, "every morning," ALR moved her desk so she could see Respondent.**

**Count 5**

**The foregoing conduct of Respondent caused ALR to consider "moving out of the class," despite the fact that ALR was "scared of being in a big class."**

**The foregoing acts and omissions by James Dunckley, as set forth in the above Counts, individually and cumulatively, constitute conduct unbecoming a teaching staff member and/or just cause warranting dismissal.**

## CHARGE III

## CONDUCT UNBECOMING A TEACHING STAFF MEMBER, AND/OR OTHER JUST CAUSE FOR DISMISSAL RELATED TO RESPONDENT'S RECURRENT PATTERN OF MISCONDUCT

**All of the foregoing Background Information, Charges, Counts, and the facts set forth therein are incorporated by reference as if fully set forth herein. It is well established that the Commissioner of Education and the Courts recognize that the totality of a pattern of conduct may constitute unbecoming conduct, even when the individual acts comprising it, standing alone, may not. See, e.g., Cowan v. Bernardsville Bd. of Educ., Tenure Hearing of Greg Young, and Tenure Hearing of Donald Dudley.**

**The course of misconduct set forth in the within Charges and Counts, jointly and severally, based on numerous and ongoing infractions over an extended period of time, notwithstanding Respondent's prior history, constitutes such a pattern of conduct unbecoming a teaching staff member. This pattern and course of unbecoming conduct during an extended period of time, and the emotional damage and disruption Respondent has caused to his students manifestly demonstrates his recalcitrance and general unfitness to continue to serve in a position of trust as a public school teaching staff member, warranting his immediate dismissal.**

## ISSUES

1. **Whether or not James Dunckley engaged in acts or omissions constituting unbecoming conduct and/or other just cause, including: inappropriate touching of students?**

2. **If so, does the conduct warrant dismissal from his employment with the Board?**

## PERTINENT PROVISIONS

**THE CHARGES AND SPECIFICATIONS:**

**SPECIFICATIONS**

**In Particular:**

**District Policy 3281, *Inappropriate Staff Conduct*, provides, "Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district," and further that "School staff shall not engage in inappropriate conduct toward or with pupils ... [and] shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities." (P-23.)**

**District Policy 5751, *Sexual Harassment*, provides that the Board "will not tolerate sexual harassment of pupils by school employees," defined as "unwelcomed sexual advances ... or other verbal, nonverbal, or physical conduct of a sexual nature ... that is sufficiently severe, persistent, or pervasive to limit a pupil's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive educational environment." (P-24.)**

**District Regulation 5751, *Sexual Harassment of Pupils*, further provides, when "elementary or middle school (grades K-8) pupils are involved, welcomeness will not be an issue. Sexual conduct between a school employee and an elementary pupil will not be viewed as consensual;" and further provides, "In determining whether conduct is sufficiently severe, persistent, or pervasive, ... all relevant circumstances should be considered ... based on the totality of the circumstances;" and further provides, "Appropriate steps will be taken to end the harassment such as counseling, warning, and/or disciplinary action ... A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment." (P-25.)**

**District Policy 3211, *Code of Ethics*, requires the educator "to attain and maintain the highest possible degree of ethical conduct," and further provides that in "fulfillment of the obligation to the pupil, the educator ... [s]hall make reasonable effort to protect the pupil from conditions harmful to learning or to health and safety," and "[s]hall not intentionally expose the pupil to embarrassment or disparagement." (P-20.)**

**District Policy 3280, *Liability for Pupil Welfare*, provides that "[t]eaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct." (P-22.) District Regulation 3280, *Liability for Pupil Welfare*, further provides, "A teaching staff member must maintain a standard of care for supervision, control, and protection of pupils commensurate with the member's assigned duties and responsibilities." (P-23.)**

**District Policy 3150, *Discipline*, "directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct," and further states, "Violations of those statutes, rules, policies and regulations will be subject to discipline." (P-19.)**

## POSITIONS OF THE PARTIES

It is the position of the Respondent that Charge I and Charge II provide "plain notice" of what one is being charged. Thus, Charge I and Charge II are legitimate, the Respondent reasons, and not procedurally defective. However, Charge III lacks specificity and "plain notice" is absent. Therefore, Charge III, the Respondent asserts, functions as an umbrella charge and should be dismissed by this Arbitrator. Three assessments are set forth in West New York v. Bock, 38 NJ 500 (1962), the prevailing case law, the Respondent contends, which shall be analyzed by this Arbitrator in the Findings and Discussion along with other related case law such as: Buglovsky v. Randolph Board of Education case of Arbitrator Licata, Esq. (Docket No: 265-9-12), decided December 21, 2012.

In regards to Respondent Dunckley's 2009 incident, the Respondent asserts that he has no prior disciplinary record. Moreover, he has never had an increment withheld nor a letter of warning or a reprimand. The Respondent, again citing Bock, op. cit., asserts that "while prior disciplinary actions can serve as a basis for an increased penalty in a future case," "it cannot serve as a basis for future disciplinary charges." Based upon the above, the Respondent reasons that since Principal Allshouse did not impose discipline on Respondent Dunckley and that to consider this 2009 incident is against the concept of industrial double jeopardy. The Respondent explains that such a principle is derived from the basic elements of due process and fairness inherent in just cause, citing Arbitrator Biren's Award, In the Matter of John Carolomagno v. School District of Hillside (Agency No: 180-8-13, decided December 20, 2013). The Respondent reiterates that since the

Petitioner through Principal Allshouse testified that no action was imposed, as evidenced in his report, then the 2009 incident should not be viable for these reasons.

Focusing on Charges I and II regarding T.A. and A.L.R. with Respondent Dunckley, the Respondent challenges the credibility of these witnesses as well as the lack of corroboration of other students in the class, who were not fully investigated.

The Respondent points out that T.A. and A.L.R. are both very close friends who mirrored each other's testimony and operated as a clique. However, the Respondent contends that there was no corroboration of their version of events with other students in the classroom nor from other adults such as the classroom aide nor any administrator who visited Respondent Dunckley's classroom. Specifically, the Respondent notes that Principal Allshouse visited twice weekly with no advanced notification but did not see any of the alleged conduct testified to by T.A. or A.L.R.

The Respondent also asserts the inconsistencies of T.A.'s statements to the District's Investigator taken in August 2015 compared with her statements taken April 10, 2015, which occurred after the alleged conduct. For example, the Respondent notes that T.A.'s first response to the Investigator states that Respondent Dunckley "touches her" when she is "mad and upset." Then, T.A. says that he concurrently asked her if she "was okay." However, in the second interview with the Investigator, in contrast, she elaborates on the touching and its frequency. The Respondent also adds that T.A.'s response was as follows: "He would just say [']are you okay[?'] but there is no reason for him to ask me if I'm OK." When the second Investigator asked T.A. when Respondent Dunckley said this, T.A. responded as follows: "He would bump into me and say [']I'm sorry[,] I don't touch kids[,'] I just find it weird."

Another inconsistency, the Respondent asserts, is the testimony of T.A. in comparison with another classmate, C.P. For example, during the second interview, T.A. mentions that C.P. "freaked out," when Respondent Dunckley "touched her shoulder." However, C.P. testified at the hearing that this was untrue and she was greatly troubled by the fact that she could have gotten Respondent Dunckley in trouble.

In regards to the lack of corroboration from teachers, the Respondent offers the testimony of the elementary teachers, S. Culleny-Peer and D. Marchese. Apparently, the Respondent asserts that both taught T.A. in the past, nonetheless T.A.'s comments to them regarding the allegations against Respondent Dunckley were divergent from her prior statements made to the District Investigators. In particular, the teachers testified that T.A. told them that Respondent Dunckley put his hand on her thigh, indicating a rubbing motion. The Respondent points out that this is a significant omission from T.A.'s earlier investigation with the Division of Youth and Family Service (DYFS) investigator, when she failed to mention this touching of the thigh incident.

Focusing now on the lack of credibility of A.L.R., the Respondent contends that A.L.R.'s response to her allegations against Respondent Dunckley that both T.A. and E.D. said that he was "weird" and he made them feel uncomfortable. In contrast, E.D. testified at the hearing, the Respondent asserts, and she denied these allegations. Thus, for all the foregoing, the Respondent strongly asserts that T.A. and A.L.R. lack credibility.

In regards to the lack of a thorough investigation of the School District, the Respondent points to the failure of the District to interview School Aide Ciampitte. She was Respondent Dunckley's aide during the school year at issue. Essentially, the Respondent asserts that she corroborated C.P.'s testimony, stating that "he does not touch

kids." Most importantly, the Respondent maintains that Aide Ciampitte never witnessed Respondent Dunckley inappropriately touching any student. This again, the Respondent contends, supports the synopsis of Principal Allshouse's version of events, when he made unannounced pop-ins on Respondent Dunckley while class was in session. In summary, the Respondent concludes that not one witness, student, principal or aide can corroborate the allegations of T.A. and A.L.R.

In response to the Petitioner's reliance on the Davis case, the Respondent rebuts that the Davis case differs from our case. In particular, the Respondent points out that there was independent corroboration that School Custodian Davis touched the student's hair. That is, it was done in front of the mother of the student. She noticed that her daughter was uncomfortable with the stroking and fondling of her hair. However, there is no similar corroboration of any student's testimony, the Respondent asserts. Besides, the Respondent notes that there was no factual dispute in the Davis case, as here.

In addition, the Respondent further asserts that the School Custodian Davis admitted to fondling the student's hair, but these factors are absent in our case with Respondent Dunckley. Based on the foregoing, the Respondent requests that the Arbitrator restore Respondent Dunckley to his prior position with full back pay because the charges are baseless and to expunge his record.

On the other hand, it is the position of the Petitioner that this is a tenure case concerning a special education teacher who chose not to appear as a witness in his own hearing. The Petitioner asserts that he is a danger to young girls and has recently touched two (2) thirteen (13)-year-old girls on numerous occasions. The Petitioner further asserts that Respondent Dunckley has touched other girls in the past. Specifically, the charges

reflect that he touched T.A. and A.L.R. on various body parts, including shoulder, thigh or leg above the knee, back, chest area, collarbone, arms, knees and legs, during the 2014-2015 school year, despite being told to stop by these young girls. Paradoxically, the Petitioner points out, Respondent Dunckley verbally exclaimed that he doesn't "touch kids," much to the confusion of the girls who he continues to touch. Thus, the Petitioner contends that T.A. and A.L.R. were made to feel uncomfortable and causing substantial anxiety, discomfort and disruptions by his conduct. Based on Respondent Dunckley's conduct, the Petitioner adds that one of the female students was transferred to another class. He was placed on administrative leave pending the outcome of the District's Investigation.

Most importantly, the Petitioner maintains that the conduct exhibited by Respondent Dunckley in 2014-2015 was not the first time he has acted inappropriately and in a disturbing manner toward minor female special education students placed in his care. That is, in 2009, two (2) girls and parents came forward and complained of the exact same conduct, forcing the administration to remove two (2) female students (J.W. and A.R.) from Respondent Dunckley's class. Thus, the Petitioner contends that he disrupted the continuity of the girls' education. At that juncture, the Petitioner points out, that Respondent Dunckley was warned and instructed to cease and desist from engaging in offensive behavior toward young girls. Based upon the conduct described, the Petitioner surmises that the Respondent is a real danger to young girls and should not be permitted to continue working with children and subjecting them to this behavior. The Petitioner asserts that three (3) cases, in particular, epitomizes this conclusion and their dismissal is required. They are as follows: In the Matter of Tenure Hearing of Marvis Davis, Agency Docket No: 22-1/4 (May 15, 2014, Arbitrator Symonette); In the Matter of Tenure Hearing McClelland (March 25, 1983, affidavit State Board, July 6, 1983 affidavit, A-152-83T2, app. Div. 1984;

and In the Matter of Grace Colon v. City of New York Department of Education, 2010 NY Slip Op 33211(U) (New York Supreme Court, 2010), Arbitrator Dr. McKissick.

In the Davis case, the Arbitrator sustained a dismissal of a school custodian when he touched the hair of female students, making them feel "weird" and uncomfortable. This was the holding, despite a Department of Children and Family (DCF) finding that sexual abuse was unsubstantiated. In the McClelland, this case was upheld of a dismissal of a tenured fifth grade teacher who engaged in improper touching with five (5) female students. In the Colon arbitration, the Arbitrator found that the special education teacher engaged in conduct unbecoming, which included ongoing physical and verbal abuse of students and faculty members. Here, dismissal was the appropriate remedy notwithstanding the teacher's unblemished record. In sum, the Petitioner urges the Arbitrator that given the Respondent's prior history as well as the recent events in 2014-2015 that there is no alternative except dismissal.

Focusing upon Charges I and II, T.A. testified to the unwanted touching and this was corroborated by A.L.R. More significantly, such actions were testified to by N.A., a classmate, and former elementary school teachers, Culleny-Peer and Marchese. Both teachers taught T.A. in the past. All support the allegations of T.A. and A.L.R. as does Dr. Greg McGann, the superintendent, and Dr. Dempsey, the school psychologist. In particular, Dr. Dempsey concluded from his analysis that T.A. and A.L.R. were greatly damaged by this traumatic experience with Respondent Dunckley who sexualized this relationship with these young pre-adolescent females.

Regarding the Petitioner's request for an adverse inference, the Petitioner points out that this is not a criminal proceeding and that no constitutional rights are at issue.

Instead, Respondent Dunckley is the only person with personal knowledge of what occurred besides the girls themselves. Nonetheless, he has chosen not to offer any material facts or to contradict the factual testimony of the victims, T.A. and A.L.R. Here, the Petitioner adds that no witnesses were presented by the Respondent to contradict the analysis and conclusions of Dr. Dempsey, the school psychologist.

Moreover, the Petitioner notes that in State v. Clawans, 38 NJ 162, 170-171 (1962), New Jersey's highest court established the appropriateness of such inferences. That case held that the failure of a party to testify raises a "natural inference" that the "party fears exposure of unfavorable" facts would be presented against him.

Looking at the totality of evidence and egregious conduct of Respondent Dunckley, the Petitioner concludes that he has failed to satisfy the standards of the teaching profession. That is, the Petitioner adds that Respondent Dunckley has blatantly breached his fiduciary duty and wreaked havoc on lives of the young female students involved. Thus, the Petitioner reasons that Respondent Dunckley deserves no additional chances as he was forewarned in 2009, yet repeated the same behavior with other young female students. Based on the foregoing, the Petitioner requests that Respondent Dunckley be dismissed.

## FINDINGS AND DISCUSSION

The appropriate evidentiary standard that applies to making findings of fact requires the Petitioner to prove its case by a preponderance of credible evidence. That is, it is more probable than not that the Respondent engaged in conduct set forth in the charges. In accordance with these requirements and consistent to the above evidentiary standard, the following Findings of Fact and Conclusions are so delineated.

### CHARGE I

**CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "TA"**

P-3 reflects T.A.'s handwritten comments regarding the substance of this charge, when she answers questions from Investigator J. R. Keney on August 19, 2015. She writes that she is a student of Respondent Dunckley during the school year 2014-2015 and that he made her feel uncomfortable. Specifically, she writes that he "touched my leg above the knee," her "shoulder and back." He also touched her "chest." She also adds "his actions were different than his words." P-3 at p. 3 also mentions that T.A.'s friend, A.L.R., was moved from his class. P-4 is also a handwritten statement written by A.L.R. It is also reflective of questions asked of A.L.R. by Investigator J. R. Keney on August 22, 2015. In that statement, A.L.R. also writes that Respondent Dunckley's actions made her feel "uncomfortable." She also writes that Respondent Dunckley sat next to her "during videos" and that he would "touch my shoulders." P-6 reflects that events written in a memo from Social Worker P. Dafgek, dated April 9, 2015 concerning a call from T.A.'s mother.

This memo was directed to Principal Allshouse where the social worker Dafgek reveals the substance of T.A.'s mother's call regarding Respondent Dunckley's touching T.A. as well as other students: "A.L.R., C.P. and E.D." In this memo, T.A.'s mother states that she contacted Respondent Dunckley who stated that T.A. was "different than other kids, more mature and is a buddy." T.A.'s mother reported that the teacher was more "sexual" with her daughter, T.A., as well as A.L.R., because they were "more developed" than other girls in the class (see P-6 at 2).

P-7 is a memo from Guidance Counselor Sonya Patel who recorded her conversation with T.A.'s mother, dated March 26 and March 27, 2015. She relates to the guidance counselor that T.A. now has anxiety attacks and she has flashbacks of earlier incidents in her life. In addition, T.A.'s mother repeats that T.A. said to Respondent Dunckley, "Don't touch me." However, he responded to T.A. by saying that "I don't touch kids." The memo continues that Respondent Dunckley has continued to touch her on the shoulder, collarbone, and back.

P-10 is a handwritten assessment of Dr. Dempsey, the school psychologist, relating that Respondent Dunckley exhibited "abusive behavior" towards "two female students," dated August 21, 2015. He continued to describe this behavior of Respondent Dunckley as "sexualizing the relationship" between these two female students, "imposing a traumatic and damaging experience upon them."

P-12 reflects an affidavit written by T.A.'s prior school teacher, S. Culleny-Peer, regarding her conversation with T.A. She further relayed the information conveyed by T.A., including that Respondent Dunckley put his hands "on my thigh," while saying "good

job." Again, T.A. relates to her school teacher, Culleny-Peer, that his touches made her feel uncomfortable.

P-13 reflects the affidavit dated September 8, 2015 of T.A.'s former teacher, D. Marchese, who she encountered while the teacher was performing "Bus Duty." Former Elementary Teacher Marchese conveyed that T.A. seemed to be "visibly upset and shaken" as she told her about the conduct of Respondent Dunckley as he "rubbed her thigh." Collectively these various allegations encompassed Charge I, Counts 1 through 6. Implicit through these corroborations are the words of T.A., A.L.R., plus the guidance counselor, the school psychologist, and 2 (two) former elementary teachers. All of this evidence was again consistent with their testimony before this Arbitrator at the hearing.

**CHARGE II**

**CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT TOWARDS A STUDENT, "ALR"**

P-4 comprises an interview with A.L.R. by Investigator Keney where A.L.R. explicitly writes that Respondent Dunckley "made her feel uncomfortable." She also writes that he sits close to her during movies in class and touches her shoulder. This was written in her own handwriting and signed by A.L.R. on August 22, 2015.

Even more striking events occurred on April 9, 2015. This was reflected in the written memo by the school guidance counselor, Patel (P-8). In detail, she recounts the events narrated by A.L.R. that Respondent Dunckley makes her feel "uncomfortable and weird." She further "believes it may be a little sexual in nature." Moreover, she explained

that the touching often occurs when the class watches a movie in class or while she is on the computer. Specifically, A.L.R. adds that she told Respondent Dunckley "to stop touching her." Nonetheless, she reports that it continues to occur. Lastly, she related to School Counselor Patel that "they [the students] feel like he is staring at them." Thus, "they move their desk and seats so they can see him." Based on the foregoing, these collective recollections are consistent with their testimonies at the arbitration hearing. Accordingly, such specific details comport with Charge II, Counts 1 through 5.

**CHARGE III**

**CONDUCT UNBECOMING A TEACHING STAFF MEMBER, AND/OR OTHER JUST CAUSE FOR DISMISSAL RELATEDTO RESPONDENT'S RECURRENT PATTERN OF MISCONDUCT**

Charge III focuses upon Background Information of Charge I and II as set forth by Dr. McGann, the superintendent. Thus, he draws a nexus between prior behavior of Respondent Dunckley and these current charges. In particular, he focuses on the similarity of Respondent Dunckley's conduct in the school year 2009-2010 involving two (2), then-minor female students, J.W. and A.R. During a series of incidents, it was alleged that Respondent Dunckley inappropriately touched their hair; stroked their shoulders, arms and back. Although both girls asked the Respondent to stop, the record reflects that it continued. As a consequence, A.R. was removed from his class. The school psychologist, Dr. Dempsey, wrote of these incidents in P-11. His analysis of these incidents was that this consisted of the "same pattern of abusive behavior" that was displayed by Respondent Dunckley with said students. Moreover, Dr. Dempsey in P-11 concluded that Respondent Dunckley displayed a "persistent and ongoing pattern of hostile bullying behavior towards

children ...." In sum, Dr. Dempsey states that there was "compelling evidence" to suggest that he was "sexualizing the student-teacher relationship."

In P-15, Director Swierc states that Respondent Dunckley was to be "counseled about appropriate parent-teacher interaction." This was referring to the series of 2009 incidents regarding J.W. and A.R.

P-16 reflects Principal Allshouse's recollection of events of 2009-2010 involved the same students. At that juncture, Principal Allshouse "removed the two students from Mr. Dunckley's classes to eliminate the possibility of future issues." This memo was dated January 8, 2010. Notwithstanding being counseled and warned, the present charges of 2014-2015 constitutes a continuing pattern of conduct unbecoming a staff member. As such, the conduct exhibited by Respondent Dunckley was emotionally damaging to the students who were inappropriately touched by him.

In response to the Respondent's argument that Charge III does not provide "plain notice" or that the charge lacks specificity, this Arbitrator must disagree. To the contrary, the charge sets forth that it compasses the totality of conduct of Respondent Dunckley. It also specifically deals with a pattern of conduct, where background information provided by Dr. McGann regarding prior conduct can be considered in deliberating at the penalty stage. Accordingly, Charge III is viable and shall not be dismissed for the above reasons. Thus, West New York v. Bock, 38 NJ 500 (1962) was correctly applied to our case on this issue.

## OMISSION TO TESTIFY AND ADMISSIONS

Since Respondent Dunckley chose not to testify in his own defense, it is necessary to more carefully analyze his responses to specific questions posed in the Answer. As to Charge I, Count 1, Respondent Dunckley "admits" that on "one occasion he touched T.A. on the leg when her leg was upon on a desk." He also "admits that he would praise students by touching them on the shoulder" or "to get the student to pay attention." However, he adds that "it was never sexual."

As to Charge I, Count 2, the Respondent Dunckley denies using the word "buddy." However, he "did state to the mother that T.A., as compared to other students age-wise, [T.A.] was more mature."

As to Charge I, Count 3 and Count 4, Respondent Dunckley denies these allegations "except on March 25, 2015, when T.A. was not paying attention, he did touch her arm." He also "admits" that "T.A." stated "at that time, 'Don't touch me'."

As to Charge I, Count 5 and Count 6, Respondent Dunckley denies because he was suspended on April 10th. Thus, he was not in school the last two (2) months of school.

As to Charge II, Count 1, Respondent Dunckley admits stating that "I don't touch kids." However, he denies Count 2, Count 3, Count 4, and Count 5 of Charge II. As to Charge III, Respondent Dunckley also denies these allegations in full.

At variance to Respondent Dunckley's responses above, A.L.R. tells the New Jersey Department of Children and Families, dated May 16, 2013 (D-3 at 11), the following: "He touched her [shoulder and leg]" "maybe more than 10 times, like twice a

week ...." When asked by Investigator Nuñez, whether A.L.R. saw him touch anyone else in the class. A.L.R. responded, Yes, "My friend, T.A." She then responds that "he does the same thing to me but sometimes he touches her thigh." When further questioned as to when this occurred, A.L.R. responded as follows: "It was when we had our feet up on the desk and he touched her [T.A.'s] thigh and asked her if she was OK." It is important to note that D-3, a composite of several persons who were investigated, also corroborates T.A. and A.L.R.'s version of events by the school guidance counselor Patel as well as the social worker Dafgek. As noted earlier and again in D-3, the school psychologist makes negative assessments concerning the Respondent Dunckley's chronic misbehavior and he validates the testimony of A.L.R. and T.A.

In response to the Respondent's argument that T.A. and A.L.R. are not credible witnesses, this Arbitrator must disagree based upon the specific questions answered and corroborated by the school guidance counselor, social worker, school psychologist, as well as other elementary teachers. Although the Respondent rightly points out that they are close friends, this Arbitrator does not find that the allegations of A.L.R. and T.A. were untrue.

In regards to the Respondent's witnesses, Classroom Aide Ciampitti and Aide Bartholomew, the record reflects that neither were employed in Spring of 2015, the timing of these events. Since they were not physically present, both were unable to offer viable evidence to counter the Petitioner's witnesses. As to the Respondent's student witness, C.P., she testified favorably but seemed emotionally intimidated by Respondent Dunckley; afraid to offend him. Thus, her testimony also was not viable to his case. Although Principal Allshouse stopped by twice a week to observe, the exact timing of this

misconduct did not occur during these exact intervals. Thus, his testimony does not rebut these occurrences of the misconduct.

In response to the Respondent's argument that to consider the 2009 incident, when Principal Allshouse did not impose a formal charge, constitutes a breach of industrial double jeopardy, this Arbitrator must again disagree. That is, Charge III specifically states "Respondent's recurrent pattern of misconduct." Thus, Dr. McGann had a right to set forth the analysis of prior misconduct exhibited in the 2009 incident. Respondent Dunckley was counseled and warned not to engage in similar misconduct of inappropriate touching (see P-31). Nonetheless, this misconduct continued and escalated and eventually culminates in his behavior with A.L.R. and T.A. in the 2014-2015 school year. It is also important to note that the withholding of one's salary increment and concurrently filing tenure charges is a part of the broad, continuing spectrum of progressive disciplinary actions since such actions do not impose separate penalties, thus industrial double jeopardy will again not apply. Here, Superintendent McGann in P-31 specifically noted the following:

> The Rockaway Board of Education voted on August 31, 2015 to withhold your employment and salary increment for the upcoming year. Therefore, your salary will be frozen during the 2015-2016 school year and will not be reinstated unless action by the Board to do so is taken in the future. Additionally, the Board is determined to continue your present suspension with pay pending further investigation and possible disciplinary action.

Accordingly, this is one transactional act, but divided into two (2) parts, as noted above. Thus, In the Matter of John Carolmagro v. School District of Hillside, supra is not applicable. In concurrence with the analysis of this Arbitrator regarding industrial double jeopardy, see Arbitrator De Treux's input on this topic, In the Matter of the Tenure Hearing

of Richard Graffanino River Dell Regional School District, Bergen County, New Jersey, Agency Docket No: 233-9/13 at 25-26, January 31, 2014.

In response to the Petitioner's request for the utilization of an adverse inference, this Arbitrator must agree. Since Respondent Dunckley chose not to testify, it is fair to make a legitimate inference that he likely fears exposure to adverse facts which would be unfavorable to his case. This natural inference is clearly supported by In the State v. Clawans, 28 NJ 162 at 170-171(1962), New Jersey's highest court. Although Clawans is a criminal case, this principle is equally applicable to civil cases, as here.

## PREVAILING CASE LAW REGARDING CHARGE I, CHARGE II, AND CHARGE III AND THE APPROPRIATE PENALTY

A case directly on point is: In the Matter of the Tenure of Marvin Davis and the School District of Asbury Park, Monmouth County, New Jersey, op. cit., Arbitrator Symonette, Esq., May 15, 2014. In that case, a school custodian was charged with conduct unbecoming a staff member when he continued to touch the hair of several young female students against their will. The custodian made this admission by way of an investigation on June 13, 2013 during an interview. This was the basis of Specification 6, the Admission. However, in the Answer, the custodian denied the charges. That is, he claimed that he did not engage conduct unbecoming and that he did not engage in inappropriate physical contact with young female students.

Two (2) students corroborated the testimony of J.R. Also, J.R.'s mother witnessed the incident which she reported to the District. The Arbitrator in that case dismissed Davis,

the school custodian, although he was remorseful and promised not to engage in such behavior again. It is important to note that there was at least one (1) prior incident of this recurrent misconduct before this current case came to fruition of the respondent custodian's proclivity to engage in inappropriate touching, when the students told him to stop.

Comparing the Davis case to our current case with Respondent Dunckley, both cases dealt with inappropriate touching of young girls who described such misconduct as acts which made them feel "uncomfortable" and "weird." Both respondents had engaged in prior misconduct, involving the same acts of repeated inappropriate touching of female students. Both respondents were warned before tenure charges were brought by their Districts. Clearly, the admission of the respondent custodian differs from our case with Respondent Dunckley. However, Respondent Dunckley made some limited admissions in his responses to the Answer, as noted earlier. Both respondents were asked to stop their behavior towards these young girls, but such misconduct continued. In the Davis case, supra, the respondent testified in his own defense and expressed regret and remorse. With our case, Respondent Dunckley chose not to testify nor did he rebut the findings of the school psychologist, Dr. Dempsey, on the traumatic harm that his misconduct caused the students, T.A. and A.L.R.

In regards to the appropriate penalty, it is helpful to analyze In the Matter of Colon v. New York Department of Education, Docket Number: 118161/2009, decided upon by this Arbitrator. In that case, Respondent Colon, a special education teacher, was charged with verbal and corporal abuse of her students. She was a long-term employee who was charged with a total of eighteen (18) Specifications of misconduct. This Arbitrator upheld Specifications 1, 2, 4, 6, 7, 9, 10, 11, 13, 14, 15, 16, and 17, but Specifications 3, 5, 8, 12,

and 18 were dismissed. This Arbitrator discharged Respondent Colon due to the severity and the egregiousness of the collective charges, notwithstanding her unblemished record.

Comparing the Colon's holding to our case, both dealt with the physical touching and abuse of special education students from a teacher on multiple occasions. Although Respondent Dunckley was not formally charged in the 2009 incident, the record reflects that he was counseled and warned of this continuing misconduct. Moreover, it is important to note that prior misconduct can be considered at the penalty stage, as here. Due to the egregious nature of these collective acts of 2009 and culminating in the misconduct of 2014-2015, the penalty of dismissal is not excessive. As the appellate court held in the Colon case, supra, "the penalty of termination is not shocking to the conscience." This Arbitrator, in particular, credits the graphic testimony of Dr. Dempsey, the school psychologist, in his analysis of the continuing harm upon T.A. and A.L.R. in reaching the conclusion of dismissal.

Lastly, the case also akin to the Davis and Colon cases is: In the Matter of the Tenure Hearing of George McClelland, School District Washington Township, Mercer County, New Jersey, No. Edu: 5284-82: Agency No: 130-4/82A, ALJ Erickson, February 10, 1983. Respondent McClelland was charged with inappropriate behavior with minor female students, which included: reciprocal hugging, touching and caressing of these students. All of these allegations were corroborated by school personnel and students. Although Respondent McClelland testified and denied these allegations, the evidence was substantially against him. Finally, it was the Commissioner of Education, on March 25, 1983, who dismissed him. As with the other respondents in Davis and here, Respondent

McClelland had been warned to cease such misconduct. Accordingly, the penalty of removal was appropriate.

## AWARD

Respondent Dunckley is hereby terminated with just cause due to the substantial, credible evidence presented against him. Charge I, Counts 1 through 6, is sustained. Charge II, Counts 1 through 5, is sustained. Charged III is also sustained for reasons set forth in the Award.

## AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

**DATE OF AWARD: June 13, 2016**

**ARBITRATOR**

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222-16

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|---|---|---|
| A.S. and M.S., on behalf of minor child, J.S., | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioners challenged the March 2014 action of the respondent, the Gloucester County Institute of Technology (GCIT), denying J.S. entry into the school's Fall 2014 Cosmetology Program based on petitioner's failure to meet the eligibility criteria. The respondent filed a motion for summary decision, seeking dismissal of the petition on the grounds that petitioner failed to file within the ninety-day time limit for the filing of appeals, pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioner claimed, *inter alia*, that the respondent's action was a denial of equal protection of the laws under the U.S. and N.J. constitutions, and sought a waiver of the time restriction based upon this argument.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; the petitioner had notice of the Board's determination denying J.S. admission into the cosmetology program on March 15, 2014, but did not file the petition until November 26, 2014 – well beyond the ninety-day time frame set forth at *N.J.A.C.* 6A:3-1.3(i); the facts in this case show that GCIT properly determined that J.S. did not meet the school's admission criteria for the cosmetology program; GCIT did not act in an arbitrary or capricious manner in considering J.S.'s eligibility for the program; and petitioner has failed to demonstrate entitlement to a waiver of the 90-day time limit for the filing of an appeal. The ALJ concluded that the within petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i); accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

June 20, 2016

OAL DKT. NO. EDU 271-15
AGENCY DKT. NO. 347-11/14

| | | |
|---|---|---|
| A.S. and M.S., on behalf of minor child, J.S., | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Gloucester County Institute of Technology's (GCIT) reply thereto.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons stated in the Initial Decision – that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). Although it is undisputed that the petition was filed well beyond the 90-day limitations period, the petitioners maintain that the 90-day period should be relaxed because this matter involves constitutional issues of public concern. Despite their claim to the contrary, the petitioners have failed to present any exceptional circumstances that might justify a finding that strictly adhering to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16. The Commissioner is also not persuaded that the exceptions submitted by the petitioners dictate a different result, as the arguments advanced by the petitioners in their exceptions were considered and fully addressed by the ALJ in the Initial Decision.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/20/16

Date of Mailing: 6/21/16

[1] Since the petition of appeal was untimely filed, it was not necessary to evaluate whether GCIT's decision was arbitrary, capricious or unreasonable.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 271-15
AGENCY DKT. NO. 347-11/14

**A.S. AND M.S. O/B/O J.S.,**
Petitioners,
v.
**GLOUCESTER COUNTY**
**INSTITUTE OF TECHNOLOGY,**
Respondent.

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**Christopher M. Manganello**, Esq., for petitioners

**Rita Barone**, Esq., for respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC, attorneys)

Record Closed: November 4, 2015 Decided: May 4, 2016

BEFORE **JOSEPH A. ASCIONE**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner A.S. and M.S. o/b/o J.S. (J.S.) challenges the March 14, 2014, action of respondent Gloucester County Institute of Technology (GCIT) denying petitioner, a seventh grader at the time of the application, a place in the Fall 2014 Cosmetology

Program. Respondent denied petitioner one of 350 places based upon petitioner's failure to rank sufficiently to meet the eligibility criteria. That criteria is based upon the applicant's: i.) declaration of career focus, ii.) attendance profile, iii.) academic record, and iv.) standardized assessment. Other criteria require a shadow visit. Petitioner opposes the respondent's denial as a denial of equal protection of the laws under the Federal and New Jersey Constitution, and a denial of a Free Access to Public Education (FAPE) in the Least Restrictive Environment (LRE), based upon GCIT's failure to consider petitioner's status as a student entitled to an Individual Education Plan (IEP). Respondent raises grounds for the dismissal of the petition herein based upon a failure of petitioner to file a petition within ninety days of the action of GCIT, N.J.A.C. 6A:3-1.3(4)(i). Petitioner seeks a waiver of the time restriction based upon the equal protection argument. Respondent maintains that it processes applications based upon a procedure authorized under N.J.A.C. 6A:19-2.3(b). Respondent maintains that petitioner must show by a preponderance of the evidence that the admission procedure is arbitrary or capricious.

On January 7, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. The respondent moved for summary decision, seeking dismissal of the petition. Petitioner opposed said motion. The record on the application for summary disposition closed on November 4, 2015. The Acting Director and Chief Administrative Law Judge granted extensions of time for the Initial Decision on December 18, 2015, February 3, 2016, and March 21, 2016.

## DISCUSSION

Initially, I note that petitioner provided no certification or affidavit in opposition to the respondent's motion in this matter. For this record, the Administrative Law Judge (ALJ) will rely on respondent's excerpts of petitioner's August 20, 2015, certified answers to interrogatories, and the initial eight paragraph Petitioner's Request for

Hearing[1]. The pertinent paragraphs of the petition are three, four, five, six and seven. Paragraph three identifies J.S. as a special education student. Paragraph four claims that GCIT refused to consider all relevant documents (the IEP) in making its admission decision as to J.S. Paragraph five claims that GCIT failed to properly communicate with A.S. and M.S. regarding the process. Paragraph six claims that GCIT failed to properly maintain student records related to J.S. and failed to provide same to A.S. and M.S. Paragraph seven claims that as a result of the denial of admission to the cosmetology program, GCIT denied J.S. a FAPE in the LRE. Petitioner in interrogatory answer thirteen, acknowledges the rejection letter on March 15, 2013. Petitioner in interrogatory answer twenty-four, acknowledged that GCIT advised her that they processed applications through a rubric and did not look at an applicant's IEP's until after it determined acceptance. That answer went on to identify the percentage of students that were special education over the last few years. The percentage totals approximately fourteen percent, or somewhere between forty to fifty special education students per year, 166 of a total enrollment of 1,286. That interrogatory answer claims that GCIT "may use" the IEP to screen the students; it also claims that A.S. believes that J.S. "should be exempt from the process and eligible for a placement based on the fact that she has and (sic) IEP."

Michael C. Dicken (Dicken) is the superintendent of the GCIT, and familiar with the admission process. He swears that annually there are approximately 950 applicants for 350 positions at GCIT. The admission criteria looks to the items identified above and the final grades from 7th grade and the first marking period of 8th grade; guidance assessment and application. GCIT does contact the guidance office of the local school for necessary student records, including IEP's, child study team records and the 504 plan, if any. Only after an affirmative decision is made on accepting an applicant does GCIT review an IEP or similar records. Dicken testified that the admission criteria is the same for all applicants, J.S. did not receive an affirmative placement but wait listed.

[1] Note that this document is signed by counsel and the petitioner's parents. However, petitioner's parents did not make a certification or verification of the statements contained therein. They appeared to have sworn to the statements made therein. However, the format does not show that they were administered an oath. Further, the statements made are to the best of their knowledge and belief. See N.J.A.C. 6A:3-1.4(a)

## FACTS

The following facts are not disputed, and I **FIND**:

1. On October 1, 2013, J.S. applied for admission at GCIT in its cosmology program. On March 14, 2014, J.S. received notification of her placement on the wait list. On November 26, 2014, more than ninety days after March 14, 2016, J.S., through her parents, requested a hearing on GCIT's denial of admission to J.S.

2. GCIT applied its admission standard to J.S.'s application without consideration of J.S.'s disability, based on J.S.'s stated career focus, her academic and attendance records, and standardized testing. This resulted in a denial of admission. GCIT wait listed J.S., however, no placement became available.

3. The petitioner recognizes that approximately fourteen percent of the student body, represents special education students accepted at GCIT.

## ADDITIONAL FACTS FOUND

Based upon the review of respondent's certification and moving papers including excerpts of the certified answers to interrogatories, and the request for hearing, I **FIND** the following as additional **FACTS**:

4. Petitioner's certified answer to interrogatory twenty-four, makes an unsupported claim that GCIT "may use" an IEP as a screen mechanism.

4. Petitioner presented no evidence of the denial of admission to J.S. based upon the equal protection of the law.

5. Petitioner presented no evidence of arbitrary or capricious actions of the respondent in its decision to deny J.S. a placement at GCIT.

## LEGAL DISCUSSION

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for deciding motions for summary decision are contained in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there is no "genuine issue" of "material fact." The determination as to whether genuine issues of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" issues of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses on the analytical procedure for determining whether a purported issue of material fact is "genuine" or is of an "insubstantial nature." Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary-decision motions. "[T]he essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). In searching the proffered evidence to decide the motion, the judge must be guided by the

applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. Id. at 535 (citation omitted). Here, the petitioner's proofs are severely lacking in evidential value.

The certified answer to interrogatory only suggests that the GCIT "may use" the IEP as a screening mechanism. This statement is belied by the fact that approximately fourteen percent of the student body at GCIT fall into the classification of special education students. Petitioner posits that J.S. "should be exempt from the process and eligible for a placement based on the fact that she has and (sic) IEP" However, petitioner provides no analysis as to the scoring of the group of special education students that were admitted to GCIT. Petitioner has had opportunity to attempt to seek this information through discovery. If obtained, petitioner's certification would have brought to the attention of this tribunal something to analyze, factually. In the absence of such information, petitioner does not show that J.S.'s denial violated the equal protection of the laws of the Federal or New Jersey State constitution.

Even if a factual showing demonstrated a questionable action, a petitioner must show that the action of the admission unit had to be arbitrary and capricious. Discretionary actions of a local board of education "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294-96 (App. Div. 1960). "In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances." T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Petitioner, has not alleged any factual

information to support a finding that GCIT's actions were arbitrary or capricious. The petitioner's position that J.S.'s denial of admission to the GCIT cosmology program, is arbitrary and capricious without any factual basis for the position, cannot support such a conclusion.

The petitioner requests a waiver of the ninety-day rule under N.J.A.C. 6A:3-1.3(4)(i) to bring the petition out of time as a result of a constitutional question that will affect others than J.S.

Petitioner acknowledged that the GCIT determination occurred on March 15, 2014, J.S. filed the petition on November 26, 2014, eight months after notice of the decision. Petitioner has not demonstrated that any constitutional question exists. Nor is there any explanation of the delay. To relax the ninety-day rule the circumstances must be exceptional or the reason must be compelling. N.J.A.C. 6A:3-1.16. Respondent cites Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572,590 (1993); and DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R. 2d (EDU) 449, 453, in support of their position. These cases involved employment/tenure rights not special education situations but, there is no meaningful distinction in the areas of law covered.

Respondent has addressed the New Jersey Attorney General's Office position requiring the Cape May School District consider admissions without consideration of special education status of the applicant. Specifically, respondent argues that to include special education into the admission criteria would inappropriately bring into consideration a criteria fraught with allegations of discriminatory action either for or against a special education student. The present criteria respondent argues is neutral, and does not violate the law.

The Commissioner of Education promulgated N.J.A.C. 6A:3-1.3(4)(i), as requiring a petition be brought within ninety days of notice of the action. J.S. did not do that here. J.S did not substantiate any exceptional or compelling reasons for the failure to file. Further, J.S. did not demonstrate on the record a constitutional question this tribunal can address.

## CONCLUSION

I **CONCLUDE** that the GCIT properly exercised its right to determine the admission status of J.S. under its admission criteria.

I **CONCLUDE** that J.S. did not bring facts to the attention of the tribunal that a constitutional question exists.

I **CONCLUDE** that GCIT's did not act in an arbitrary or capricious manner to the detriment of J.S.

I **CONCLUDE** petitioner is barred by N.J.A.C. 6A:3-1.3(4)(i), from bringing this petition out of time.

I **CONCLUDE** petitioner has failed to demonstrate that she is entitled to a waiver of the time period of N.J.A.C. 6A:3-1.3(4)(i).

## ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**, and petitioner's petition is **DISMISSED and DENIED** in all respects. This Initial Decision disposes of all issues in controversy in this matter.

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

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

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

May 4, 2016
DATE

**JOSEPH A. ASCIONE**, ALJ

Date Received at Agency: 5/4/16

Date Mailed to Parties: 5/4/16

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# APPENDIX

## LIST OF WITNESSES

**For Petitioner:**

None

**For Respondent:**

None

## LIST OF EXHIBITS

**For Petitioner:**

Opposition to motion for summary decision, dated October 21, 2015

**For Respondent:**

Motion for summary decision with support certification and documentation, dated September 14, 2015

Reply submission in support of summary decision, dated November 2, 2015

223-16

| | | |
|---|---|---|
| R.A., on behalf of minor child, B.A., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

The petitioner challenged the determination of the respondent Board that B.A. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). The Board contended that the incident in question constituted student conflict and did not meet the definition of HIB pursuant to the Act. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; the main issue for resolution in this case is whether the Board's finding that there was no HIB was arbitrary, capricious or unreasonable; the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication – whether it be a single incident or a series of incidents – that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; in the instant matter, the petitioner alleged that there had been intermittent incidents involving a group of friends that B.A. perceived to be harassment, beginning in 2013 – when the girls were in sixth grade – after B.A. was invited to a birthday party when the other friends were not, and culminating in a January 2015 incident involving B.A.'s lunch bag allegedly being kicked out of a classroom and then pushed back in; the Board's investigation into the allegations was inconclusive as to the intent of the girls involved, and not all of the girls involved in the January 2015 incident had been involved in prior alleged incidents; further, there were no allegations that a distinguishing characteristic of B.A., either actual or perceived, motivated any of the conduct by the girls. The ALJ concluded that it was reasonable for the Board to conclude that the circumstances in this case – which certainly showed personal conflict between B.A. and the other girls, but not conduct based on any distinguishing characteristic of the victim – did not rise to the level of HIB. Accordingly, the Board's motion for summary decision was granted, the petitioner's cross motion was denied, and the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusion of the ALJ; accordingly, the Initial Decision was adopted as the final decision in this matter.

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

ISSUED

OAL DKT. NO. EDU 10485-15
AGENCY DKT. NO. 143-6/15

| | | |
|---|---|---|
| R.A., on behalf of minor child, B.A., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's decision in connection with B.A. was not arbitrary, capricious or unreasonable. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/16
Date of Mailing: 6/22/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 10485-15
AGENCY DKT. NO. 143-6/15

**R.A. ON BEHALF OF MINOR CHILD, B.A.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,**
Respondent.

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**Catherine Merino Reisman**, Esq., for petitioner (Reisman, Carolla and Gran, LLP, attorneys)

**Patrick F. Carrigg**, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, attorneys)

Record Closed: February 10, 2016 Decided: May 12, 2016

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

## STATEMENT OF THE CASE

Petitioner R.A., on behalf of minor child B.A., appeals respondent Hamilton Township Board of Education's (Board's) determination that B.A. was not the victim of

harassment, intimidation or bullying (HIB) under the Anti-Bullying Bill of Rights Act, (Anti-Bullying Act or ABA), N.J.S.A. 18A:37-13 to -32.1.

## PROCEDURAL HISTORY

On February 28, 2015, the respondent's anti-bullying specialist, Ms. Hart, submitted her investigation report to the Board at its public meeting. The Board concluded that the incident in question was student conflict and thus did not meet the definition of an incident of HIB under N.J.S.A. 18A:37-14. Thereafter, petitioner requested a hearing before the Board regarding its determination. On March 25, 2015, the Board of Education conducted a closed-session hearing. Following the hearing, the Board affirmed the superintendent's decision that the petitioner was not a victim of HIB per the Act. On June 22, 2015, petitioner filed an appeal with the Department of Education's Bureau of Controversies and Disputes, which filed it with the Office of Administrative Law on July 16, 2015.

The Board filed a motion for summary decision with exhibits with the undersigned on January 27, 2016. Petitioner filed a cross-motion for summary decision and a response to the Board's motion for summary decision on February 1, 2016. The Board filed a reply brief in opposition on February 4, 2016. On February 10, 2016, I held oral argument.

## ISSUE

The issue is whether the Board's determination that the conduct petitioner complained of did not constitute harassment, intimidation or bullying under N.J.S.A. 18A:37-14 was arbitrary, capricious or unreasonable.

## STIPULATED FACTS

1. During the 2014–15 school year, B.A. was an eighth-grade student in Crockett Middle School.

2. Crockett Middle School is one of three middle schools under the control of the Hamilton Township Board of Education.

3. This matter arises from a Petition of Appeal filed by B.A. wherein petitioner seeks to reverse the finding of respondent that B.A. was not subject to HIB. (Exhibit M.)

4. Respondent, per its statutory obligation, adopted Board Policy 5512, which sets forth: the definition of HIB; the procedures for making a complaint of HIB; the procedures for investigation of a complaint of HIB; and the Board's obligations to respond to a complaint of HIB. (Exhibit A.)

5. Petitioner initiated a complaint of HIB through her mother, R.A., via email on January 13, 2015, when she emailed Roger Bigos, Crockett Middle School principal; Charles Eyster, teacher; Beth Maddalon, guidance counselor; Donna Sarver, guidance counselor; and Sue Niedrach, substance awareness counselor. (Exhibit B.) R.A. previously complained of bullying in June 2013 to guidance counselor Beth Maddalon when students threw a blown-up paper bag in B.A.'s face and called her names. B.A. explained that such acts started after she was invited to a birthday party when other students, J.S., M.D., M.M. and C.R., were not.

6. R.A. indicated that petitioner had been subjected to bullying by other female students, M.M., C.R., and J.S., for the past two years. (Exhibit B.)

7. Petitioner did not file an HIB complaint relative to the alleged incidents during the prior two years.

8. Beth Maddalon, guidance counselor at Crockett Middle School, documented her recollection of the prior years' events. (Exhibit C.)

9. Ms. Maddalon recalled that at the end of April of B.A.'s sixth-grade year, B.A. advised that her friends were upset with her for having attended the birthday

party of another girl, H., who attends Reynolds Middle School. B.A. went to the party and her friends attended a Trenton Thunder game. B.A. said that her friends were texting her and H. during the party, being sarcastic, and that someone drove them past the party and that they honked the horn while driving by. B.A. claimed she was confronted by the girls and that some name-calling occurred. (Exhibit C.)

10. Ms. Maddalon interviewed the other girls and they admitted to texting, but indicated it was along the lines of "Happy Birthday. I hope you had fun." The girls also admitted that they were driven by the home and the horn was honked, but it was done to say "Hi." The girls claimed that B.A. ignored them at the bus stop the next day. Finally, the girls denied any name-calling. (Exhibit C.)

11. There were no allegations that a distinguishing characteristic of B.A., actual or perceived, motivated any of the conduct by the girls.

12. An HIB complaint was not filed by petitioner. Thus, an HIB investigation did not occur. However, petitioner disputes that the policy requires that the students or their parents file a written HIB complaint for an investigation to be mandated. (Exhibit C.)

13. During the following school year, Donna Sarver was the guidance counselor for B.A. (Exhibit C.) In or about February 2014, it was conveyed to Ms. Sarver that two of the girls who were friends with both B.A. and the other group of girls felt "put in the middle." Ms. Sarver made an attempt to get B.A. and M.M. on good terms, but was unaware of the incident during the prior school year. (Exhibit C.)

14. In an email of February 25, 2014, R.A. contacted Ms. Sarver, expressed her dissatisfaction with Ms. Sarver's involvement in the situation, and advised that she did not want B.A. to be friends with M.M. or J.S. under any circumstances. (Exhibit D.)

15. Also in or around February 2014, B.A. wanted to share her situation at the Bully Free Friends Night. Ms. Maddalon advised Sue Niedrach that this would not be a good idea because it would cause the other girls and their parents to be upset. (Exhibit C.)

16. Although R.A. did not want her daughter to speak at the Bully Free Friends Night either, she wrote that she would not discourage her daughter from speaking, on the belief that it was an outlet for her to confront the situation and become a stronger person. (Exhibit D.)

17. In R.A.'s email of February 25, 2014, R.A. directed that the counselors not request B.A. to be friends with any of the girls—J.S., M.M., M.D., and C.R. Further, she directed that the counselors not speak with B.A. regarding the issues with the girls because it pulled her out of valuable class instructional time. Finally, R.A. indicated that she instructed B.A. not to have any further contact with the two girls that found it "difficult" to be friends. (Exhibit D.)

18. In January 2015, R.A. submitted a complaint via email indicating that B.A. had ignored the "glaring stares" during the year, but that on January 13, 2015, B.A. alleged that the three students stomped and kicked her lunch. (Exhibit B.)

19. Upon receipt of the complaint, Principal Bigos directed Drew Acquaviva, vice principal, to investigate the incident. (Exhibit E.)

20. Vice Principal Acquaviva, along with Ms. Maddalon and Christine Hart, anti-bullying specialist, met with B.A. on the morning of January 14, 2015. (Exhibit E.)

21. At the meeting, B.A. described the incident and her observations, including that she was in the lavatory when the lunch bag was kicked into the hallway and then pushed back into the room. (Exhibit E.)

22. Following the meeting with B.A., Vice Principal Acquaviva and the others met and interviewed all students involved in the incident. (Exhibit E.)

23. Later on January 14, 2015, during lunch, B.A. alleged that M.D. engaged in name-calling in the hallway. (Exhibit E.)

24. Mr. Acquaviva writes in his memorandum that he reviewed the tape of the hallway and determined that an exchange between B.A. and the alleged harasser did not take place. Further, Mr. Acquaviva documented that he spoke to a "friend" of B.A.'s that allegedly witnessed the incident who denied that anything was said. (Exhibit E.)

25. Similarly, Principal Bigos writes in his memorandum that he spoke with B.A.'s friend and that she said that she did not hear anything. (Exhibit N.)

26. Per Board Policy 5512, Ms. Hart, conducted an investigation and memorialized same in a written report dated January 16, 2015, and submitted to Principal Bigos on January 21, 2015. (Exhibit F.)[1]

27. On January 14, 2015, R.A. filled out the HIB Report. (Exhibit F.)

28. B.A.'s written statement of the events is set forth at Exhibit G.

29. The written statements of the seven witnesses/alleged harassers, M.M., C.R., C.L., J.S., M.D., S.L., and O.D., are attached at Exhibit H.

30. Students M.M., C.R., C.L., J.S., S.L., and O.D. uniformly indicated that M.M. and C.L. were in Mr. Eyster's room to see their other friends. At that time, petitioner was not in the room. After a few minutes, M.M. and C.L. tried to leave

[1] By agreement of counsel with the involvement of the judge via phone conference, the complete report was provided to petitioner on or about November 30, 2015, with the understanding that the contents thereof are confidential. However, due to the State privacy regulations related to student records and confidentiality of student records under the Family Educational Rights and Privacy Act, only the redacted report is submitted with this motion.

when another student, G., held the door, preventing them from leaving. M.M. and C.L. pushed the door from one side while G. held the door on the other. At some point, G. relented and M.M. and C.L. lost their balance, causing C.L. to kick a brown paper bag, later identified as B.A.'s lunch, out of the room. C.L. then used her foot to push the bag back into Mr. Eyster's room. (Exhibit H.)

31. With regard to the second alleged incident occurring on January 14, 2015, student M.D. indicated in her statement that C.L. saw B.A. in the hall and related that she was called down to B house, and that B.A. had told her mother about C.L. tripping over B.A.'s lunch. (Exhibit I.)

32. B.A. identified to Mr. Acquaviva another student, S., as a "friend" that allegedly witnessed the name-calling by M.D. As referenced in Mr. Acquaviva's March 16, 2015, memorandum, he spoke to S. regarding the incident of January 14, 2015, and she indicated that the alleged harassers "did not say anything." (Exhibit E.)

33. Prior to the submission of the investigation to the Board of Education, B.A. withdrew from Crockett Middle School.

34. On February 28, 2015, Ms. Hart's investigation report was provided to the Board of Education at its public meeting. The conclusion was that the incident in question was student conflict and thus did not meet the definition of an incident of HIB under N.J.S.A. 18A:37-14.

35. Thereafter, petitioner requested a hearing before the Board of Education relative to the determination.

36. On March 25, 2015, the Board of Education conducted a closed-session hearing. The Board first heard from Christine Hart and Drew Acquaviva, and then heard from B.A. and R.A. (Exhibit J.)

37. R.A. provided the Board with a packet of materials, attached hereto as Exhibit K.[2]

38. Following the hearing, the Board affirmed the superintendent's decision that B.A. was not a victim of HIB per the statute. (Exhibit L.)

## ADDITIONAL FACTS

R.A. clarified some of the facts set forth in the Board's statement of facts. At the time of the initial alleged bullying incident, Ms. Maddalon spoke to the students involved. (See Tab 1 to R.A.'s Certification (e-mail from F.S., parent of J.S., regarding Maddalon's inquiry into bullying accusations).) B.A. discussed with guidance counselor Beth Maddalon that her friends were upset with her because she had refused an invitation to a ball game to go to a party instead. She explained to Ms. Maddalon that they had sent her inappropriate texts, driven past the party, and honked and called her names. The other girls admitted to driving past the party, but denied calling B.A. names. (See Carrigg Cert., Exhibit C at BA 194; R.A. Cert., Tab 1 at 2.)

R.A. provided independent third-party corroboration of the birthday-party incident to the Board. (See R.A. Cert., Tab 1 at 4.) However, Ms. Maddalon did not commence a bullying investigation because "Mrs. A. did not file official HIB paperwork," and she unilaterally determined that this was a "conflict and not an incident of [HIB]." (See Carrigg Cert., Exhibit N at 1.)

Hamilton's policy requires an employee who receives a verbal report of bullying to submit a report in writing to the principal within two days. (See Carrigg Cert., Exhibit A.) Ms. Maddalon did not submit a written report to the principal, and, thus, did not follow Hamilton's HIB policy in June 2013.

[2] Respondent withheld a portion of the packet to maintain student confidentiality. Petitioner has supplied the additional fourteen pages so that Exhibit K is the complete copy of documents provided to the Board.

## LEGAL DISCUSSION

Under N.J.A.C. 1:1-12.5(a), a party may move for summary decision upon all or any of the substantive issues in a contested case prior to a hearing. A motion for summary decision shall be granted where the papers and discovery together with affidavits show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When a motion for summary decision is made and supported, an adverse party, in order to prevail, must by responding affidavit set forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. Ibid. In the present case, although petitioner denied some of the statements of fact submitted by the Board, both parties agreed that there were no genuine issues of material fact and that the case was ripe for summary decision, and I so **CONCLUDE**.

That issue having been resolved, the main issue for resolution is whether the Board's finding of no HIB was arbitrary, capricious or unreasonable, in light of the information that the Board possessed when it made its determination. The HIB Act, N.J.S.A. 18A:37-14, sets forth:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being **motivated either by any actual or perceived characteristic**, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, **or by any other distinguishing characteristic**, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or

> emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The Board argues in its motion for summary decision and oral argument that the investigation into the January 2015 incident was inconclusive as to the intent of the girls. The alleged harassers, not all of whom were involved in the prior alleged incidents, said they had no knowledge of whose lunch it was. Further, there were no allegations that a distinguishing characteristic of B.A., actual or perceived, motivated any of the conduct by the girls. The vice principal, who has no stake in whether there is a finding of HIB, conducted the investigation, but did not conclude that there was bullying. The superintendent recommended this finding to the Board. Thus, the Board argues that it correctly determined that the conduct described and investigated by the Board did not rise to the level of HIB.

Petitioner argues that the "bullies" victimized B.A. because of the distinguishing characteristic that she was invited to a party to which other girls were not invited. (See response to respondent's statement of facts at #11.) She argues that there was a power differential back in June 2013 when B.A. complained about the alleged harassers' conduct. Despite the Board's policy requiring it to conduct an HIB investigation, the Board did nothing. In 2014, the guidance counselor told B.A. to be friends with the girls who were bullying her. By 2015, R.A. argues, the Board had information that B.A. had severe emotional distress and that this was not a mere conflict but a power differential with a negative impact on the student with less power. R.A. urges reference to the Task Force report on bullying rather than the law itself to see that the power imbalance must be considered. She argues that the Board applied the wrong standard. Last, she argues with regard to the name-calling incident that it was wrong for the Board not to preserve the videotape, yet use it against her to say that it did not

show what B.A. said it would show. If it was not recorded over for thirty days and B.A. reported the incident the day after, it is unfair not to preserve the videotape, and she argues that an adverse inference should be taken from the failure to preserve it.

In K.L. v. Evesham Township Board of Education, 423 N.J. Super. 337, 351 (App. Div. 2011), the Appellate Division noted that the offending conduct for purposes of HIB must be motivated by a distinguishing characteristic. It noted that the statutory definition of HIB "does not include all violent or aggressive conduct against a student," but it has consistently required that the perceived motivation be a distinguishing characteristic. 423 N.J. Super. at 350–51. The court also provided a summation of what does not constitute HIB:

> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.
>
> [Id. at 351.]

By its plain terms, the Legislature made clear that courts and school districts should not limit the scope of the statute to the more classic protected characteristics such as race or religion, and they intended instead that the statute apply whenever the harassment at issue was motivated by any distinguishing characteristic of the targeted student. Instead of providing a longer list, the Legislature in the ABR intentionally included a very open-ended phrase, "any other distinguishing characteristic," to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student.

For example, in J.M.C. ex rel A.C. v. Board of Education of East Brunswick, EDU 04144-12, Initial Decision (November 27, 2012), adopted, Comm'r (January 9, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner found that a single incident in which a male student was demeaned by a statement that he "danced like a girl" was

a violation of the Act because it was an act of bullying based on the distinguishing characteristic of the perception of the targeted student's dancing.

Furthermore, in C.C. ex rel S.C. v. Board of Education of Jefferson, EDU 10872-14 (April 6, 2015), adopted, Comm'r (May 12, 2015), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner ruled that a perception that the targeted student was not a good athlete was sufficient to trigger the protection of the Act. The Commissioner noted that "the HIB statute is intended to drive home the principle that cruel words will not be tolerated in a school environment." Similarly, in W.C.L. and A.L. ex rel L.L. v. Board of Education of Tenafly, EDU 03223-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner held that even a single and true comment by a student that the targeted student had dyed her hair because she had head lice violated the statute.

However, courts have addressed situations where an act is not considered to be bullying motivated by a "distinguishing characteristic." In L.B.T. ex rel K.T. v. Board of Education of the Freehold Regional School District, EDU 7894-12 (January 24, 2013), adopted, Comm'r (March 7, 2013), <http://njlaw.rutgers.edu/collections/oal/>, there was a mutual dispute between two students about their respective roles on the swim team. The judge held that if a victim was targeted because of a dispute between the two people involved—such as a relationship falling apart between former friends, a fight over a piece of property, or some form of personal vendetta of one against another—such conduct would not be based on a "distinguishing characteristic" of the victim and would not be a violation of the statute. This is because a personal breakdown in the relationship between two students is a mutual non-power-based conflict that is not about a characteristic of the targeted student.

Similarly, here, the factual record shows that there was a history of sporadic conflict between these students. It started with the incident where B.A. told the guidance counselor that her friends were upset with her for attending a birthday party to which they had not been invited. Then, in February 2014, the animosity between B.A. and the other girls resurfaced when two other girls that were friends with both B.A. and

the alleged harassers indicated that they felt in the middle of the conflict. The guidance counselor tried to get the girls to talk to each other, which B.A. believed made things worse. As a result of this incident, B.A.'s mother advised the school counselor not to intervene in any issues between B.A. and the girls. Also, B.A.'s mother told B.A. not to try to be friends with the girls that felt like they were in the middle. There were no specific allegations of any distinguishing characteristic at the time.

In the last incident, B.A. alleged that the other girls purposefully kicked her lunch out of the classroom where B.A. was eating. However, B.A. did not actually witness the lunch bag being kicked out of the classroom because she was in the lavatory at the time. The alleged harassers that were present when the lunch was kicked indicated that the bag was kicked accidentally and that they did not know whose bag it was at the time, as they did not see it when they entered the classroom. Petitioner argues that the statements were conflicting, which they were on minor points, but no one corroborated B.A.'s complaint that they purposefully kicked the lunch knowing it was hers. Following the lunch incident, B.A. alleged that M.D. called her a slut in the hallway. However, B.A.'s friend "V." advised the principal that this comment was never made. Later, at the Board hearing, B.A. offered text messages from her friend "V." indicating that "V." did tell Mr. Bigos that M.D. was "saying mean things and bad words about [B.A.]." Although the hallway had a video camera, the videotape did not have audio and the Board did not preserve the tape, as it recycles itself every thirty days.

The events between B.A. and the other female students as set forth do not appear to have been "motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14. Although the law originated from the Task Force report, the Legislature made it a requirement that the bullying be based on a distinguishing characteristic, not just a perceived power imbalance. Petitioner is correct that the guidance counselor should have followed up B.A.'s verbal complaint to her in 2013 with a written report to the principal pursuant to the school's HIB policy. However, the outcome would have been the same had she filed the report with the principal, because being invited to a party is not a distinguishing characteristic that is actionable

under the Anti-Bullying Act. The last incident, the kicking of the lunch bag, which is the incident that precipitated the official HIB complaint and investigation, also was not motivated by a distinguishing characteristic. The allegations contained in B.A.'s written statements, as well as those gleaned from her mother's email, fail to reference any actual or perceived characteristic. Also, the Board had seven written statements saying that the girls did nothing to harm B.A. The allegation regarding B.A. reporting that the girls called her a bad name in the hallway following the lunch incident also could not be substantiated. B.A. and the alleged aggressors were friends before the incidents complained of, and then the relationship deteriorated when B.A. attended a party to which the other girls were not invited. It was reasonable for the Board to conclude that the circumstances, which certainly showed a conflict between B.A. and the girls, did not rise to the level of bullying.

As noted above, a dispute between students such as a relationship falling apart between former friends, a fight over a piece of property, or some form of personal vendetta of one against another is not conduct based on a "distinguishing characteristic" of the victim and, thus, does not constitute a violation of the Act. This is because a personal breakdown in a relationship between students is a mutual non-power-based conflict that is not about a characteristic of the targeted student. Although petitioner feels that the conflict escalated into a power-based conflict, as the initial girls turned B.A.'s friends against her, there still is no distinguishing characteristic. Further, the administration could not substantiate the alleged act of bullying because B.A. did not witness it herself, and no one who saw the kicking of the lunch supported her belief that the action was directed at her. Petitioner did not allege any "distinguishing characteristic" about which the aggressors were motivated to bully B.A. Therefore, the petitioner has not demonstrated that the Board's decision was arbitrary, capricious or unreasonable.

## CONCLUSIONS OF LAW

The Board has demonstrated that there are no facts in dispute and that it is entitled to summary decision as a matter of law. Petitioner has not demonstrated entitlement to judgment as a matter of law. The Board applied the standard in the law

that the comments and actions alleged must be motivated by a distinguishing characteristic and not just a perceived power imbalance. Therefore, I **CONCLUDE** that the action of the Board in determining that the conduct does not constitute harassment, intimidation, or bullying within the meaning of the Act was not arbitrary, capricious or against the weight of the evidence.

## ORDER

For the foregoing reasons, I **GRANT** the Board's motion for summary decision and **DENY** petitioner's cross-motion for summary decision. The petition is **DISMISSED**. It is so **ORDERED**.

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

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

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

May 12, 2016
DATE

**LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: May 13, 2016

Date Mailed to Parties: May 13, 2016

cmo

## APPENDIX

## WITNESSES

**For Petitioner:**

None

**For Respondent:**

None

## EXHIBITS

**For Petitioner:**

| | |
|---|---|
| Exhibit P-A | Fourteen missing pages attached to Certification of R.A. at Tab 1 |

**For Respondent:**

| | |
|---|---|
| Exhibit A | Board Policy 5512 |
| Exhibit B | R.A. email of January 15, 2015 |
| Exhibit C | Notes of Beth Maddalon |
| Exhibit D | R.A. email of February 25, 2014 |
| Exhibit E | Memorandum of Vice Principal Drew Acquaviva |
| Exhibit F | HIB Investigation Report |
| Exhibit G | Written Statement of B.A. |
| Exhibit H | Written Statements of M.M., C.R., C.L., J.S., M.D., S.L. and O.D. |
| Exhibit I | Written Statement of M.D. |
| Exhibit J | Executive Session Board meeting minutes of March 25, 2015 |
| Exhibit K | Packet received from petitioner at hearing |
| Exhibit L | Letter from Board attorney re Board decision to affirm superintendent's findings |

| | |
|---|---|
| Exhibit M | Petition of Appeal |
| Exhibit N | Memorandum of Beth Maddalon |

224-16

OAL DKT. NO. EDU 06698-16
AGENCY DKT. NO. 125-4/16

| | | |
|---|---|---|
| KIAN SADRIAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, the Commissioner notes that the settlement agreement also resolves an Office of Special Education Programs (OSEP) matter which was transmitted to the OAL concurrently with this matter – docketed as EDS 06779-16 – and that the Administrative Law Judge (ALJ) issued a Final Decision in that matter on May 11, 2016, approving the terms of the settlement agreement.* As the issues resolved in the settlement agreement were within OSEP's jurisdiction – and as a Final Decision has already been issued approving the settlement terms – there is nothing left for the Commissioner to determine. Accordingly, the case is hereby dismissed as moot.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/16

Date of Mailing: 6/22/16

* The ALJ's decision in the OSEP matter is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A).

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 06698-16

AGENCY DKT. NO. 125-4/16

**K.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,**

Respondent.

---

**K.S.**, petitioner, pro se

**Marc H. Zitomer**, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: May 11, 2016 Decided: May 11, 2016

BEFORE **IRENE JONES**, ALJ:

On May 3, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for hearing on May 11, 2016 and during that time the parties engaged in settlement discussions and agreed to settle the matter. The Stipulation of Settlement indicating the terms of settlement is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the dismissal and **ORDER** that the parties comply with the dismissal terms and that these proceedings be **CONCLUDED**.

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

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

May 11, 2016

DATE

**IRENE JONES**, ALJ

Date Received at Agency: 5/13/16

Date Mailed to Parties: 5/13/16

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

KS [redacted] v. Watchung Hills Regional High School District
OAL Dkt Nos. EDS 6779-16 & EDS 6698-16

WHEREAS, KS is an adult student attending Watchung Hills Regional High School District; and

WHEREAS, a dispute was raised with regard to KS's education; and

WHEREAS, the parties agree to amicably resolve all outstanding issues without the need for litigation and without the District admitting any deficiencies, the parties hereby agree as follows:

1. The parties agree that the Emergency Care Plan referenced in the 504 Plan is the Authorization for Emergency Treatment from Dr. Sampson dated 5/15/15.

2. For the prom, the District agrees that a school nurse trained in KS's emergency plans will be designated as his epi-pen delegate. For project graduation, the District will hire a nurse to be KS's epi-pen delegate and will ensure the nurse is ~~trained regarding KS and his~~ emergency plans by the school nurse. The emergency plans are the Authorization for Emergency treatment dated 5/15/15.
3. The authorization for emergency treatment dated 5/15/15 will be added to the 504 Plan as maintained on the District's computer data base.

A and/or
4. Another copy of KS's IHCP will be sent to ~~[illegible]~~ his mother, LS.

5. This Agreement resolves all issues that were or could have been raised in the above-referenced actions. By signing this agreement LS and KS release the District from ~~[illegible]~~ all issues that were or could have been raised in the above-referenced matters.

6. This Agreement was entered into freely willingly and voluntarily, without duress or coercion and with each party having the opportunity to consult with counsel of their choosing and option. LS and KS ~~acknowledge they had the ability to consult with counsel~~, opted to execute this Agreement without the benefit of counsel, understand the contents of this Agreement and how it impacts their rights.

7. It is agreed that this Agreement shall be governed by ~~the laws of~~ the State of New Jersey.

8. Neither party is a prevailing party for any purpose.

9. This Agreement shall be incorporated into a final order by the Honorable Irene Jones.

10. By signing this Agreement, LS and KS agree that the District may administer the epi-pen ~~of~~ Benadryl + Xopenex HFA ~~Advil~~ to KS in accordance with ~~the attached~~ Exhibit 1 attached hereto.

LS KS

Kiran Sabrina
KS

LS individually and o/b/o KS

Marianne Sales

Dated: May 11, 2016

Marianne Sales
Supervisor of Special Services

Exhibit 1

# WATCHUNG HILLS
REGIONAL HIGH SCHOOL

Elizabeth C. Jewett
Superintendent

Timothy M. Sys, CPA
Business Administrator

George P. Alexis
Principal

Francine DelloRusso RN,BSN,CSN
Marybeth Clark RN,BSN,CSN
Angela Valerio RN,BSN,CSN
Ext. 4972/4877/4878
Fax (908)647-4828

**Department of Health Services**
**Authorization for Administration of Medication in School**

The New Jersey State Law requires physician/dentist/APRN/PA's written order and the parent/guardian's authorization for a nurse to administer medications or, in his/her absence, the principal and/or designated staff to administer medications. Medications must be in pharmacy-prepared containers and labeled with the name of student, name of drug, strength, dosage, frequency, name of physician/dentist/APRN/PA's, date of original prescription. NOTE: If the medication is a prescription, ask the pharmacist to prepare two labeled containers, one for school and one for home.

NAME OF STUDENT: Kian Sadrian GRADE: 12 DOB: 5-1-98 KS

NAME & DOSAGE OF MEDICATION(S): Epi-Pen ~~Auvi-Q~~ 0.3mg (0.3 mg of ~~0.3mg~~ See Authorization for Emergency Treatment form dated 5/15/15 attached

TIME TO BE GIVEN AT SCHOOL: N HOW TAKEN: inject into upper outer thigh
(Example: by mouth, by inhaler, with food or after meals)

RELEVANT SIDE EFFECTS TO BE OBSERVED, IF ANY: increase in heart rate, jitteriness, rapid vomiting

REASON/HEALTH PROBLEM: Anaphylaxis (milk allergy and allergy to undercooked beef/veal/lamb and milk products

(Signature) _____ M.D. Date_____

.....

**Authorization by Parent/Guardian of the above medication by school personnel:**

To School Personnel:
I request that the above medication, ordered by the physician/dentist/APRN/PA for my child Kian Sadrian, be administered by school personnel. I understand the ultimate responsibility for administration of the medication is mine and do hereby release, discharge and hold harmless WATCHUNG HILLS REGIONAL HIGH SCHOOL, its agents and employees from any and all liability and claim whatsoever for the administration of the above medication pursuant to these directions.

| | | |
|---|---|---|
| Kian Sadrian 5/11/2016 | 5/11/2016 | 917-244-4300 908-419-4319 |
| PARENT/GUARDIAN SIGNATURE | DATE | DAYTIME PHONE# |

Reviewed by RN: _____ Staff _____ may/_____ may not administer

_____ _____
RN (Print Name) RN Signature

Exhibit 1

# WATCHUNG HILLS
## REGIONAL HIGH SCHOOL

Elizabeth C. Jewett
Superintendent

Timothy M. Siys, CPA
Business Administrator

George P. Alexis
Principal

Francine DelloRusso RN,BSN,CSN
Marybeth Clark RN,BSN,CSN
Angela Valerio RN,BSN,CSN
Ext. 4972/4877/4878
Fax (908)647-4828

**Department of Health Services**
**Authorization for Administration of Medication in School**

The New Jersey State Law requires physician/dentist/APRN/PA's written order and the parent/guardian's authorization for a nurse to administer medications or, in his/her absence, the principal and/or designated staff to administer medications. Medications must be in pharmacy-prepared containers and labeled with the name of student, name of drug, strength, dosage, frequency, name of physician/dentist/APRN/PA's, date of original prescription. NOTE: If the medication is a prescription, ask the pharmacist to prepare two labeled containers, one for school and one for home.

NAME OF STUDENT: Kian Sadrian GRADE: 12 DOB: 5/1/98

NAME & DOSAGE OF MEDICATION(S): Xopenex HFA (2 puffs as needed)
See Authorization for Emergency Treatment dated 5/15/15 attached

TIME TO BE GIVEN AT SCHOOL: ^ HOW TAKEN: Inhale
(Example: by mouth, by inhaler, with food or after meals)

RELEVANT SIDE EFFECTS TO BE OBSERVED, IF ANY: _____

REASON/HEALTH PROBLEM: Anaphylaxis / milk, milk products and ~~allergy~~ to undercooked beef/veal/lamb, asthma

(Signature) _____ M.D. Date_____

.....

**Authorization by Parent/Guardian of the above medication by school personnel:**

To School Personnel:
I request that the above medication, ordered by the physician/dentist/APRN/PA for my child KIAN SADRIAN be administered by school personnel. I understand the ultimate responsibility for administration of the medication is mine and do hereby release, discharge and hold harmless WATCHUNG HILLS REGIONAL HIGH SCHOOL, its agents and employees from any and all liability and claim whatsoever for the administration of the above medication pursuant to these directions.

917-244-4300

Kian Sadrian 5/11/16 5/11/2016 908-419-4319

PARENT/GUARDIAN SIGNATURE DATE DAYTIME PHONE#

Reviewed by RN: _____ Staff _____ may/_____ may not administer

_____ _____

RN (Print Name) RN Signature

WATCHUNG HILLS
REGIONAL HIGH SCHOOL

Elizabeth C. Jewett
Superintendent

Timothy M. Siys, CPA
Business Administrator

George P. Alexis
Principal

Francine DelloRusso RN,BSN,CSN
Marybeth Clark RN,BSN,CSN
Angela Valerio RN,BSN,CSN
Ext. 4972/4877/4878
Fax (908)647-4828

**Department of Health Services**
**Authorization for Administration of Medication in School**

The New Jersey State Law requires physician/dentist/APRN/PA's written order and the parent/guardian's authorization for a nurse to administer medications or, in his/her absence, the principal and/or designated staff to administer medications. Medications must be in pharmacy-prepared containers and labeled with the name of student, name of drug, strength, dosage, frequency, name of physician/dentist/APRN/PA's, date of original prescription. NOTE: If the medication is a prescription, ask the pharmacist to prepare two labeled containers, one for school and one for home.

NAME OF STUDENT: Kian Sadrian GRADE: 12 DOB: 5/1/98

NAME & DOSAGE OF MEDICATION(S): Benadryl (4 teaspoons)
See Authorization for Emergency Treatment dated 5/15/15 attached

TIME TO BE GIVEN AT SCHOOL: ^ HOW TAKEN: orally
(Example: by mouth, by inhaler, with food or after meals)

RELEVANT SIDE EFFECTS TO BE OBSERVED, IF ANY: drowsiness

REASON/HEALTH PROBLEM: Anaphylaxis (allergic) to milk, milk products, undercooked beef, veal, lamb

(Signature) _____ M.D. Date _____

.....

**Authorization by Parent/Guardian of the above medication by school personnel:**

To School Personnel:
I request that the above medication, ordered by the physician/dentist/APRN/PA for my child KIAN SADRIAN be administered by school personnel. I understand the ultimate responsibility for administration of the medication is mine and do hereby release, discharge and hold harmless WATCHUNG HILLS REGIONAL HIGH SCHOOL, its agents and employees from any and all liability and claim whatsoever for the administration of the above medication pursuant to these directions.

| | | |
|---|---|---|
| [signature] | 5/11/2016 | 917-244-4300 / 908-419-4309 |
| PARENT/GUARDIAN SIGNATURE | DATE | DAYTIME PHONE# |

Kian Sadrian 5/11/16

Reviewed by RN: _____ Staff _____ may/_____ may not administer

_____ _____
RN (Print Name) RN Signature

Exhibit 1

Icahn School of Medicine at Mount Sinai

Department of Pediatrics
Division of Allergy & Immunology

Hugh A. Sampson, MD
Kurt Hirschhorn Professor of Pediatrics
Dean for Translational Biomedical Research
Director, Jaffe Food Allergy Institute
One Gustave L. Levy Place, Box 1198
New York, NY 10029-6574

# AUTHORIZATION FOR EMERGENCY TREATMENT

**Kian Xavier Sadrian has Anaphylaxis (severe allergies) to:**
**Milk, Milk Products, Undercooked Beef or Lamb.**

If you suspect that a food allergen has been ingested, immediately determine the symptoms and treat the reaction as follows:

| Symptoms | | Give Medications: | |
|---|---|---|---|
| Mouth | Swelling, itching or tingling of lips, tongue, cheeks or gums | | Benadryl |
| Skin | Hives, swelling on face or extremities, itchy rash | | Benadryl |
| Gut | Nausea, abdominal cramps, vomiting, diarrhea | | Benadryl |
| Throat | Tightening of throat, hoarseness, hacking cough | Epinephrine | Benadryl |
| Lung | Shortness of breath, repetitive coughing, wheezing | Epinephrine | Benadryl |
| Heart | Thready pulse, passing out, fainting, pale, blueness | Epinephrine | Benadryl |
| General | Panic, sudden fatigue, chills, fear of impending doom | | Benadryl |
| If beef, veal or lamb has been ingested, but *no* symptoms: | | | Benadryl |
| If significant milk has been ingested, but *no* symptoms: | | Epinephrine | Benadryl |
| If a reaction is progressing (two or more of the above areas affected): | | Epinephrine | Benadryl |

**Medication Doses:** (Approximate weight: 60.8 kg, 134 lbs. Date of birth: May 1, 1998)
**Epinephrine: EpiPen** 0.3 mg OR **Auvi-Q** 0.3 mg injected once into upper out thigh; may be in repeated 10 – 15 minutes if significant symptoms persist
**Antihistamine: Benadryl** 4 teaspoons or 20 cc ( 50 mg) by mouth

- **Call 911 (or Ambulance service).**
- **State that the child had a severe allergic reaction & additional Epinephrine doses may be needed.**

Additional Contact Information:
Nearest Hospital: Morristown Phone: 973-971-6020 973-971-5004 Address: 100 Madison Avenue Morristown, NJ 07960

**ALLERGIST: Dr. Hugh Sampson** ***** Phone: **212-241-5548** *****
Pediatrician: Dr. Donald Cotler Phone: 973-912-0400

Parent's Name (other contacts) and Contact Numbers:
Mother: Lucinda Sadrian Phone: 908-419-4319 (cell) Phone: 917-244-4300 (cell)
Friend: Elizabeth Vagell Phone: 908-403-5444 (cell) Phone: 908-251-5255 (home)

**DO NOT HESITATE TO ADMINISTER MEDICATION OR TAKE THE CHILD TO A MEDICAL FACILITY EVEN IF PARENTS CANNOT BE REACHED!!**

***** **AFTER ADMINISTERING MEDICATIONS & CALLING 911 (OR AMBULANCE), CALL ALLERGIST (212-241-5548) IMMEDIATELY FOR FURTHER INSTRUCTIONS.**
***** **TELL HOSPITAL & AMBULANCE TO CALL ALLERGIST IMMEDIATELY.**

Hugh A Sampson, MD — 5/15/2015 Date
Parent's Signature — 5/15/2015 Date

225-16

OAL DKT. NO. EDU 9030-16
AGENCY DKT. NO. 163-6/16

| | | |
|---|---|---|
| ASHLYNN DIAZ, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

In so concurring, however, the Commissioner is compelled to clarify that petitioner *has* met the threshold standard of irreparable harm.[1] Although the participation in graduation exercises is a privilege rather than a right, the opportunity to participate in such an event cannot be regained once it is lost, and the dismissal of an emergent application on this criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[2]

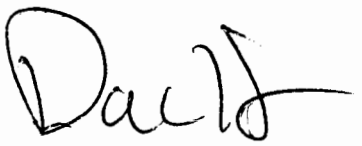
[1] The Commissioner notes that irreparable harm is a separate and distinct requirement from likelihood of success on the merits.

[2] The Commissioner is fully aware of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed as a totality, as they were by the ALJ herein; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that

That being said, the fact remains that petitioners seeking emergent relief must additionally demonstrate that they have a likelihood of success on the merits of their underlying appeal. *N.J.A.C.* 6A:3-1.6(b). The Commissioner agrees with the ALJ – for the reasons stated in her decision – that the petitioner has failed to demonstrate a likelihood of success on the merits. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the two remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein, as modified above. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 6/22/16
Date of Mailing: 6/22/16

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applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1966; *L.J., on behalf of minor child, S.J. and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See also *D.M.S., on behalf of minor child, E.B. and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 09030-16
AGENCY DKT. NO. 163-6/16

**A.D.,**

Petitioner,

v.

**TOWN OF WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY,**

Respondent.

---

**Mario M. Blanch**, Esq.

**Michael Goldman,** Esq., for respondent

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

In this case, petitioner A.D. is a high school senior seeking emergent relief to allow her to attend and participate in the high school graduation ceremony scheduled for June 23, 2016 as well as Project Graduation on that same evening. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on June 17, 2016, on petitioner's application for emergency relief. The matter was scheduled for oral argument at 10:00 a.m. on June 21, 2016 and heard on that date. At the conclusion of the hearing, the record closed with respect to the emergent relief, which is the only relief being sought.

Petitioner, an honor roll senior at Memorial High School in West New York, New Jersey, requests emergent relief from the Commissioner of Education in regards to an incident occurring on May 19, 2016, while in route to and attending Memorial High School's senior class prom. Prior to the prom, the Principal met with the seniors to advise them of unacceptable behavior such as drinking at prom will result in a suspension and not walking at the graduation ceremony.

Petitioner took a rented shuttle bus with approximately twenty-seven other students to the prom. The driver, suspecting alcohol or drug use among the students when finding an empty alcohol bottle, reported to school officials his/her suspicion. District staff, including the Principal Scott Wohlrab, then searched the contents in the bus and found alcohol and contraband. School officials then escorted all the students on the bus to the hospital to be blood tested for drugs and alcohol. All students were handed the results at Palisades Hospital. Four of the seniors and one junior tested positive for alcohol. Petitioner states the hospital tests found that she tested positive for alcohol, which could possibly be a result of petitioner's use of Listerine before attending the prom, the alcohol swab used at the hospital or food she may have consumed. Test results used reflected a ten being the lowest of a positive reading with petitioner having a reading of thirty. As a result of this test result, the school suspended petitioner and the other four students for five days. She attended and completed an alcohol treatment program. Petitioner and the three other seniors are barred from attending Project Graduation and from walking at graduation because they tested positive for alcohol.

Petitioner must meet the requirements for emergent relief set forth in N.J.A.C. 6A:3-1.6(b), and must show that the Board acted arbitrarily, capriciously or unreasonably in denying petitioner's intended guest's attendance at the prom.

N.J.A.C. 6A:3-1.6 sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Irreparable harm

As to the irreparable harm requirement, there are a number of cases holding that a prohibition from attending a graduation ceremony or other similar events does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant the extraordinary remedy being requested. Nevertheless, the Commissioner has recently pointed out that there is no adequate after-the-fact remedy that can adequately redress the intangibles of a lost experience after the event is over.

The issue in this matter is whether the petitioner is entitled to participate in the graduation ceremony. It is only where the petitioner can show such entitlement and is being prevented from participation that she is being irreparably harmed. See D.S. o/b/o D.C. v. Bd. Of Educ. of Parsippany Troy Hills, OAL Doclet No. EDU-90055-96, 96 N.J.A.R. 2d (EDU) 697 (June 14, 1996). Therefore, the key issue is whether she can show a likelihood of success on the merits. Petitioner participating in a graduation ceremony is clearly a privilege and not a right. Petitioner asks that the respondent take into account that this is her only infraction; she is an honor student with a full scholarship to Kean University and a volunteer. Petitioner had notice of consequences of unacceptable behavior at the prom. In the absence of a showing of a likelihood of success on the merits such as here, I **FIND** that petitioner has failed to establish irreparable harm and cannot satisfy this first prong.

Although petitioner must satisfy all requirements of Crowe and I need not address the remaining three prongs, I will nevertheless address the remaining three prongs.

Right to underlying claim must be settled

As to the requirement that the right to the underlying claim being settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1C. The boards adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, counsel for respondent has represented that the District's drug and alcohol testing procedures are permissible in accordance with N.J.S.A. 18A:40A-12 which requires personnel who suspects a student is under the influence of alcohol or drugs, report the matter to the school nurse, medical inspector or principal or their designee. That individual will notify parents, and if a doctor is not available, the student will be transported to the emergency room accompanied by school staff. Here, petitioner's parents were notified. Their consent is not necessary. See Gutin v. Washington Township Bd. Of Educ., 467 F.Supp. 2d 414 (D.N.J.) 2006. Under the Board's duly adopted policies, the petitioner is clearly subject to the discipline imposed.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as having no rational basis. Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL DKT. EDU 1839-98 (January 22, 1999) (citing Bayshore

Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of the Boro.of Begenfield, 1 965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "the well-established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives."

Based upon the foregoing, I **FIND** there is a rational basis for the respondent's action when alcohol and drugs were found on the bus and the students were transported to be tested since they were at a school activity. The right underlying petitioners' claim is settled against the petitioner's position. Petitioner was not singled out. All seniors who tested positive had the same disciplinary action taken. Therefore, I **FIND** that petitioner has failed to establish the right to relief in the absence of a full evidentiary hearing showing that the action of respondent is arbitrary, capricious and unreasonable.

Requirement to show reasonable probability of prevailing on the merits

The petitioner must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. At this point, it has been acknowledged that the petitioner tested positive for alcohol no matter what the amount. In view of this, I cannot make a determination that the petitioner at the age of eighteen is not guilty of illegally consuming alcohol in the absence of a full hearing on the merits. Therefore, I **FIND** that petitioner has failed to show the likelihood of prevailing on the merits.

Relative hardship to the parties

The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief in order to preserve the status quo pending a full hearing on the merits. While neither party specifically addressed this

factor, it appears that more hardship will fall upon petitioner and his family rather than upon respondent school district, and I so **FIND**.

## CONCLUSION

Based on the above, I have found that for purposes of deciding this application for emergency relief, petitioner has failed to establish the existence of irreparable harm, that petitioner's claim is based upon a settled right, or that petitioner is likely to prevail on the merits. In view of the fact that petitioner has failed to establish the four requirements for emergency relief, I **CONCLUDE** that petitioner's request should be **DENIED**. Since the emergent relief was the only relief being requested in this matter, I **CONCLUDE** that this matter should be dismissed.

## DECISION ANDORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is hereby **DENIED and DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 21, 2016

DATE

**JOANN LASALA CANDIDO**, ALAJ

ljb

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NEW JERSEY 08625-0500
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6081
Fax No. (973) 648-6124

DAVID C. HESPE
*Commissioner*

**JoAnn LaSala Candido**
*Administrative Law Assignment Judge*

June 21, 2016

David C. Hespe, Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500
Attn: Kathleen Duncan, Director of
Controversies & Disputes

Re: A.D. v. Town of West New York Board
of Education, Hudson County
OAL Dkt. No. EDU 09030-16

Dear Commissioner Hespe:

Enclosed please find a copy of an order entered regarding an application for emergent relief in the above-mentioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective in forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency heard.

Very truly yours,

JoAnn LaSala Candido
Administrative Law Assignment Judge

RM/ljb
Enclosure
C: Mario Blanch, Esq.
Lester Taylor, Esq.
Robert Giordano, ALJ/MOD

229-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

| | | |
|---|---|---|
| In the Matter of Tenure Charges by | X | |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | X | |
| "Petitioner" | X | Agency Docket No. 276-9/15 |
| -against- | X | |
| SHIRLEY KING | X | |
| "Respondent" | X | |
| Pursuant to Education Law §3020-a | X | |

**APPEARANCES**

FOR THE PETITIONER
RIKER DANZIG SCHERER HYLAND PERRETTI, LLP
By: Brenda C. Liss, Esq.

FOR THE RESPONDENT
PICKETT & CRAIG, ESQS.
By: Robert T. Pickett, Esq.

**BEFORE:** Earl R. Pfeffer, Arbitrator

**DISCUSSION AND FINDINGS**

On August 20, 2015, the Petitioner State-Operated School District of the City of Newark, in the County of Essex ("State District"), filed a Notice of Tenure Charge of Inefficiency against Respondent Shirley King in accordance with N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3, and same was served on Respondent with notice of opportunity to submit evidence and argument in opposition to the Charge. Following his review of the Charge and any opposition thereto, State District Superintendent Christopher Cerf, by Determination dated September 16, 2015, found probably cause to credit the evidence in support of the Charge and, accordingly, on September 17, 2016, the State District submitted same to the Commissioner of Education for a hearing. Respondent was suspended, effective September 16, 2015, in accordance with N.J.S.A. 18A:6-14.

On or about October 8, 2015, Respondent, through counsel, filed her Answer and Affirmative Defenses denying the State District's charges of inefficiency. On October 19, 2015, I was appointed Arbitrator to hear and decide this tenure matter. A Pre-Hearing Conference was convened on December 10, 2015, at which time the parties discussed discovery issues and potential settlement of the Charges. Hearings were scheduled for the first week of February 2016.

Thereafter, the parties informed me they had reached

agreement settling this case, and on February 10, 2016, pursuant to N.J.A.C. 6A:3-5.6, they forwarded to me for review and approval a fully executed copy of their Settlement Agreement and General Release ("Agreement").

I have carefully reviewed the Agreement and I determine it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6. In particular:

1. The nature of the Charges are part of the record of this proceeding and were known to all parties to the Agreement;

2. The circumstances justifying settlement and withdrawal are incorporated into the Agreement. For the Respondent, the State-District agrees to dismiss the Charge and to confer upon her certain financial benefits; for the State-District, Respondent has agreed to resign her tenured position, to waive any right to re-employment with the State-District, to withdraw any pending claims or suits against the District, and to release and discharge the State-District and its Board, officers, employees, representatives, agents, successors and assigns, with respect to any claims or rights she may have against them.

3. The Agreement advised Respondent of her rights under the Older Workers Benefit Protection Act of 1990, in particular of her right to revoke and rescind her execution of the Agreement within seven (7) calendar days after she signed it on February 1, 2016.

4. The Agreement is signed by the parties and their representatives, and contains the State District's Certification of Consent to Settlement pursuant to N.J.A.C. 6A:3-5.6(b), and Respondent's Certification she entered into the Agreement freely and voluntarily, with a full understanding of her rights following full, satisfactory and unimpeded discussions with her representative which were conducted without duress, coercion or pressure.

5. The Agreement does not contain terms which restrict access to information or records deemed public by law, accurately represents the circumstances of Respondent's resignation and is in the public interest.

I approve the Agreement.

June 22, 2016.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY )
) ss.:
COUNTY OF ESSEX )

On this 22nd th day of June 2016, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed
before me this 22nd day
of June 2016.

Notary Public

ANTHONY D STEVENSON
Notary Public
State of New Jersey
My Commission Expires Sep 6, 2017

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-Operated School District of the City of Newark

| | | |
|---|---|---|
| In the Matter of<br><br>SHIRLEY KING,<br><br><br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX | : | **SETTLEMENT AGREEMENT** |

This Settlement Agreement and General Release ("Agreement") is made by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, with an address at 2 Cedar Street, Newark, New Jersey 07102, ("School District"), and SHIRLEY KING ("Employee") (collectively, the "Parties").

**WHEREAS** Employee is a tenured teaching staff member employed by the School District as a teacher;

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of inefficiency to the Commissioner of Education of New Jersey, captioned *In the Matter of Tenure Charge Against Shirley King, State-operated School District of the City of Newark, Essex County* ("Tenure Charge"); and such charge was assigned Docket No. 276-9/15; and the Commissioner of Education referred the matter to Arbitrator Earl Pfeffer ("Arbitrator") for a hearing;

**WHEREAS** the Parties wish to resolve this matter in accordance with the terms set forth herein;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. This Agreement shall be and is subject to final approval by the Arbitrator, and shall be effective only upon the School District's receipt of a copy of this Agreement, executed by the Arbitrator to indicate his approval. The effective date of this Agreement ("Effective Date") shall be such date of the School District's receipt of this Agreement,

approved by the Arbitrator, or the eighth day after the School District's receipt of this Agreement, executed by Employee, whichever is later, provided that Employee has not exercised her right to rescind this Agreement in accordance with paragraph 12 below. In the event of disapproval by the Arbitrator or any failure to act on such approval, this Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Tenure Charge.

2. Employee hereby agrees to resign from her tenured position effective on the 37th work day following the effective date of this Agreement. For purposes of this Agreement, a "work day" shall be a day on teachers are required to be present for school, staff development or other work-related purpose. Attached as Exhibit A is a copy of Employee's signed letter of resignation. Employee's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the School District will be limited to confirmation of Employee's employment, position, title, salary and dates of employment.

3. Employee agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the School District that are pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This settlement is intended to be the final resolution of all outstanding matters between the School District and Employee. Should Employee fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims or suits, this Agreement will serve as Employee's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

4. Commencing on the first work day following the Effective Date, Employee will be placed on administrative leave with pay for thirty-six and one half (36.5) work days, and will remain in such status until the effective date of her resignation ("Resignation Date"), which shall be the 37th work day following the Effective Date. As of the Resignation Date, all of Employee's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

5. Other than the salary and benefits that she receives up to the Resignation Date, Employee will not receive any further compensation or other monies from the School District in exchange for this Agreement. Except for such salary and benefits, Employee waives any right or claim she may have to additional compensation by the School District, including any claims for fees or other monetary relief, with the exception of workers' compensation claims.

6. Employee agrees that she will not apply for reemployment with the School District at any time. Specifically, Employee will be considered to have permanently resigned from her tenured position as a result of this Settlement Agreement. If Employee does apply for reemployment with the School District and is approved for employment, the terms of this Agreement shall control and be grounds for immediate termination of Employee's employment.

7. The School District agrees to dismissal of the Tenure Charge upon approval of this Agreement by the Arbitrator.

8. This settlement shall not constitute a precedent in any matters involving other employees.

9. By entering into this Agreement, and in exchange for good consideration as set forth in Paragraph 4 above, the sufficiency of which is hereby acknowledged, Employee hereby releases and discharges the School District, its Advisory Board of Education and its Advisory Board members, the Superintendent, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Released Parties, or any of them. This includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Employee's employment with the School District and separation from employment with the School District. It specifically includes, without limitation, all claims which Employee may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination

in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual or tort claim or public policy or whistleblower claim, and any claim having any bearing whatsoever on her employment by and the termination of her employment with the District, including but not limited to any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Employee agrees to save, hold harmless and indemnify the School District for any legal costs and attorneys fees associated with the enforcement of the terms of this Agreement should enforcement become necessary.

10. Notwithstanding Paragraph 9 of this Agreement, it is understood and agreed that the Parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency.

Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Employee agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990 ("Act"), if applicable, this Agreement advises Employee of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Employee acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. King understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

12. The Parties respectively acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid,

void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

Date: February 1, 2016

SHIRLEY KING

Date: Feb 01, 2016

ROBERT T. PICKETT, ESQ.
Attorney for Shirley King

Date: 2/9/16

CHRISTOPHER CERF
State District Superintendent

Date: 2/9/16

BRENDA C. LISS, ESQ.
Attorney for State-Operated School District
of the city of Newark

**CERTIFICATION**

I, SHIRLEY KING, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: February 1, 2016

SHIRLEY KING

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Date: 2/9/16

Brenda C. Liss
Riker Danzig Scherer Hyland & Perretti LLP
Attorneys for State-operated School District
of the City of Newark

**APPROVED:**

Dated: _____

EARL PFEFFER, Arbitrator

**EXHIBIT A**

Christopher Cerf
State District Superintendent
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

**RE: SHIRLEY KING**
**NOTICE OF RETIREMENT**

Dear Superintendent:

I hereby unconditionally resign from employment with the Newark Public Schools, effective on the 37th work day following the Effective Date of the Settlement Agreement and General Release that I am signing today.

Dated: February 1, 2016

SHIRLEY KING

4689881v1

233-16

233-16


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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*


June 28, 2016

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

*Re: Request for Docketing of Judgment*

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the June 28, 2016 Order of the Commissioner of Education finding that Mayra Mizhquiri is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *M.M., on behalf of minor child, V.H.A. v. Board of Education of the Township of West Orange, Essex County.*[1] By copy of this letter, I am advising Ms. Mizhquiri, as well as counsel for the West Orange Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Mayra Mizhquiri (with copy of Order)
Stephen J. Christiano, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Mizhquiri's initials, her full name is included within the body of the Commissioner's Order.

233-16

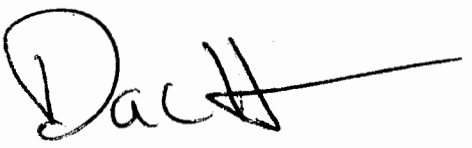
AGENCY DKT. NO. 356-11/15

| | | |
|---|---|---|
| M.M., on behalf of minor child, V.H.A., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, | : | ORDER |
| RESPONDENT. | : | |

On April 7, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found M.M. liable for tuition in the amount of Five Thousand Three Hundred Nine Dollars and Forty Four Cents ($5,309.44), representing tuition for a period of ineligible attendance by her child, V.H.A., in the Board's school district between June 1, 2015 and November 30, 2015. The Board subsequently notified the Commissioner that M.M. has failed to comply with the decision and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. M.M. offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Mayra Mizhquiri is now subject to entry of a judgment by the court in the amount of $5,309.44, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 6/28/16

Date of Mailing: 6/28/16

234-16

IN THE MATTER OF THE SUSPENSION :

OF THE CERTIFICATE(S) OF : COMMISSIONER OF EDUCATION

CHAE HYUK IM, SCHOOL DISTRICT : DECISION

OF THE TOWNSHIP OF WAYNE, :

PASSAIC COUNTY. :

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## SYNOPSIS

In December 2014, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:28-8 for resigning his position without giving the required 60 day notice. The respondent contended that he resigned because he was appointed as an FBI agent and had to begin his training immediately. Respondent further asserted that he had requested a leave of absence, but the Board denied his request; he therefore had no alternative but to resign immediately. The Board sought an order suspending Im's teaching certificate for one year, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:28-8 provides that any tenured teaching staff member who wishes to leave their position "shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice"; the statute further provides that any tenured teacher who fails to give such notice "shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year."; the wording of the statute is clear, and does not allow the Commissioner discretion in finding "unprofessional conduct"; there is, however, discretion allowed as to what penalty is imposed; the purpose of *N.J.S.A.* 18A:28-8 is to protect students from unnecessary disruption of their education caused by the teachers leaving their posts on short notice; there are no disputed material facts as to the issue of unprofessional conduct in the instant matter, and the Board is entitled to judgment as a matter of law. The ALJ concluded that the respondent is guilty of unprofessional conduct, but on the issue of the penalty, there are questions of fact still outstanding that require testimony as to mitigation. Accordingly, the ALJ granted partial summary decision to the Board on the issue of unprofessional conduct, and ordered that the length of the respondent's suspension be determined following additional testimony at a prospective hearing.

Upon comprehensive review, the Commissioner concurred with the ALJ that the respondent is guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:28-8. Accordingly, the Commissioner adopted the ALJ's recommended Order on Partial Summary Decision, and ordered the matter to continue at the OAL for a hearing to determine if the respondent's certificate should be suspended for failure to give the required notice.

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

June 30, 2016

OAL DKT. NO. EDU 1019-14
AGENCY DKT NO. 357-12/14

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE CERTIFICATE(S) OF | : | COMMISSIONER OF EDUCATION |
| CHAE HYUK IM, SCHOOL DISTRICT | : | DECISION |
| OF THE TOWNSHIP OF WAYNE, | : | |
| PASSAIC COUNTY. | : | |

The record of this matter and the Partial Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent, Chae Hyuk Im, and the Wayne Board of Education's reply thereto.[1] This matter involves a determination as to whether the respondent's certificate(s) should be suspended pursuant to *N.J.S.A.* 18A:28-8 for his failure to provide the Board with the requisite notice prior to resigning from his teaching position. The Administrative Law Judge (ALJ) issued a Partial Order on Summary Decision wherein she found that the respondent is guilty of unprofessional conduct for failing to provide the Board with the 60-days notice required under *N.J.S.A.* 18A:28-8 when he voluntarily choose to pursue a career with the Federal Bureau of Investigation (FBI). The ALJ further found that since there are facts in dispute with respect to mitigation, a hearing is required before a penalty determination can be made.

Upon a comprehensive review of this matter, the Commissioner concurs with the ALJ – for the reasons outlined in the Partial Initial Decision – that the respondent is guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:28-8. Under *N.J.S.A.* 18A:28-8,

[1] Before the ALJ submitted the Partial Order on Summary Decision to the Commissioner for review under *N.J.A.C.* 1:1-12.5(e), the respondent filed a request for interlocutory review of the ALJ's Order. The request for interlocutory review was subsequently denied on May 27, 2016. Thereafter, the parties both requested that their respective papers – which were submitted in the context of the request for interlocutory review – be considered as respondent's exceptions and the Board's reply thereto.

> any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he **shall** be deemed guilty of unprofessional conduct, and the commissioner **may** suspend his certificate for a period not exceeding one year. [*N.J.S.A.* 18A:28-8 (emphasis added); *See also N.J.S.A.* 18A:26-10]

Despite the respondent's arguments to the contrary, the Commissioner agrees with the ALJ that the wording in *N.J.S.A.* 18A:28-8 is quite clear: when the requisite notice is not provided, the employee "shall" be deemed guilty of unprofessional conduct. A plain reading of the statute provides that the Commissioner is not afforded any discretion on the finding of unprofessional conduct when 60 days notice is not provided. In contrast, the use of the term "may" in connection with the penalty establishes that there is undoubtedly discretion afforded to the Commissioner to determine whether the lack of requisite notice warrants a suspension of the employee's certificate. The Commissioner is not persuaded that the cases relied on by the respondent support his assertion that the Commissioner has discretion to decide whether a teaching staff member is guilty of unprofessional conduct when it is undisputed that the employee did not provide the requisite notice under *N.J.S.A.* 18A:28-8. Instead, the cases cited by the respondent stand for the proposition that mitigating factors may exist which may warrant the suspension of a certificate for less than one year or even no suspension at all. See, *Board of Education of the Township of Clifton, Hunterdon County v. Robert Burgess*, 1983 *S.L.D.* 183; *Board of Education of the Black Horse Pike Regional School District, Camden County v. Janice Mooney*, 1984 *S.L.D.* 810, adopted 1984 *S.L.D.* 821.

The Commissioner also finds that the ALJ properly decided that the respondent is guilty of unprofessional conduct on a motion for summary decision.[2] The respondent maintains that the ALJ erroneously issued a Partial Order on Summary Decision because it effectively barred him from presenting evidence at a hearing with regard to the impact that a finding of "unprofessional

[2] The Commissioner also agrees with the ALJ's determination – for the reasons stated in the Partial Initial Decision – that the justification of "necessity" does not dictate a different result in this case.

conduct" will have on his future ability to testify in court in the course of his employment as an FBI agent. Respondent's argument is misguided because there is no genuine issue of fact as to the respondent's failure to provide the Board with the requisite notice; the material facts in dispute only pertain to the mitigating circumstances that could impact the potential suspension of his certificate. *See, In the Matter of the Suspension of the Certificate of Jacqueline Bordon, School District of the Township of Edison, Middlesex County*, EDU 12810-14, Initial Decision (June 18, 2015), adopted Commissioner Decision No. 247-15, decided July 29, 2015 (The teaching staff member's abrupt departure was "unprofessional conduct" within the meaning of *N.J.S.A.* 18A:26-10; however, based on the mitigating circumstances only a three-month certificate suspension was warranted). Notwithstanding the finding of unprofessional conduct, the respondent will be afforded a hearing to determine whether a certificate suspension is appropriate in this case. To that end, the respondent will be given a full opportunity to present evidence of mitigation, including the fact that he left his teaching post to take a job with the FBI.

Accordingly, the recommended Order of the OAL is adopted for the reasons expressed therein. This matter shall continue at the OAL for a hearing to determine if the respondent's certificate should be suspended for failure to give the 60 days notice required by *N.J.S.A.* 18A:28-8.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/16
Date of Mailing: 6/30/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**
**PARTIAL SUMMARY DECISION**
OAL DKT. NO. EDU 01019-15
AGENCY DKT. NO. 357-12/14

**IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CHAE HYUK IM, SCHOOL DISTRICT OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY.**

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**Christine Bernacki Smith**, Esq., for petitioner, Wayne Board of Education (Machado Law Group, attorneys)

**Louis P. Bucceri**, Esq., for respondent, Chae Hyuk Im (Bucceri & Pincus, attorneys)

BEFORE **CAROL I. COHEN**, ALJ,t/a:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the Township of Wayne (the Board), seeks an order suspending the respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Chae Hyuk Im, replies that he resigned because he was appointed as an FBI agent and had to begin his training immediately. When he asked the Board for a

leave of absence, it denied his request. He therefore had no alternative but to resign immediately.

On December 1, 2014, at the request of the Board, the Commissioner of Education (the Commissioner) entered an Order directing Im to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:28-8. Im filed a pro se answer on December 29, 2014. On January 21, 2015, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. On February 6, 2015, the matter was assigned to Judge Irene Jones. On August 13, 2015, the petitioner filed a motion for summary decision. On September 3, 2015, the respondent filed his responsive brief. On September 10, 2015, the petitioner filed a reply brief. On April 4, 2016, this matter was transferred to Judge Carol I. Cohen.

## FACTUAL DISCUSSION AND FINDINGS OF FACT

The underlying facts are fairly straightforward, and generally uncontroverted.

The Wayne Board of Education is a public school district in Passaic County. The respondent was employed as a tenured chemistry teacher at Wayne High School from September 2005 through October 2014. His last day of teaching was October 17, 2014. The Board's Policy 3141 states that "the Board may notify the Commissioner of Education of any tenured teaching staff member who terminates his/her position without having given sixty days' notice to the Board and without the express permission of the Board." A letter to Im from the superintendent of Wayne schools dated May 15, 2014, which indicated what his salary for the following year would be, stated, "should you have reason to believe that you will be unable to serve the entire 2014–2015 school year, please write and inform this office immediately."

In late July 2014, Im met with human resources specialist Claudia Olivo and stated that there was a chance that he would be joining the FBI effective September 1, 2014, and requested a leave of absence, although he was not sure he would be accepted into the program. Im had applied for a position with the FBI several years

before, but had not been offered a potential position until the summer of 2014. On July 23, 2014, Im sent a letter to the superintendent requesting a "potential leave of absence" for a period of one year from September 2014 through June 2015 to pursue a "new opportunity." The one year would give him the opportunity to return to teaching if necessary. Im stated that the leave was "potential" because he was awaiting "definitive terms" from the FBI. In the interest of his students, he wanted to give the district time to get an adequate replacement.

As part of the special-agent application the applicants had to pass a physical-fitness test within sixty days of reporting for training. On August 7, 2014, Im failed the test. In late August 2014, Im informed Ms. Olivo that he was not chosen for the September 2014 class and therefore did not need the leave of absence. Im started the September 2014 school year. Later in August, Im was advised by the FBI that if he took the physical exam again and passed, he could be added to the training class. He did not feel confident that he could pass the September test, so he waited until October. On October 9, 2014, Im took the physical-fitness test again. This time he passed. On that date he contacted the Board and informed the Board that he had passed the test and was accepting an offer from the FBI, and would be starting at the FBI the following Monday. He then requested a leave of absence from the new superintendent, Dr. Mark Toback. Dr. Toback denied his request. Im requested a meeting with Dr. Toback, who again denied his request. Toback also told Im that action could be taken to suspend his license because of untimely notice of resignation. On October 10, 2014, Im received his official appointment letter from the FBI, and he accepted the appointment on October 11, 2014. On October 15, 2014, Im tendered a letter of resignation to the superintendent stating that he had received a job opportunity that he could not pass up. A Board of Education meeting was held on October 16, 2014. Im was given a "Rice" letter, and the Board discussed his application for a leave in closed session. The Board denied his request. Im's last day of employment with Wayne was Friday, October 17, 2014. He commenced his FBI training on October 19, 2014. On December 8, 2014, the Board filed an Order to Show Cause to suspend Im's teaching certificate for unprofessional conduct.

Four separate teachers covered Im's classes from October 20, 2014, until a permanent teacher was hired on January 19, 2015. These teachers were teaching five other classes. They were asked to teach a sixth class to cover Im's classes. They received an additional stipend for covering these classes. In addition, the district paid a substitute teacher who covered one of Im's classes $100.00 per day, for a total of $4,000.00. The total paid to these teachers was $9,535.24 for the sixty-day period from October 20, 2014, through December 20, 2014. The respondent's gross monthly salary in September 2014 was $5,952.00. Multiplying by two, the total that Im would have made in that sixty-day period was $11,904.00. Therefore, there was a net financial gain to the district of $2,368.76.

## LEGAL ARGUMENTS

### Argument of the Board

N.J.S.A. 18A:28-8 provides that

> [a]ny teaching staff member, under tenure of service, desiring to relinquish his positon shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

The Board argues that in terms of statutory construction, the use of the term "shall" denotes something that is mandatory and is inconsistent with a concept of discretion. Black's Law Dictionary 1375 (6th ed. 1990). As a consequence of a failure to provide notice, and as a method of deterrence, the Legislature instructed that the staff member "shall be deemed guilty of unprofessional conduct." The length of the suspension is the only portion of the statute that is discretionary. The Board distinguished Board of Education of Clinton v. Burgess, 1983 S.L.D. 193, 190, relied upon by Im. It pointed out that the district in that case was able, within five days of Burgess's formal resignation, to employ a full-time teacher to fill the vacancy he left. In his decision, the Commissioner

stated that the Board failed to fulfill a promise to Burgess to do all within its power to replace him in a timely fashion. In addition, only two substitutes were required to cover Burgess's classes. Further, the Commissioner said that in deciding to suspend a teaching certificate, all the "attendant circumstances" must be considered. Burgess, supra, 1983 S.L.D. at 190. The Board here went on to discuss the "attendant circumstances" in this case, including the monetary impact on the district; that Im delayed until 2014 telling the Board of his intention to join the FBI, even though he had applied for the special-agent position in 2011; and the fact that Im valued serving the public as an FBI agent above serving the students of the district.

The district also asserted that Im's invocation of the doctrine of necessity was misplaced, because it should only be invoked where there is a need for pressing public action. See Griggs v. Princeton Borough, 33 N.J. 207, 220–21 (1960); Cranberry Lake Quarry Co. v. Johnson, 95 N.J. Super. 495 (App. Div. 1967). The Board argued that Im had four years to make the Board aware of his intent to seek employment elsewhere, and chose to take his re-take physical-fitness test in the fall of 2014, after the commencement of the school year. The Board argued that "[t]he Respondent chose to accept the FBI's offer for a position without notifying his superiors; he was made aware of the statute requiring sufficient notice on numerous occasions and should have known, as a teacher within the District for many years, of the potential effects of his departure on his students." Therefore, the doctrine of necessity did not apply.

**Argument of the Respondent**

Im argued that the standards used in cases arising under N.J.S.A. 18A:28-8 are analogous to the defense of "necessity." N.J.S.A. 2C:3-2, entitled "Necessity and other justifications in general," provides:

> a. Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Similarly, the governing education law does not exclude the claimed exception due to "justification" because the statute gives the Commissioner discretion in imposing a penalty or not doing so. Im claimed that "when he was notified of a second chance to take the physical exam, he had no choice but to accept it with the resulting lack of advance notice to the Board, or give up his goal of serving his adopted country as a member of the [FBI]." During oral argument, the respondent analogized his situation to that of a soldier drafted into the service. In both cases there is a necessity that the individual report for duty at a certain time, and therefore the statute does not apply.

Im also argued that as an immigrant, it was his life-long ambition to join the FBI and serve his country.

The respondent also argued that, despite the fact that the statute used the word "shall," the Commissioner in fact had discretion to find Im guilty of "unprofessional conduct." He based this on the fact that in the Burgess decision, even though the teacher did not give sixty days' notice, there was no finding of unprofessional conduct.

Finally, Im argued that the record of "unprofessional conduct" would affect his ability to testify in trials as an FBI agent and might affect his ability to obtain promotions.

## CONCLUSIONS OF LAW

### Summary Decision

The rules governing practice in the OAL provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented, as well as any affidavits that may have been filed with the application. In order for the adverse, i.e., the non-moving, party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact that can only be determined in an evidentiary proceeding.

This provision mirrors the summary-judgment language of R. 4:46-2(c), which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

This rule was further elaborated on in the Supreme Court's decision in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), and clarified in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), which sets forth the standard to be applied when deciding a motion for summary judgment.

> [T]he determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

I **CONCLUDE** that this matter is ripe for partial summary decision as to the issue of "unprofessional conduct." There are no material disputed facts which require a plenary hearing, and the Board is entitled to judgment as a matter of law.

**N.J.S.A. 18A:28-8**

The Commissioner has held that the central purpose of N.J.S.A. 18A:28-8 is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." See: Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407, which analyzes the concept of notice upon resignation under a comparable statute, N.J.S.A. 18A: 26-10.

The statute is quite clear in the wording that the employee "shall be deemed guilty of unprofessional conduct." There is nothing in the wording about discretion by the Commissioner to find "unprofessional conduct." Where the discretion of the Commissioner lies is as to what penalty should be imposed. The fact that Burgess did not make a finding as to "unprofessional conduct" and merely glossed over the issue and dealt with penalty does not give license to ignore the plain language of the statute. There is a reason for the statute, which is to protect students from unnecessary disruption of their education caused by the precipitous leaving of one of their teachers. It is to penalize a teacher for doing so that is at the heart of the matter. While the district was able to piece together a program for the students, it is uncontroverted that a full-time replacement for Im was not hired until January 2015.

Im's argument about "necessity" is equally unpersuasive. The respondent attempted at oral argument to analogize his position to that of a soldier called up to service. That analogy does not hold. The soldier has no choice but to go when he is called. Im had a choice, albeit a difficult one. He could have decided not to start the school year and waited to take the retest and see if he passed the exam, or he could have told the FBI that he could not leave his students mid-year and see if he could reapply later. He could have chosen to take the physical test again at the beginning of September, possibly before the school year had begun. The necessity that the respondent speaks of was based on the choices that Im decided to make. As the district pointed out, "the Respondent *chose* to accept the offer for a position without giving sufficient notice and being aware of the notice requirement." The doctrine of necessity is inapplicable because there is no pressing public interest in not imposing the statute.

Additionally, Im's argument about his joining the FBI as a noble cause is equally inapplicable. The respondent is asking this judge to decide that becoming an FBI agent is somehow more important and more noble than being a chemistry teacher. I decline to make such a determination. While being an FBI agent may be more important to Im than being a teacher, that is a personal choice. The respondent can make that choice, but there are consequences. When questioned about the decision in In re Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), <http://njlaw.rutgers.edu/collections/oal/>, which dealt with a teacher who left to become a police officer and gave 12 days' notice, the respondent claimed that a police officer was not the same as an FBI agent. Further, the decision did not discuss whether Montalbano could have waited to join the force. One could assume that if Montalbano could have waited to take the job, he would have done so, to avoid suspension. More importantly, it is a dangerous path to start deciding what jobs are more important and therefore worthy of more consideration. The statute does not make exceptions for FBI agents, and I also decline to do so.

The respondent presented no proof that the finding of "unprofessional conduct" would have any impact on his ability to testify or even be allowed to impeach his testimony. N.J.R.E. 404 deals with admission of prior bad acts. The fact that Mr. Im left his job without proper notice could not be used to attack his credibility at trial, nor would it be considered relevant to testimony in a criminal case. Other than an assertion on the respondent's part, no evidence has been presented showing that the finding would have any impact on his ability to perform his job or get promotions. The certification presented by Im from Special Agent Eric A. Parisi throws no light on the subject. Special Agent Parisi stated, "I am advised that the suspension of Special Agent Im's teaching license would require a finding of 'unprofessional' conduct. It would appear that such a consequence should be avoided in the absence of overwhelming proof of the alleged existence of truly unprofessional conduct." This commentary is presumptuous at best, and far outside his area of expertise.

Therefore, based on the papers submitted and the argument of counsel, I **CONCLUDE** that the respondent is guilty of unprofessional conduct. As to the issue of

penalty, that will have to be decided after a hearing, because there are questions of fact that are still outstanding, and that will require testimony on the issue of mitigation.

## ORDER

Based on the foregoing, partial summary decision is **GRANTED** to petitioner on the issue of unprofessional conduct. The length of respondent's suspension is to be determined following receipt of additional testimony at a hearing.

This order **GRANTING** partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

May 18, 2016

Carol I Cohen

DATE

**CAROL I. COHEN**, ALJ, t/a

Date Received at Agency:

Date Mailed to Parties:

Db

235-16

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|---|---|---|
| JOHN BARAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured teacher employed in respondent's school district – asserted that the respondent Board acted in an arbitrary, capricious and unreasonable manner when it withheld his salary increment for the 2013-2014 school year. The Board contended that petitioner's increment was withheld for good cause – specifically for performance and attendance issues – pursuant to *N.J.S.A.* 18A:29-14.

The ALJ found, *inter alia*, that: petitioner was absent from work for twenty-three days during the year in question, exceeding his yearly absentee allotment by seven days; his absences required the retention of a substitute teacher and negatively impacted the education of his students on twenty-three days during the 2013-2014 school year; petitioner was evaluated during this period as "partially ineffective" in a number of areas, and "ineffective" in several others, including managing student behavior, communicating with students, and engaging students in learning, among others; petitioner failed to produce any evidence that he provided meritorious service that entitled him to an increment; petitioner also failed to show that the Board's decision to withhold his increment was arbitrary, capricious or unreasonable; a salary increment is a reward for meritorious service, not an entitlement; pursuant to *N.J.S.A.* 18A:29-14, a board of education may withhold an employment increment in any year for inefficiency or other good cause, and a decision to do so is a matter of management prerogative and entitled to a presumption of correctness; the petitioner herein failed to carry his burden of proving that the withholding of his increment was arbitrary, capricious or unreasonable, while the Board presented sufficient, credible and convincing evidence that petitioner's attendance and performance were unsatisfactory during the 2013-2014 school year. The ALJ concluded that the Board's actions were not arbitrary, capricious or unreasonable; accordingly, petitioner is not entitled to restoration of his salary increment.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner rejected the petitioner's exceptions, emphasizing that increment withholdings and tenure matters are separate proceedings with individual requirements; accordingly, the statutes and regulations governing tenure charges do not apply in the context of the withholding of a salary increment. The petition was dismissed.

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

June 30, 2016

OAL DKT. NO. EDU 14772-14
AGENCY DKT. NO. 319-10/14

| | | |
|---|---|---|
| JOHN BARAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The Board's reply was not timely filed in accordance with *N.J.A.C.* 1:1-18.4 and was therefore not considered by the Commissioner.

In his exceptions, petitioner argues that the Administrative Law Judge (ALJ) failed to consider a March 5, 2015 letter that informed the District's staff that during the 2013-2014 school year, teacher evaluations, teacher summative and SGO scores were not properly completed in accordance with AchieveNJ, and that all teachers would therefore be classified as "teacher not evaluated" for that school year. (Exhibit P-1) Accordingly, petitioner contends that the evaluation conducted by David Radulich – which the ALJ relied upon – was improper, as the Board had previously determined that the evaluations conducted during the 2013-2014 school year would not count. Petitioner maintains that the ALJ failed to abide by *N.J.S.A.* 18A:6-118, the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act. Specifically, petitioner argues that the Board failed to observe him multiple times during the

2013-2014 school year, nor did it provide him with an opportunity to improve his effectiveness as required by *N.J.S.A.* 18A:6-123(7) and (9).

Additionally, petitioner contends that the ALJ speculated as to why petitioner's increment was withheld because there was no testimony as to the reason. Petitioner also points out that there was no testimony that his absences were excessive, and that all of his absences were approved by the District and used his own sick leave. Petitioner further argues that the ALJ failed to recognize *N.J.A.C.* 6A:10-1.1 *et seq.*, which guides Boards in establishing evaluation rubrics for evaluating the effectiveness of teachers. Petitioner maintains that only one short observation by his supervisor, and the subsequent lack of follow up on perceived shortcomings, fails to satisfy the intent of the regulation. Accordingly – citing a string of cases that were presented to and addressed by the ALJ – petitioner emphasizes that the Board acted arbitrarily in withholding petitioner's increment.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly expressed in the Initial Decision – that the Board's decision to withhold the petitioner's increment for the 2013-2014 school year was not arbitrary, capricious and unreasonable. The Commissioner is also in accord with the ALJ that the Board presented sufficient, credible and convincing evidence that petitioner's absences were excessive and his performance was unsatisfactory during the 2013-2014 school year.

The Commissioner is not persuaded by petitioner's exceptions. An increment withholding and tenure matters are separate proceedings with individual requirements, and accordingly, the statutes and regulations governing tenure charges do not apply in this context. Pursuant to *N.J.S.A.* 18A:29-14, boards of education have the authority to withhold an employee's increment for "inefficiency or other good cause." Although the statute uses the word

"inefficiency," it does not require compliance with the requirements for filing tenure charges of inefficiency. *See Margaret Sidberry v. Board of Education of the City of Trenton, Mercer County*, OAL Docket No. EDU 06610-09, Initial Decision, dated September 24, 2010 (noting that "[t]he decision to withhold an increment does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act" (citing *Kopera v. West Orange Board of Education*, 1960-61 *S.L.D.* at 62)). As such, the statutes and regulations cited by petitioner are irrelevant to this matter, as is the March 5, 2015 letter that petitioner relies upon.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/16

Date of Mailing: 6/30/16

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

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 14772-14

AGENCY DKT. NO. 319-10/14

**JOHN BARAN,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,**

Respondent.

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**Philip Feintuch**, Esq., for petitioner (Feintuch, Porwich & Fenintuch, attorneys)

**Katherine A. Fina**, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: June 23, 2015 Decided: May 20, 2016

BEFORE **EVELYN J. MAROSE**, ALJ:

## STATEMENT OF THE CASE

Petitioner, John Baran (Baran), asserts that the Board of Education (BOE) of the City of Jersey City, Hudson County, was arbitrary, capricious and unreasonable when it

withheld his salary increment for the 2013-2014 School Year. The BOE asserts that petitioner's increment was withheld for good cause pursuant to N.J.S.A. 18A:29-4.

The New Jersey State Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on November 14, 2014. A hearing was held on March 31, 2015. The record closed on June 23, 2015, upon receipt of written summations. Due to a voluminous caseload and medical leave, time for the issuance of this Initial Decision was extended until June 20, 2016.

## FACTUAL DISCUSSION AND FINDINGS

Respondent's Testimony

David Radulich (Radulich), Performing Acts Supervisor for the Jersey City School District (District) and Baran's direct supervisor for the eight years that Baran has taught in the District, evaluated Baran annually and provided him with support activities. In the year at issue and in accordance with the request of the school principal, Radulich observed Baran teaching on at least a dozen occasions. Radulich conducted one formal written observation. (R-3.) On the other occasions, in accordance with a change in District policy that provided for no written documentation of informal classroom observations, Radulich provided Baran with verbal feedback regarding his observations.

Radulich described what he observed during his unannounced Formal Short Observation on December 3, 2014. The educational classroom setting was negative. Positive instruction was not taking place. Baran's lesson consisted of a very long skit that involved only one or two students at a time. The rest of the class was not engaged with the skit. The students were not in their seats. They were running around, acting out, and hitting and pushing each other. The class was also talking out of turn and cursing. Baran did not attempt to adjust his lesson in response to the student confusion. Baran's attempt to gain control of the class by screaming at them was totally unsuccessful. The classroom atmosphere was so chaotic that Radulich feared for Baran's and the students' physical safety. Radulich had no control over the students and the students showed him no respect. (R-3.) Radulich provided Baran with verbal

feedback as to how to improve, provided him (as well as other drama teachers) with professional development opportunities and encouraged Baran to observe and confer with other colleagues who had good discipline and good classroom management. Radulich provided Principal W. Michael Yorker (Principal Yorker) with a copy of his written evaluation, which was also part of Baran's permanent file. Radulich did not make the decision that Baran's increment should be withheld.

Frank Borroto has been the Assistant Principal at Baran's school throughout his employment. One of his duties is keeping track of staff attendance. While teachers are provided with thirteen sick days and three personal days per year, the allotted days should be used as "needed" and not as a "given." Further evidence of the intent that such days only be used as needed is that they are not a "use or lose" benefit. Unused days "roll over" yearly.

If a teacher is absent, the District incurs the expense of paying for a "substitute" in addition to the teacher's salary. However, classroom management and learning is not on the same level when a substitute teacher must be obtained. Borroto described good staff attendance as essential not only for learning but also for student safety.

In accordance with school protocol, Borroto received copies of letters sent to Baran by the principal expressing concern that his attendance was excessive during the 2013-2014 school year. During that year, Baran was absent twenty-one days for illness, took two personal days, and was late on one occasion. (R-1, R-2.) Baran did not request, nor was he absent during that year, for a medical leave. While Borroto kept track of Baran's attendance, he did not make the decision to withhold Baran's increment.

Petitioner's Testimony

Baran is certified as a Teacher of English (for middle and high school), a Teacher of Dramatic Arts and Speech (for kindergarten through twelfth grade) and a Teacher of Elementary Education. He has been employed by the District since 2006 and worked at P.S. #15 since 2011. From 2011 to February 2015, and accordingly during the school

year at issue, he was the only Drama teacher at P.S. #15. Baran taught thirty different classes per week usually consisting of eighteen to twenty three students per class. However some classes with inclusion children might consist of up to thirty five students.

Baran admitted that he received a letter stating that his increment was being withheld because of his attendance and performance during the 2013-2014 school year. Baran stated, however, that he never received a performance improvement plan at the end of that year and that, upon calling the Jersey City Central Office, he learned no more details as to his alleged negative attendance and performance than was contained in the notification letter.

Baran acknowledged that during the 2013-2014 school year he was absent for twenty-three days and late on one occasion. He states that all of his absences were based upon medical need, and while under the care of both his primary care physician and a pulmonary specialist for chronic bronchitis and asthma. Baran was always paid for the days he was absent through his annual sick-day allotment and/or his banked sick-day benefits. Baran denied receiving one of the letters produced by the District, dated May 7, 2014, that was addressed to him and that advised Baran that the District was concerned about his attendance. (R-2.) He further complained that his classroom assignment in the basement was environmentally the cause of, or instrumental in the severity of, his pulmonary issues.

Baran acknowledged that he found his teaching assignment difficult in P.S. #15. Though he was certified to teach dramatic arts to kindergarten through twelfth grade and certified to each elementary education, since most of his teaching experience had been in high school, Baran said he had difficulty from the time that he was assigned to P.S. #15 in 2011. Since the school contained only grades kindergarten through fifth grade, he was assigned to teach kindergarten through third grade. Baran also complained that, some time after his arrival at P.S. #15, he learned that he was the third Drama Teacher in the school within seven or eight years.

Initially since Baran took over a teaching assignment mid-year, he found Radulich responsive and helpful when he reached out to him. However, Baran denied

receiving any help when he reached out to Principal Yorker. He asserted that the principal directed him, as a professional, to find his own solutions. Baran acknowledged that Radulich recommended in the one written Short Term Evaluation that he received on December 3, 2013, that he "seek assistance from colleagues in his building that implement successful classroom management skills." Baran stated that he did approach his colleagues, as was suggested. Sometimes their advice was helpful and other times it was not.

Baran acknowledged that Radulich and Principal Yorker came into his classroom on several occasions during the 2013-2014 School Year and observed his teaching. However, Baran denies ever receiving help or assistance, one-on-one, from any administrator or other educational professional to improve his teaching during the 2013-2014 School Year. Baran complained that the school administration in P.S. #15 was not as diligent in working with teachers to establish student discipline as the school administration had been in his prior District assignment, P.S. #41. Baran also complained that students sometimes arrived to his classroom "out of control" from their prior teacher, as they did on the day when Radulich made his written observation.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, in addition to the stipulated facts, I **FIND** the following pertinent **FACTS**:

While neither Radulich nor Borroto made the decision to withhold Baran's increment for the 2013-2014 School Year, both provided a factual basis for the determination, of which Baran acknowledged he was advised in writing, that his increment was being withhold for attendance and performance reasons.

Baran certainly was aware of his own attendance. However, Borroto, the person in charge of tracking teacher attendance, provided testimony and documentation that, during the year at issue, Baran was absent twenty-three days and late on one occasion. Thus, his yearly attendance exceeded, by seven days, his yearly absentee allotment.[1]

[1] Naturally, teachers are not provided with any allotted day when they may arrive late.

Although Baran had sufficient banked days to be paid for all days he was absent that school year, as noted by Borroto, Baran's absence required the retention of a substitute teacher and negatively impacted the teaching provided to his students for twenty-three days that school year.

As to Baran's performance, in his own testimony, Baran stated that from 2011 to the year at issue, he found his teaching assignment difficult. He complained that he had to teach some thirty different classes of children from kindergarten to third grade, when all of his other teaching experience was with older children. He complained that the teaching support and school discipline that the administration provided was insufficient. While he complained of not being given more written evaluations, he never alleged that his performance improved from December 2013, when he received a detailed performance evaluation noting that he was only partially effective in creating an environment of respect and rapport, partially effective in establishing a culture for learning, partially effective in managing classroom procedures, partially effective in organizing physical space, ineffective in managing student behavior, ineffective in communicating with students, ineffective in using questioning and discussion techniques, ineffective in engaging students in learning, ineffective in using assessment in instruction, and ineffective in demonstrating flexibility and responsiveness. No areas of strength, mastery of content, or areas of growth were noted on the evaluation.

I **FIND** that Baran failed to produce any evidence that he provided meritorious service that entitled him to an increment or that the District's decision to withhold his increment was arbitrary, capricious and unreasonable. In contrast, I **FIND** that the District presented credible and convincing evidence that Baran's attendance and performance were unsatisfactory during the 2013-2014 School Year.

## LEGAL ANALYSIS AND CONCLUSIONS

A salary increment is a reward for meritorious service, not an entitlement. N. Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 593 (1984). Any board of education may with withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year. N.J.S.A.

18A:29-14. A local school board's decision to withhold a salary increment is a matter of management prerogative and is entitled to a presumption of correctionness. Fogerty v. State-Operated Sch. Dist. of the City of Jersey City, 97 N.J.A.R.2d (EDU) 439; Kaska v. Bd. of Educ. of the City of Trenton, 95 N.J.A.R.2d (EDU) 55.

When challenging an increment withholding, the teacher has the burden of proof to show that the board of education acted arbitrarily without rational basis or was induced by improper motives. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). In the absence of clear and convincing proof that a board of education acted unreasonably or in a cursory manner in withholding an increment, the Commissioner will not substitute his judgment for the board of education's judgment. Id. at 296. A board of education must simply be able to demonstrate that the recommendation to withhold is factually supported by observation reports or other reliable evidence. Id. at 296-97.

Thus, by statute, among other things, a board of education can withhold an increment for inefficiency or other good cause. The standard is not a certain number of evaluations. The standard is not a showing of an unsatisfactory evaluation, teacher summative or score or compliance with any provision of Achieve NJ. N.J.A.C. 6A:10-1.1 et seq. (P-1.)

I note that Baran's argument of numerous cases, with no precedential value to this matter, is unpersuasive, as is his argument that the Chief Academic Officer of The District's letter to P.S. #15 Staff Members dated March 5, 2015, can prevent the withholding of increments to non-meritorious performers. (P-1.) The issue in this matter is not whether Baran received a certain number of evaluations to be considered "evaluated" but rather whether Baran's performance was meritorious.

As noted above, Baran failed to sustain his burden in showing that the District's action in withholding his increment was arbitrary, unreasonable and capricious. Further, the District presented sufficient, credible and convincing evidence that Baran's attendance and performance were unsatisfactory during the 2013-2014 School Year. I **CONCLUDE** that Baran is not entitled to restoration of his salary increment.

## ORDER

It is **ORDERED** that Baran's challenge of the withholding of his increment for the 2013-2014 School Year is hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

Evelyn J. Marose

May 20, 2016
DATE

**EVELYN J. MAROSE**, ALJ

Date Received at Agency: May 20, 2016

Date Mailed to Parties: 5/20/16

kep/sej

## APPENDIX

## WITNESSES

For Petitioner:

John Baran

For Respondent:

Frank Borroto

David Radulich

## EXHIBITS

For Petitioner:

P-1 Letter to PS#15 Staff Member, from Jason Bing, Chief Academic Officer, dated March 5, 2015

For Respondent:

R-1 Employee Absence Daily Report

R-2 Letter to Baran from Principal Yorker, dated May 7, 2014, regarding attendance concern

R-3 Short Observation of Baran, December 3, 2013

R-4 Letter to Baran from Principal Yorker, dated May 23, 2013, regarding Failure to Engage Students in Learning and Inappropriate Classroom Management

R-5 Record of Support Activities 2012-13, dated April 12, 2013

R-6 Record of Support Activities 2012-13, dated April 23, 2013

R-7 Record of Support Activities 2012-13, dated September 10, 2013

R-8 Not admitted into evidence

R-9 Not admitted into evidence

R-10 Not admitted into evidence

238-16

| | | |
|---|---|---|
| AAA SCHOOL, LLC, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, | : | |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner AAA School, LLC (AAA) – a company that provides transportation services to public schools – owns six (6) seven-passenger minivans. Petitioner has bid a number of times for business from the respondent, Passaic County Educational Services Commission (Commission), and has filed several appeals before the Commissioner prior to the instant case, which was remanded for a hearing on the merits. Petitioner challenged the award of bids on four school bus routes, claiming that AAA School was the lowest bidder and had the appropriate vehicles to handle the routes in question. A hearing was held on May 11, 2016, on which date the record closed. The Commission presented the testimony of four witnesses; petitioner was present at the hearing, but did not testify, nor did it provide any witnesses.

The ALJ found, *inter alia,* that: most of the facts in this matter are not in dispute; the Commission presented the testimony of four credible witnesses; in June 2014, petitioner submitted a bid specification and challenged the Commission's sixteen-passenger bus routes, even though he did not own sixteen-passenger buses; petitioner requested that those routes be modified to allow the use of a seven-passenger minivan, which he does own; however, the routes in question involved two school districts and the sixteen-passenger yellow bus was not optional; although petitioner was the low bidder, it did not conform to the bid requirements; the sixteen-passenger yellow school bus is the default vehicle for the Commission's bus routes for safety and reliability reasons; the fact that the vehicle is yellow and clearly marked as a school bus enhances its safety over that of an unmarked minivan; the selection of a yellow sixteen-passenger school bus is at the discretion of the district; such a vehicle is considered the safest for transporting students; and petitioner's allegations that the bid requirements are against the law – as it should be up to taxpayers to determine the form of transportation used by the Commission – are without merit. The ALJ determined that the petitioner has not proven by a preponderance of any credible evidence that the action of the Commission in awarding the bids to operators who conformed to the requirement of a sixteen-passenger yellow school bus for the four bus routes was arbitrary, capricious or unreasonable. Accordingly, the ALJ ordered the within petition dismissed with prejudice.

Upon comprehensive review, the Commissioner concurred with the ALJ – for the reasons set forth in the Initial Decision – that the Commission's decision to require the sixteen-passenger yellow school bus for the bus routes in question was not arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

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

Issued 6/30/16

OAL DKT. NO. EDU 9967-15
(EDU 13493-14 ON REMAND)
AGENCY DKT. NO. 222-8/14

| | | |
|---|---|---|
| AAA SCHOOL, LLC, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, the AAA School, LLC.[1] This case is one of a series of petitions filed by the petitioner in which it is alleged that the Passaic County Educational Services Commission (Commission) improperly denied it a contract after it submitted bids for transportation services that require a sixteen-passenger yellow school bus. In this matter, the petitioner claims that he was the lowest bidder and had the appropriate vehicles (seven-passenger minivans) for school bus routes 8029, 8038, 8039 and 8106. After a hearing on the merits,[2] the Administrative Law Judge (ALJ) found that the Commission's decision to require sixteen-passenger yellow school buses for routes 8029, 8038, 8039 and 8106 was not arbitrary capricious or unreasonable.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that the Commission's

[1] The record does not include a transcript from the hearing that was conducted at the OAL on May 11, 2016.

[2] This matter was remanded to the OAL to afford the petitioner the opportunity to have a hearing on the merits based on the disputed factual issues.

decision to require a sixteen-passenger yellow school bus for the bus routes in question was not arbitrary, capricious or unreasonable, and that the petitioner should not be awarded the transportation routes. The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ found that the testimony of the Commission's witnesses was "compelling and credible" and "[t]hey were forthright and detailed in their testimony concerning the safety and choosing of the sixteen-passenger yellow school bus." (Initial Decision at 4) On the other hand, the petitioner did not present any witness testimony at the hearing, but rather simply provided a summation at the end of the hearing. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her, and made findings of fact based upon their testimony. It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record. *N.J.S.A.* 52:14B-10(c).

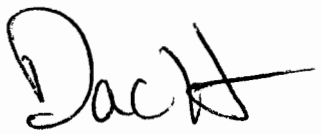
It is undisputed that the petitioner does not own a sixteen-passenger yellow school bus; however, it fervently argues that sixteen-passenger yellow school buses are not necessary for certain routes, and that the Commission cannot require them in the bid specifications. Despite the petitioner's assertions, based on the testimony provided at the hearing, the ALJ found that it is the individual school districts that have the discretion to determine whether a sixteen-passenger yellow school bus is used for their transportation routes, not the Commission.[3] If a school district does not request the type of vehicle to be used on the Student Transportation Information Sheet, the Commission automatically provides a sixteen-passenger yellow school bus. Ultimately it is the decision of the school district to accept the type of vehicle before contracting and paying for the transportation service. The record in this matter is devoid of any

[3] The Commission provides coordinated transportation services to various school districts.

evidence to the contrary or any evidence to suggest that the Commission's decision to reject the petitioner's bid was arbitrary, capricious or unreasonable. The Commissioner also finds the exceptions submitted by the petitioner to be unpersuasive. The petitioner's exceptions largely replicate the arguments advanced at the OAL that were fully considered and appropriately addressed by the ALJ in the Initial Decision.

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

IT IS SO ORDERED.[4]



COMMISSIONER OF EDUCATION

Date of Decision: 6/30/16

Date of Mailing: 6/30/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 09967-15
AGENCY DKT. NO. 222-8/14

**(ON REMAND EDU 10510-14)**

**AAA SCHOOL LLC / EL ELDESOUKY,**
Petitioner,
v.
**PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,**
Respondent.

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**El Eldesouky**, petitioner, pro se (AAA School, LLC)

**Deryls Gutierrez, Esq.**, for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: May 11, 2016 Decided: May 23, 2016

BEFORE **JOANN LASALA CANDIDO,** ALAJ:

Petitioner, the owner of AAA School, LLC, a bus company, initially brought this action on June 26, 2014 seeking emergency relief in challenging the decision of respondent, Passaic County Educational Services (PCES), an educational services commission that provides coordinated transportation services to school districts, in

refusing to accept his bid, which was the lowest, on four sixteen passenger school bus routes. The Commissioner of Education transmitted the matter to the Office of Administrative Law on June 27, 2014 for hearing. On July 7, 2014, oral argument was presented before the undersigned. The emergent relief sought was denied.

This remand addresses the merits of petitioner's petition. Petitioner challenges school bus Routes 8029, 8038, 8039 and 8106, claiming he was the lowest bidder and had the appropriate vehicles. The matter was heard on May 11, 2016, on which date the record closed.

Most of the facts surrounding this matter are not in dispute. PCES presented testimony from four credible witnesses. PCES Transportation Supervisor Janette Silva testified that petitioner came to her office during or about May 2013 requesting bid specifications for a summer bid. As part of her duties, she coordinates routes for township school districts in Passaic County and described how districts apply should they want PCES to bid for them. PCES sends a Coordinated Student Transportation Information Sheet to each district to be completed for each student in need of transportation. R-1 This application form requires the name of the student, telephone number, classification, request for equipment, the need for an aide or any other special conditions and the type of vehicle needed. If there is no vehicle type requested, PCES provides a sixteen passenger yellow school bus. If there is a "straggler", that is, a student during the school year that now needs transportation, Silva sends out a notice for bidding for that student if an additional route is needed.

The form prior to the 2014-2015 school year did not have a section specifying that a sixteen passenger school bus would be provided if the type of vehicle were not specified. Silva provided these revised forms to the districts in February 2014 by via email. However, a few of the districts continued to use the old form for the 2014-2015 transportation requests. Because of the complaints filed by petitioner against PCES, they changed their forms to reflect that a sixteen-passenger school bus would be provided if no type of vehicle were chosen. Most of the school districts opt for the yellow school bus because it is safer and is the standard vehicle used. The district makes the decision on the type of vehicle sought. If a minivan is requested, a bid is

required, same as the sixteen-passenger bus. Petitioner's bid was accepted for the minivan.

On June 11, 2014, petitioner submitted a bid specification and challenged PCES' sixteen passenger bus routes even though he did not own sixteen passenger buses, requesting that these routes be modified to allow for a seven-passenger minivan. Although he was the lowest bidder on the four school routes challenged here, those routes required a sixteen passenger yellow school bus since a jointure route was involved with two school districts and the safety of the children required that the yellow school bus be chosen. Silva allowed petitioner a few weeks to obtain a sixteen passenger yellow school bus so that he could bid on these routes, but he was unable to do so.

Oneida Phillip, transportation assistant with PCES, confirmed that the yellow sixteen passenger school bus is safer for children because it is large, more visible and loud. She also noted and that it is the ultimate decision of the district to accept this vehicle before contracting and paying for it. She also confirmed that some districts continued to use the incorrect form for the 2014-2015 and further stated that if a type of vehicle is not specified, the sixteen passenger yellow school bus will be chosen for bid. That initial decision is at the discretion of PCES.

Kathleen MacDonald, transportation supervisor for the Clifton Board of Education testified that district procedure requires the case manager to complete the transportation form and forward it to her so that she can forward it to PCES. She always requests the sixteen passenger yellow school bus because of its safety. MacDonald will request the yellow school bus even if it is for only one child. As vice president of the transportation supervisors of the State of New Jersey, she is aware of the steel construction of these vehicles and the installed warning signals, making these vehicles safe for students.

Lastly, Aida Esquilin, Passaic Board of Education transportation manager, testified, confirming that the sixteen passenger yellow school bus is the most reliable and safest.

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). Based upon these principles, I **FIND** that the testimony of all PCES witnesses was compelling and credible. They were forthright and detailed in their testimony concerning the safety and choosing of the sixteen passenger yellow school bus. Petitioner did not testify nor did it provide any witnesses, only providing a summation at the end of the hearing.

Based upon the credible testimony of the witnesses presented by PCES at the hearing, I **FIND** that when choosing the sixteen passenger yellow school bus, it is at the discretion of the district, since it is, in its opinion, the safest for transporting students. It is clearly marked and identifiable as a school bus, among other reasons offered by witnesses who testified.

Petitioner has filed three emergent applications addressing the same issue and has been denied relief on all three. The Commissioner issued a final decision in this matter on July 10, 2014 affirming the denial of emergent relief, reasoning that petitioner cannot be successful on the merits. The Commissioner also affirmed the Initial Decision (OAL DKT. NO. EDU 08740-15) of Judge Michael Antoniewicz in granting summary decision, concluding that petitioner did not fit the requirements of the bidding specifications, and therefore was not entitled to the bid.

The testimony presented on the merits before me on May 11, 2016 does not change the facts. They remain the same. It is undisputed that petitioner did not own a sixteen-passenger yellow school bus during the bidding on the four routes in question. This was the type of school bus approved by the districts. Petitioner only owned a minivan. Petitioner alleges that the bid requirements are against the law, arguing that it should be up to the taxpayers to determine which form of transportation should be provided by PCES. Petitioner further claims that the requirement of a sixteen-passenger yellow bus is "illogical."

The practice of competitive bidding is "rooted deeply in sound principles of public policy." Hillside Twp v. Sternin, 25 N.J. 317, 322 (1957). The purpose of public bidding requirements is to secure for the public the benefits of unfettered competition, and to guard against favoritism, improvidence, extravagance and corruption. National Waste Recycling, Inc. v. Middlesex County Imp. Authority, 150 N.J. 209, 219 (1997). Public bidding statutes exist for the benefit of taxpayers, not bidders, and are to be construed with sole reference to the public good. Id at 220. The major objective of all public bidding statutes has been to promote honesty and integrity of those bidding and of the system itself. Keyes Martin & Co. v. Director, Div. of Purchase., 99 N.J. 244, 256 (1985). The bid specifications to which petitioner cite N.J.A.C. 6A:27-9.3(a) reads:

> Specifications drawn for purposes of competitive bidding shall be drafted in a manner designed to encourage free, open, and competitive bidding. Specifications shall not knowingly discriminate; exclude prospective bidders by reason of the impossibility of performance, or bidding by any one bidder. All bidding practice shall be designed to prevent fraud, favoritism, and extravagance, to safeguard the taxpayers, and protect the lowest responsible bidders. The bid specifications shall be definite, precise, impose common standards, and protect against discrimination in accordance with N.J.S.A. 10:5-31 et seq. When bid specifications are formed to deter rather than invite genuine competition, an award to the favored bidder shall be set aside.

Petitioner has not presented any proof of discrimination against it when it failed to secure four bids as the lowest bidder since it did not own sixteen passenger buses. PCES even gave petitioner additional time to secure a sixteen passenger yellow school bus so that it could bid for the four routes in question. It is evident from the compelling testimony of the witnesses that the sixteen passenger yellow school bus is the safest form of transportation, and in the discretion of the district is the school bus of choice. It is also evident that PCES is not the ultimate decider of the bus sought. It is the district which decides whether or not to accept a bid, irrespective of the wording on the forms provided by PSEC.

Based on the foregoing, I **CONCLUDE** that petitioner has not proven by a preponderance of any credible evidence that the action of PCES was arbitrary,

capricious or unreasonable when it was ultimately determined and agreed to by the district that only sixteen passenger yellow school buses, being the safest for the children, which petitioner did not own, be used for Routes 8029, 8038, 8039 and 8106.

## ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition filed by petitioner be and is hereby **DISMISSED WITH PREJUDICE.**

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

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

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

May 19, 2016
DATE

**JOANN LASALA CANDIDO**, ALJ

Date Received at Agency:

Date Mailed to Parties: MAY 24 2016

Ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## LIST OF WITNESSES

For petitioner:

None

For Respondent:

Janette Silva

Oneida Phillip

Kathleen MacDonald

Aida Esquilin

## LIST OF EXHIBITS

For petitioner:

DR1 and DR1-1 – Coordinated Student Transportation Information Sheet 2014-2015 School Year

DR1-a-bb and c - Coordinated Student Transportation Information Sheet 2014-2015 School Year

DR1A, B and C - Route Description

DR1-1 d,e,f and g - Coordinated Student Transportation Information Sheet 2014-2015 School Year and route descriptions

DR1-1M - Coordinated Student Transportation Information Sheet 2014-2015 School Year

DR4- hand written note

DR52 – page from Judge Candido initial decision

DR52-1 page from Judge Moscowitz initial decision

DR60 – Commissioner of Education Decision

DR61- 64 excerpts from a respondent moving papers

DR-100 - Commissioner of Education Decision

For Respondent:

R-1 Coordinated Student Transportation Information Sheet 2014-2015 School Year

R-2 Route description Chapel Hill Academy and Coordinated Student Transportation Information Sheet 2014-2015 School Year

R-3 Route Description Henry Milnes and Coordinated Student Transportation Information Sheet 2014-2015 School Year

R-4 Route description Highland School and Coordinated Student Transportation Information Sheet 2014-2015 School Year

R-5 Route description Windsor Academy and Coordinated Student Transportation Information Sheets 2014-2015 School Year

R-6 Route description Calais School and Coordinated Student Transportation Information Sheets 2014-2015 School Year

OAL DKT. NO. EDU 14813-15
AGENCY DKT. NO. 294-9/15

| | | |
|---|---|---|
| A.S., on behalf of minor child, M.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL, DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/30/16

Date of Mailing: 6/30/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 14813-15
AGENCY DKT. NO. 294-9/1

**A.S. ON BEHALF OF**
**MINOR CHILD, M.S.,**
Petitioner,
v.
**BOARD OF EDUCATION OF**
**THE SOMERVILLE HILL**
**REGIONAL SCHOOL DISTRICT,**
**SOMERSET COUNTY,**
Respondent.

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**A.S.,** petitioner, pro se

**Cheri Adams,** Esq. for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: May 16, 2016 Decided: May 24, 2016

BEFORE **ROBERT BINGHAM II**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 23, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Confidential Settlement Agreement and General Release (J-1), along with a copy of the Board Minutes (J-2) approving this settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the Confidential Settlement Agreement and General Release.

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

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

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

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

May 24, 2016
DATE

**ROBERT BINGHAM II, ALJ**

Date Received at Agency: 5/24/16

Date Mailed to Parties: 5/25/16

/lam

**The Somerset Hills School District**
**PUBLIC INPUT & ACTION MEETING MINUTES - May 11, 2016**

**FINANCE**
Mr. Baker moved Finance items #1-8, seconded by Mrs. Leiss. Finance resolutions were approved by a roll call vote of 9-0.

Action 8. Approve Settlement Agreement*
Resolution Resolved, that the Somerset Hills Board of Education approve the settlement agreement for the following student:

| | |
|---|---|
| **Student ID** | 2021322 |

Certified True & Correct

Nancy Lee Hunter
Board Secretary

245-16

*In the Matter of Arbitration Between*

**Lesley Etheridge**
**and**
**Passaic County Vocational School District**
**Passaic County**

Agency Docket No. 120-6/15

# Opinion and Award

**Tia Schneider Denenberg**, *Arbitrator*

## APPEARANCES

FOR THE DISTRICT:

Albert C. Buglione, Buglione, Hutton & Deyoe, L.L.C

FOR THE TEACHER:

Lesley Etheridge, *Pro se*

## BACKGROUND

This dispute initially concerned 22 charges, dated April 23, 2015, involving inefficiency and unbecoming conduct.[1] They were brought against tenured teacher Lesley Etheridge[2] under Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. The charges, as scanned by the district, are appended [Exhibit 1]. Charge 1 alleges inefficiency for the 2013-2014 and 2014-2015 school years. The remaining 22 charges are allegations of conduct unbecoming a teacher during the same period.[3] The respondent has denied all charges.

[1] For ease of reference the arbitrator has cited the date on which each document was created, rather than the date on the DOE stamp. In this matter there is no allegation of failure to comply with time limits.

[2] The teacher was hired as an electronics instructor on September 1, 1996. Holding a standard certificate in that subject, she taught Electronics 1 and Electronics 3 [Petitioner Exhibit 1]. In the documentation, her name is given in several different forms.

[3] No. 22, the penultimate charge, was intentionally dropped by the district.

The pre-hearing phase of the proceeding was prolonged by the teacher's struggle to find and retain satisfactory counsel.[4] She was given ample opportunity to do so, inasmuch as the arbitrator believed that she should be represented by a qualified advocate, if at all possible. As a result, a case that was referred to the arbitrator in June, 2015, could not begin to be heard until late November of that year. Apart from a brief period, the teacher was unrepresented. She was cautioned that, while representing herself, she must comply with statutory requirements, including deadlines.[5]

When the arbitrator received this dispute from the Commissioner, in a letter dated June 26, 2015, she discovered that some of the accompanying documents needed to be reproduced in color for the sake of legibility. The arbitrator also noted that three exhibits listed in the initial submission were missing: Corrective Action Plan Self-Evaluation Progress Report [Exhibit 1.17], Corrective Action Plan Interim Report [Exhibit 1.18], and Pre-Observation Conference Record [Exhibit 1.19], which was divided into:

a) 2014-2015 Formal Classroom Observation Forms.
b) 2014-2015 Corrective Action Plan Reports.
c) 2014-2015 Corrective Action Plan Self-Evaluation Progress Report.
d) 2014-2015 Corrective Action Plan: Interim Report.

The arbitrator denied a motion by the teacher for dismissal of the charges, owing to the omissions. The district promptly rectified the deficiencies in the submissions.

In July, the arbitrator proposed the dates of August 3 and August 4, 2015, for a hearing. The district was prepared to go forward, but the teacher objected. She maintained that she needed more time to obtain counsel. A conference call was conducted on July 17, 2015, and transcribed for the official record.[6] During the call, the teacher moved for an "adjournment so that I may have an attorney present with me at this hearing so that I may

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[4] The arbitrator has not attempted to give an exhaustive account of the many motions that she ruled upon during the pre-hearing phase. The rulings were generally transmitted to the parties by email for the sake of efficiency.

[5] The teacher was also advised that she could be accompanied and supported by someone who was not legally qualified [Tr. , 20]. Her husband, who is a fellow electronics teacher, attended portions of the hearings.

[6] Participating in the call were the teacher, the arbitrator, Mr. Buglione, and Mr. Parent, the district principal. At the arbitrator's request, Howard A. Rappaport, Certified Court Reporter, was at Mr. Buglione's office, transcribing the call for the official record. The teacher emailed the following message on July 16: "I will record every conference call and every contact I have with you and the board attorneys." The parties were informed that any material provided to the arbitrator should be sent to the opposing party as well and that phone calls, other than conference calls, were to be avoided.

have an opportunity for a fair and meaningful hearing as required under the law" [Tr., pp. 3-4].

At the time of the phone call, all statutory deadlines had been met, in the arbitrator's view, although the district questioned the sufficiency of the teacher's response: "the respondent hasn't filed the required list of witnesses and summaries of testimony according to New Jersey Statute Annotated 18:A6-17.1 subpart B, subpart 3" [Tr., p. 26]. The parties agreed that a thorough response[7] would arrive by July 31 and include a witness list and summary of testimony [Tr., p. 38]. These documents were also needed as an accommodation to the district counsel, who suffers from a speech-related disability. To avoid stuttering, he normally studies the advance summary of testimony carefully and writes out the questions he wishes to ask the witnesses [Tr., pp. 48-49].

The teacher, too, asked for a disability accommodation. She believed that her asthma would be aggravated by recent construction in the district [Tr., p. 54]. The district counsel pointed out that construction had ended, and new air-conditioning had been installed. In addition, he said, food could be brought into the hearings, which would ensure both comfort and efficiency [Tr., pp. 55-56]. The parties ultimately agreed to hold the hearing at the district counsel's law office in Wayne, New Jersey [Tr., p. 61].

The arbitrator summarized the hearing arrangements in an email to the parties, dated July, 22, 2015:

> Thank you for your participation in the conference call on Friday. As promised, attached is a notice of hearing, as well as hearing guidelines and a digital style sheet that you may find useful. Below is my brief summary of the arrangements we made for hearings on September 21, 22 and 23.
>
> We will begin each day at 10:00 AM. The parties should be prepared to stay into the evening, if necessary to finish in three days. We thank Mr. Buglione for agreeing to host the hearings as an accommodation to Ms. Etheridge.
>
> Ms. Etheridge is encouraged to familiarize herself with the statutory requirements. Our discussion on Friday was not intended as legal advice but as a reminder that each party is responsible for ensuring its compliance with the statutory framework and deadlines for pre-hearing exchange of information. Attention must be paid to:
>
> > P.L.2012, CHAPTER 26 11
> > (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be

[7] The arbitrator reminded the district that a respondent has no obligation to produce witnesses or other evidence; the district bears the burden of proving its case without her help.

> precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.
>
> Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

We have agreed that Ms. Etheridge will be submitting on or before July 31, 2015, her list of witnesses and summaries of their testimony, as well as the evidence she intends to introduce at the hearing. Ms. Etheridge hopefully will secure counsel in time for the hearing, but I intend to proceed even if she is unable to do so.

My preference is to receive all material in digital format as well as hard copy (see attached digital style sheet). A format that is readable in Word or PDF, allowing excerpting, will be the most convenient. Filing by email will suffice to meet a deadline, so it is not necessary to send material to me by overnight delivery with signature required.

The next day the teacher moved to postpone the hearing for health reasons. The arbitrator denied the motion and on August 18 emailed the following ruling to the parties:

I have reviewed the materials the parties have submitted. To the extent that either party has reargued an issue which was previously decided, please note that you have a standing objection to the ruling. It need not be reiterated. All other issues raised in the submissions have been taken under advisement until the hearing.

The parties should focus on the issues at hand. Ad hominem comments or asides are out of place in an arbitration. After the hearings are complete and the transcript is available, the parties will be afforded an opportunity to submit final arguments.

The district was ready to begin the hearing on August 3 and 4. Over the district's objection, the arbitrator consented to reschedule hearings on September 21, 22 and 23 in order to allow the respondent additional time to secure counsel and to prepare her case. The hearing will go forward as scheduled. The district is asked to provide the court reporter with a list of acronyms, names, titles, buildings, or programs that are likely to be mentioned during the hearing.

Consistent with the statute, the district is permitted to extend the respondent's time off the payroll for an additional 49 days.

Outside the hearings, communication with the arbitrator should occur only via email. If a message is more than one page, also send a hard copy and attachments through the postal service. I do not expect to receive any submissions until we meet. I will be out of town for an extended period and will be unreachable.

I look forward to spending productive time in September.

The hearings scheduled for September were postponed, however, at the request of the respondent when she secured the services of Nancy I. Oxfeld as her counsel. After a brief conference call between the attorneys and the arbitrator on September 11, the hearings were rescheduled for November 30, December 1, and December 2, 2015.

Since the teacher was responsible for delay of the proceeding, the arbitrator allowed the district to extend her time off the payroll. The teacher understood, according to Ms. Oxfeld, that her pay would continue to be tolled.

On November 12, Ms. Oxfeld made a motion to be relieved as counsel, because of incompatibility with the client. The respondent opposed the motion. Since the hearings were due to start in two weeks, the motion was denied on November 17. The hearings already had been delayed for 119 days by the representation issue; the district had been ready to proceed on the hearing dates scheduled in August and September, 2015.

At the outset of the hearing (November 30, 2015), Ms. Oxfeld described on the record her discomfort in representing the respondent. She asserted that her client had directed her to act in a manner which was inappropriate and inconsistent with ethical and professional standards. Before the district called its first witness, the teacher dismissed Attorney Oxfeld:

> I'd like to say Ms. Oxfeld, I'm allowing you to recuse yourself because this hasn't been going in my favor at all. So, you can leave. It was nice knowing you. I can handle it from this point on. Because you said a few things that are untrue [Tr., p. 111].

The parties were afforded a full and fair opportunity to present evidence and argument on the November and December hearing days, which spanned a total of approximately 25 hours. The arbitrator confirmed that the transcript ordered by the district was the official record and that the teacher would receive a copy without charge. The arbitrator granted the district's motion to preclude the teacher's recording the proceedings herself.

The following administrators of Passaic County Technical Institute testified under oath or affirmation for the district:

Michael Parent, Principal

Lydia Yikon'a, Curriculum Instruction Supervisor

Joseph Sabbath, Assistant Principal

Robert Gray, Assistant Principal

Briefs were filed by both parties, who agreed to admit without comment the respondent's previous grievances and formal complaints, along with the replies [Tr., p. 750]. The arbitrator also requested that the exhibits be reorganized for better access, adding attachments to district documents, already in evidence [Tr., p. 520]. The reorganization was accomplished by the court reporting service. The commissioner granted an extension until June 27, 2016 to issue the decision.

## DISCUSSION

The tenure charges filed against the respondent alleged inefficiency, inappropriate grading practices, inappropriate conduct, and insubordination. In support of the charges, the district presented the testimony of its four witnesses and entered numerous exhibits into the record. The respondent cross-examined the district's witnesses and advanced arguments but produced no witnesses or documentary evidence.[8] She also declined to testify on her own behalf. The following dialog between the respondent and the arbitrator occurred during the hearing:

THE RESPONDENT: I'm a Christian, and as a Christian I do not believe in oaths to anyone.

THE ARBITRATOR: It's an oath or affirmation.

THE RESPONDENT: I don't believe in it.

THE ARBITRATOR: An affirmation?

THE RESPONDENT: None of those.

THE ARBITRATOR: Do you promise to tell the truth?

THE RESPONDENT: I only make promises to my Father in heaven, not to human beings.

THE ARBITRATOR: So, when you testify --

THE RESPONDENT: I don't testify. I already told you all this. I never testify.

THE ARBITRATOR: So you're not going to give evidence in this hearing?

THE RESPONDENT: I'm only going to question these people, but I'm not going to testify to anything.

[Tr. 98-99]

[8] The teacher was cautioned that her questions were not evidence *per se,* and her attempt to submit new evidence after the hearing, to which district objected, was not permitted.

**Charge 1–Inefficiency**

The burden in this proceeding is on the district to demonstrate by a preponderance of the record evidence that the tenure charges should be sustained. Under TEACHNJ, if a tenured teacher is rated "ineffective" or "partially ineffective" in two consecutive summative annual evaluations, the teacher becomes subject to loss of tenure.

The arbitrator's authority to review tenure charges is limited. If a district brings charges against a teacher, the arbitrator may not consider the merits of the decision but must instead determine, based on the evidence, whether:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan (CAP);
(2) there is a mistake of fact in the evaluation;
(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law;
(4) the district's actions were arbitrary and capricious.

[NJSA 18:A-6-17.2]

The district used a state-approved system—the Stronge Evaluation Model—to evaluate teachers' performance. The model consists of seven performance standards: (1) professional knowledge; (2) instructional planning; (3) instructional delivery; (4) assessment of and for student learning; (5) learning environment; (6) professionalism; and (7) student academic progress. Each performance standard includes a number of indicators that help calculate a teacher's effectiveness on his or her annual summative evaluation. Administrators examine several data sources—classroom observations, a documentation log, and Student Growth Objectives (SGOs), a tool for measuring learning—in developing an annual summative rating for a teacher. In each year the respondent received classroom observations, three in 2013-2014 and four in 2014-2015, including one that was announced in advance. In some instances, there were co-observers [Tr., pp. 126, 233, Exhibits 1.1.F and 1.22].

**School Year 2013-2014**

The respondent was trained on the components of the Stronge Evaluation Model at the beginning of the 2013-2014 school year. Formal observations of the respondent were conducted by Ms. Yikon'a on October 30, 2013 [Exhibit 1.1A] and February 6, 2014 [Exhibit 1.1B] and by Administrator Nicola Bucci on March 25, 2014 [Exhibit 1.1C]. Both Ms. Yikon'a and Administrator Bucci were certified annually to complete summative evaluations of the district's teachers.

For the 2013-14 school year, the respondent received the following performance ratings for each standard in her summative report:

(1) Standard One - Professional knowledge - effective;
(2) Standard Two - Instructional planning - partially effective;
(3) Standard Three - Instructional delivery - effective;
(4) Standard Four - Assessment of and for student learning - effective;
(5) Standard Five - Learning environment - partially effective
(6) Standard Six - Professionalism - ineffective; and
(7) Standard Seven - Student Academic Progress - highly effective.

[Exhibit 1.1.F]

Applying the weighting protocol to the performance standards, the district reached an annual summative rating for the teacher of "partially effective" for the 2013-14 school year [Exhibit 1.1.F]. The annual rating listed the following areas as needing improvement:

> Improve on collegial interactions with peers outside the department and also with administration.
>
> Cease unnecessary combativeness.
>
> Be receptive to constructive criticism.
>
> Be less combative in communicating with others.
>
> Be self-reflective in order to be aware of behaviors that are construed as conduct unbecoming a teacher.

[Exhibit 1.1.F]

**School Year 2014-2015**

On June 6, 2014, the respondent was notified that she would be placed on a CAP for the 2014-2015 school year and expected to correct deficiencies in three performance standards:

(1) Standard Two - Instructional planning;
(2) Standard Five - Learning environment;
(3) Standard Six - Professionalism.

She was instructed to attend workshops on enhancing communication skills and improving other capabilities.

Following an observation of the respondent on October 21, 2014, her supervisor, Ms. Yikon'a, told her that, in keeping with the CAP, she was expected to meet all timelines, adopt improvement measures, and adhere to recommendations [Exhibit 1.19.A]. During

the rest of the year, the teacher received numerous messages and reports about her performance from administrators, including classroom observers:

- On October 28, 2014, the respondent, along with other teachers at PCTI, was notified that SGO drafts must be delivered to supervisors by November 7 [Exhibit 1.11]. The respondent missed that deadline.

- On November 12, 2014, Ms. Yikon'a informed her that a self-evaluation report for the CAP must be submitted by November 21.

- On November 14, the respondent was directed to complete her SGO draft in one week [Exhibits 1.6]. Ten days later (November 24), the supervisor memorialized the lack of a draft.

- On December 16, 2014, a pair of assistant principals observed the respondent's Electronics 3 class and made recommendations for improvement in their report. [Exhibit 1.19B]. The observers found that the teacher "jumped from topic to topic in rapid succession" and "provided little opportunity for students to actively participate in discussions." An oral quiz "resulted in answers being shouted out from around the room." The recommendations included an instruction to develop activities "conducted in a logical sequential order" and assignments "directly related to the objective of the day." The respondent did not file a rebuttal to the report or acknowledge the recommendations.

- On December 17, 2014, Dr. Parent informed the teacher that, despite five reminders, she had not submitted the SGO draft and the CAP Self Evaluation Report:

> Your inactions are inappropriate, defiant and insubordinate, demonstrate a blatant disregard of and open defiance of administrative directives, and are nothing more than your attempt to deflect from the real issue that you refuse to conform to TEACHNJ.
> [Exhibit 1.11]

- On January 12, 2015, Dr. Parent reminded the teacher that several reprimands had been issued since September, 2014, for missing important deadlines and failing to complete required tasks [Exhibit 1.13]. In order to assist the respondent, he wrote, a member of the School Improvement Panel would meet with her weekly. No meeting with a panelist took place, according to the district.

- On January 21, 2015, Ms. Yikon'a wrote to the teacher about her need to improve classroom management:

> During my walk-through on January 20, 2015, three students were working on unrelated activity you gave the class (Geo physical science). I spoke to them about following your directives and being engaged on the assigned task. Two of the students went back to what I assume were their seats but one student stayed on and continued to work on an assignment from another class.
>
> [Exhibit 1.14]

The respondent did not acknowledge receiving the memorandum.

- On January 26, Ms. Yikon'a transmitted the CAP Interim Report, which the respondent also did not acknowledge [Exhibit 1.18]. In the report Ms. Yikon'a noted that the teacher still had not submitted the SGO draft or the CAP Self Evaluation Report and had not "followed up with any of the recommendations outlined" in the CAP. The supervisor also criticized her for misusing lesson plans, failing to submit grades, recording "grades unrelated to the electronics program in Electronics 1 prompting the administration to revoke online grade book privilege on December 2, 2014," refusing "to adhere to school policy," ignoring the curriculum, lacking professional ethics, hindering "all aspects of student learning," leaving "instructional tools all over the classroom," and coaxing students "to write petitions against the administration based on false information."

- On February 19, 2015, Dr. Parent and Assistant Principal Paterson observed the respondent's Electronics 1 class [Exhibit 1.19D]. In their report, they criticized the teacher for "pontificating" on extraneous matters, for keeping an untidy classroom, and for permitting the walls to be "[de]void of student work" and "decorated with inspirational posters." The observers noted that only ten of the 22 students were taking notes. They also mentioned a need to "modify her erratic behavior and improve her combative interaction towards her colleagues and school community." The respondent did not acknowledge the observation report.

- On March 17, 2015, the respondent's supervisor and Dr. Parent observed her Electronics 3 class [Exhibit 1.19E]. They faulted the teacher for not giving students an "opportunity to use higher level thinking skills" and for a "lack of understanding of the intellectual, social, and emotional development of this age group." They also criticized her for not submitting lesson plans for the week and asserted that "suggestions for using effective [teaching] strategies are met not only with resistance, but extreme hostility." Again, the respondent never acknowledged the observation report.

- On April 21, 2015, the respondent's supervisor submitted a final CAP report [Exhibit 1.20]. The report stated, in part:

Throughout the 2014-2015 school year, Mrs. Etheridge was the perpetrator of abuse of the district's grading system, inappropriate conduct, desertion of professional responsibilities, and insubordination for neglect of duty.

Mrs. Etheridge has not completed the following:

- SGO drafts (due October 2014)
- Corrective Action Plan Self Evaluation Progress Report
- Furthermore, Mrs. Etheridge has been issued reprimands for the following:
- Misuse and abuse of the grading system
- Failure to complete your SGO draft
- Failure to complete your Corrective Action Plan Self Evaluation
- Showing inappropriate and unapproved films
- Poor Lesson Planning
- Abandonment of Duty
- Discourteous correspondence
- Mrs. Etheridge has not followed up with any of the recommendations outlined in the Corrective Action Plan:
- Attend workshops that would modify her erratic behavior and improve her combative interaction towards her colleagues and school community.

Mrs. Etheridge needs improvement in the following areas based on the evidence and the recommendations outlined by observers:

1. Professional Knowledge
2. Instructional Planning
3. Instructional Delivery
4. Assessment of and for Learning
5. Learning Environment
6. Professionalism
7. Student Academic Progress

**Final recommendation based on outcome of Corrective Action Plan:**

The deficiencies were not corrected: The teacher is recommended for non-renewal/dismissal. [Exhibit 1.20.]

- On May 8, 2015, the district sent the respondent her Teacher Summative Report for the year [Exhibit 1.22], which is dated April 22, 2015. Applying the Stronge Evaluation Model, the district rated the respondent as "ineffective" for the 2014-2015 school year in all seven standards, each of which comprised four to nine performance indicators. Her annual summative rating therefore became"ineffective." The following comments in the report indicate the significance of the rating for each standard:

Standard 1—The teacher bases instruction on material that is inaccurate or out-of-date and/or inadequately addresses the developmental needs of students.

Standard 2—The teacher does not plan, or plans without adequately using the school's curriculum, effective strategies, resources, and data.

Standard 3—The teacher's instruction inadequately addresses students' learning needs.

Standard 4—The teacher uses an inadequate variety of assessment sources, assesses infrequently, does not use baseline or feedback data to make instructional decisions and/or does not report on student academic progress in a timely manner.

Standard 5—The teacher inadequately addresses student behavior, displays a harmful attitude with students, and/or ignores safety standards.

Standard 6—The teacher demonstrates inflexibility, a reluctance and/or disregard toward school policy, and rarely takes advantage of professional growth opportunities.

Standard 7—The work of the teacher does not achieve acceptable student academic progress.

**Charges 2 to 23—Conduct Unbecoming a Teacher**

Charge 23 addresses "conduct unbecoming a teaching staff member and other just cause." This charge repeats and incorporates all of the allegations contained earlier in the complaint and alleges that "all of these foregoing charges considered as a whole demonstrate a pattern of inappropriate and insubordinate behavior that is wholly improper in a public school setting and constitute(s) conduct unbecoming a teaching staff member and/or other just cause for termination."

Specifically, Charge 2 alleges that the respondent falsified grades and engaged in inappropriate grading practices. Charges 3 through 7 allege that the respondent engaged in inappropriate staff conduct by: coercing students (Charge 3); engaging in unprofessional conduct during an affirmative action meeting (Charge 4); engaging in unprofessional conduct during a parent-teacher meeting (Charge 5); showing an unauthorized film (Charge 6); and by engaging in unprofessional conduct during a parent-teacher meeting (Charge 7).

Charges 8 through 21 allege that certain of the respondent's actions constituted desertion of professional responsibility. Specifically, the district asserts that the respondent failed to report to her Period 1 co-teaching assignment on October 22, 2014 (Charge 8); the respondent left her Period 2 students unattended on December 8, 2014,without providing

notice to her immediate supervisor or an administrator (Charge 9); the respondent's immediate supervisor issued a memorandum on February 4, 2015, indicating that the respondent had left campus without permission or following proper notification and sign-out procedures (Charge 10); the respondent failed to report to her Period 1 co-teaching assignment on February 18 (Charge 11) and on February 19, 2015 (Charge 12); the respondent failed to report to her Period 1 co-teaching assignment in a timely manner on March 9 and March 10, 2015 (Charges 13 and 14); the respondent failed to remain in her Period 6B-7A co-teaching assignment on March 17, 2015 (Charge 15); the respondent failed to report to her Period 1 co-teaching assignment on March 19, 2015 (Charge 16); the respondent failed to report to her hall duty, as required, on November 21 and November 24, 2014 (Charges 17 and 18) and on January 13, 2015 (Charge 19).

Charge 20 alleges that on December 8, 2014, the respondent was issued a formal reprimand by her immediate supervisor for failure to complete and submit lesson plans, and that on December 17, 2014, she was issued a memorandum by the principal accusing her of insubordination for failure to adhere to the required lesson plan format and mandates outlined by her immediate supervisor. This charge also alleges that on January 21, 2015, the respondent was issued a memorandum by her immediate supervisor reminding her to complete and submit appropriate lesson plans, and that the respondent refused to read or sign the memorandum.

Charge 21 alleges that, contrary to established district policy, the respondent had composed and sent 14 emails to the administration from September 2 through October 30, 2014, during scheduled instructional time. This charge also alleges that on October 30, 2014, Dr. Parent sent an email to the respondent regarding the time-stamps of her emails to administration; that on November 5, 2014, he issued her a memorandum regarding the tone of her emails that she sent to the administration; and that on January 8, 2015, he issued her a memorandum regarding the tone and demeanor of emails that she had sent to the administration.

In sum, the record contains substantial evidence supporting the charges relating to unbecoming conduct. Some of the events figured in the discussion of Charge 1 and were taken into account in her effectiveness evaluation. Viewed in their entirety, the allegations demonstrate a consistent pattern of insubordinate conduct and behavior inappropriate for a tenured teacher. Therefore, the charges are upheld.

## Conclusion

The respondent was notably uncooperative with the district's effort to improve her teaching during the 2014-2015 school year, as evidenced by her disregard of the CAP and SGO requirements. Detailed critiques by classroom observers went unanswered. The respondent's failure to comply with explicit instructions and recommendations from the school administration, and, in some instances, even to acknowledge them, reflects an inability and/or unwillingness to perform as befits a tenured teacher.

In addition, the respondent has failed to establish any of the four limited bases set forth in TEACHNJ under which an arbitrator may reject a district's tenure determination. Specifically, the respondent has not shown that her annual summative evaluation for the two pertinent years failed to adhere substantially to the evaluation process. Although both in her cross-examination of witnesses and in her post-hearing brief the respondent challenged the timing and manner in which the CAP was developed, her contentions do not demonstrate any statutory violation by the district in this regard.

Further, the respondent has not shown that a mistake of fact tainted the evaluation or that the tenure charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law. Finally, contrary to the respondent's contentions, she has not shown that the district's actions were arbitrary and capricious. The record indicates that the district complied with applicable procedural requirements designed by statute to provide teachers with due process in the evaluation process. The district carefully documented her pedagogical failings, used a wide variety of qualified evaluators, and accorded her opportunities to correct the deficiencies. But she did not take advantage of them, often refusing even to respond to observation reports, evaluations or suggestions for improvement.

The teacher contended in her post-hearing brief that she was a victim of unfair treatment, claiming that the district's "actions are discriminatory and malicious," having little to do with her teaching ability. The "motive is to inflict both financial hardship and to ruin Mrs. Etheridge's professional reputation," according to the teacher. But she adduced no compelling evidence to substantiate her accusation or explain her lack of cooperation with the reasonable demands of school administrators.

The district believed that the "few deficiencies" shown by the respondent during the 2013-2014 school year "could be remedied through cooperation and through very simple remedial measures on both our part and Ms. Etheridge's part," Dr. Parent testified [Tr., 143]. However, he added that

> [w]hat was unfortunate was that at the end of the 2014-2015 school year, in all of the seven standards, minus possibly one, Ms. Etheridge rated ineffective. Completely—a complete downturn, right from the beginning of the school year, with regard to cooperation, with regard to communications with the District.
>
> [Tr., 143]

It is regrettable that a teacher who was rated "highly effective" for student academic progress in 2013-2014 and had the potential to contribute much to her students and the school community failed so dramatically the following year. That disastrous outcome seems to have been a consequence of displacing blame onto others and ignoring constructive criticism.

The Commissioner has previously ruled that "outrageously inappropriate behavior," combined with lack of "remorse or contrition" and a likelihood of repeating the behavior are factors that may be taken into account in assessing a penalty for a non-teaching employee.[9] Those factors are present here. Consequently, all the charges are sustained, which warrants loss of tenure and dismissal from the school district.

**Tia Schneider Denenberg**
***Arbitrator***

[9] District brief, pp. 28-29, Tenure Hearing of Natalizia Busnelli Aliallad (April 12, 2011)

*In the Matter of the Tenure Hearing of*

**Lesley Etheridge**
**and**
**Passaic County Vocational School District**
**Passaic County**

Agency Docket No. 120-6/15

## Ruling of Arbitrator

*The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:*

For the reasons set forth in the accompanying opinion, the teacher shall be dismissed from employment with loss of her tenure rights.

**Tia Schneider Denenberg**
*Arbitrator*

Dated: June 27, 2016

*State of New York*
*County of Columbia*

*On this 27th day of June, 2016, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.*

**Kristy Lee Brailey**
*Notary Public State of New York*
*No. 01BR6326865*
*Qualified in Columbia County*
*Commission Expires June 29, 2019*

Albert C. Buglione, Esq.
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**Attorneys for Passaic County Technical Institute**

**STATE OF NEW JERSEY
BEFORE THE COMMISSIONER
OF EDUCATION
VERIFIED COMPLAINT
SWORN STATEMENT OF TENURE
CHARGES AGAINST LESLEY
ETHERIDGE,TEACHER
FOR INEFFICENCY AND CONDUCT
UNBECOMING A
TEACHING STAFF MEMBER**

IN THE MATTER OF TENURE :
PROCEEDINGS AGAINST :
LESLEY ETHERIDGE, TEACHER :

Petitioner, Passaic County Technical Institute (hereinafter "PCTI"), by way of verified complaint against Respondent Lesley Etheridge hereby advances the following Tenure Charges:

## PRELIMINARY STATEMENT

This is a Verified Complaint, hereby being advanced by the Complainant, Passaic County Technical Institute, which is a District that is operated by the Passaic County Technical Institute Board of Education. The representative for Passaic County Technical Institute who has knowledge and information

regarding the substance of this Tenure Complaint is Dr. Michael Parent, Principal of Passaic County Technical Institute. Dr. Parent will be verifying this Verified Complaint. As such, the within Tenure Charges are hereby submitted for consideration and action to dismiss Lesley Etheridge, a tenured teaching staff member of Passaic County Technical Institute (herein to be referred to as: Respondent Lesley Etheridge) from her tenured employment at Passaic County Technical Institute.

1. On September 1, 1996, Respondent Lesley Etheridge was hired as an Electronics instructor.

2. During all times herein, Respondent Lesley Etheridge was a tenured Electronics teacher at Passaic County Technical Institute in Wayne, New Jersey.

3. Respondent Lesley Etheridge holds a standard certification in Electronics.

4. Respondent Lesley Etheridge has taught Electronics I and Electronics III.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 1

8. Pursuant to the Corrective Action Plan, Respondent Lesley Etheridge was expected to remedy the following deficiencies: Performance Standard 2 - Instructional Planning, Performance Standard 5 - Learning Environment, and Performance Standard 6 - Professionalism.

9. Pursuant to this Corrective Action Plan, Respondent Lesley Etheridge was expected to "Attend workshops that enhances communications with other individuals in an organization", "Read all communication, electronic and/or hard copies from administration", and "Seek NJEA workshops that deal with professional ethics in education, instructional and lesson planning strategies, classroom management techniques and strategies; or any workshops that enhance profession growth in all areas as identified by standards and indicators for teacher effectiveness."

10. On October 21, 2014, Supervisor of Instruction Lydia Yikon'a observed Respondent Lesley Etheridge's period 2 Electronics I class. Lydia Yikon'a noted that, "Because Mrs. Etheridge had been rated as "Partially Effective" for the 2013-2014 school year, she has been issued a Corrective Action Plan (CAP). Mrs. Etheridge is expected to meet all timelines, improvement measures, and adhere to recommendations."

11. On October 28, 2014, the faculty of Passaic County Technical Institute was notified that all Student Growth Objective drafts were due to supervisors by October 31, 2014.

12. On October 31, 2014, Respondent Lesley Etheridge did not present her immediate supervisor, Lydia Yikon'a, with her preliminary Student Growth Objectives.

13. Pursuant to the recommendations of the Stronge evaluation model, a Corrective Action Plan Self-Evaluation Progress Report was issued to all faculty who were placed on a Corrective Action Plan for the 2014-2015 school year.

14. On November 4, 2014, Respondent Lesley Etheridge was issued a memorandum reminding her that none of the requirements of the Corrective Action Plan had yet to be addressed. Respondent Lesley Etheridge was directed to register and attend two professional development workshops indicated in the Corrective Action Plan.

15. On November 12, 2014, Supervisor of Instruction Lydia Yikon'a informed Respondent Lesley Etheridge that a Corrective Action Plan Self-Evaluation Progress Report must be submitted by November 21, 2014.

16. On November 14, 2014, Respondent Lesley Etheridge was issued a memorandum directing her to complete the required preliminary Student Growth Objectives plan by November 21.

17. On November 24, 2014, Respondent Lesley Etheridge was issued a memorandum by her immediate supervisor for Respondent Lesley Etheridge's failure to complete the required Student Growth Objectives drafts as noted in the November 14 memorandum.

18. On December 16, 2015, Assistant Principals Robert Gray and Joseph Sabbath observed Respondent Lesley Etheridge's period 2 Electronics I class. The observation contained recommendations for improvement in the following areas: Professional Knowledge, Instructional Planning, Instructional Delivery, Assessment of and for Learning, Learning Environment, and Professionalism. The observation was not "acknowledged" by Respondent Lesley Etheridge. The observation noted, "The instructor has had access to the evaluation as of 1/5/15 and the additional recommendations as of 1/14/15. Additionally she was directed via e-mail to acknowledge the observation by 1/26/15 and attach a rebuttal if she chose to. I am therefore finalizing the observation as nothing has been acknowledged or submitted as of 1/28/15."

19. On December 17, 2014, Dr. Michael Parent, Principal, issued a memorandum for Insubordination to Respondent Lesley Etheridge; Respondent Lesley Etheridge had failed to complete two required elements of the district's evaluation model - the Student Growth Objectives and the Corrective Action Plan Self-Evaluation Progress Report.

20. On January 12, 2015, Dr. Michael Parent, Principal, issued a memorandum to Respondent Lesley Etheridge informing her that several reprimands have been issued since September 2014 in relation to missing important deadlines and required actions. In an effort to assist Respondent Lesley Etheridge with meeting past and future requirements and to assist her with needed professional growth, Mrs. Kathy Oscar (a member of the School Improvement Panel) would be meeting with Mrs. Etheridge every Monday morning to assist with meeting deadlines and improvement deficient professional duties and responsibilities. Respondent Lesley Etheridge did not and has not made an effort to attend any such meetings with Mrs. Oscar.

21. On January 21, 2015 Supervisor of Instruction Lydia Yikon'a issued a memorandum to Respondent Lesley Etheridge regarding "Classroom Management". Respondent Lesley Etheridge refused to acknowledge receiving the memorandum by signing the document.

22. On January 26, 2015, Supervisor of Instruction Lydia Yikon'a completed the required Corrective Action Plan Interim Report. The report was not "acknowledged" by Respondent Lesley Etheridge.

23. On February 19, 2015, Principal Dr. Parent and Assistant Principal Lois Paterson observed Respondent Lesley

Etheridge's period 2 Electronics I class. The observation report was not "acknowledged" by Respondent Lesley Etheridge.

24. On February 25, 2015, Respondent Lesley Etheridge submitted incomplete Student Growth Objectives; neither data nor rubrics that would be used for data collection and growth measurement were submitted.

25. On March 17, 2015, Supervisor of Instruction Lydia Yikon'a and Principal Dr. Parent observed Respondent Lesley Etheridge's period 7 Electronics III class. The observation report was not "acknowledged" by Respondent Lesley Etheridge.

26. On April 16, 2015, Pursuant to the "Teacher Effectiveness and Accountability for the Children of New Jersey Act" and in accordance with the Stronge evaluation model approved by the Passaic County Board of Education, Respondent Lesley Etheridge was rated as "Ineffective" with a composite score of 1.4.

27. The actions and conduct of the respondent constitutes Inefficiency so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that tenure charges should be certified and should be sustained by the Commissioner of Education, and Respondent Lesley Etheridge suffer the loss of her tenure status and dismissed from her teaching position

# Charge 2

CHARGE TWO

FALSIFYING GRADES/INAPPROPRIATE GRADING PRACTICES

(Conduct Unbecoming a Teaching Staff Member)

28. Complainant hereby repeats and realleges each and every allegation contained in paragraphs five through twenty-seven of this complaint, and incorporates the same reference as if fully set forth herein and again.

29. On June 27, 2014, Dr. Michael Parent, Principal, learned that a student was issued a grade of A+ for his Electronics I final exam. The student personally informed Dr. Parent that he [the student] did not take the Electronics I final exam. A review of Respondent Lesley Etheridge's grade book indicated that a final exam grade of A+ was recorded for this student in her grade book on June 25, 2014.

30. On June 28, 2014 Respondent Lesley Etheridge's immediate supervisor presented Dr. Michael Parent, Principal, with all of Respondent Lesley Etheridge's Electronics I official final exam grades. All of the Electronics I students, with the exception of one, had been issued a grade of A+ on their final exam.

31. Passaic County Technical Institute BOE Policy Regulation #2624 (Grading System, section F states: "In order that he/she may justify a grade, each teacher is directed to

retain in his/her possession… records to validate grades awarded to pupils."

32. On July 23, 2014 Respondent Lesley Etheridge was asked to respond to allegations that she purposefully instructed her students not to complete the final exam, arbitrarily assigned a final exam letter grade of A+ to at least one student who did not take the final exam, and knowingly recorded false final exam grades of A+ for all of the Electronics I students.

33. On August 1, 2014 Respondent Lesley Etheridge responded to aforementioned allegations.

34. On August 5, 2014, Respondent Lesley Etheridge was sent a letter requesting more information about the Electronics I final exam grades. Respondent Lesley Etheridge did not offer further information.

35. On August 20, 2014, the Passaic County Technical Institute Board of Education was presented with a recommendation for the withholding of an increment for the 2014-2015 school year for Respondent Lesley Etheridge on the grounds of violating Passaic County Technical Institute BOE Policy and the corresponding Regulation #2624 (Grading System).

36. On August 20, 2014, the Passaic County Technical Institute Board of Education voted unanimously to withhold Respondent Lesley Etheridge's increment for the 2014-2015 school year on the grounds of Falsifying Grades.

37. On November 10, 2014, Respondent Lesley Etheridge was issued a memorandum requesting justification for six "participation/discipline" grades issued to her students. Passaic County Technical Institute BOE Policy Regulation #2624 (Grading System), section F states: "In order that he/she may justify a grade, each teacher is directed to retain in his/her possession the following records to validate grades awarded to pupils." Respondent Lesley Etheridge did not provide the requested rationale or justification.

38. On November 17, 2014 Respondent Lesley Etheridge was issued a memorandum directing her to remove the unjustified six "participation/discipline" grades noted in the November 10, 2014 memorandum. Respondent Lesley Etheridge replied that she would not change or remove the grades.

39. On November 24, 2014, Respondent Lesley Etheridge was issued a formal reprimand by Dr. Michael Parent, Principal, for insubordination for Respondent Lesley Etheridge's failure to remove the unjustified six "participation/discipline" grades noted in the November 10 and 17, 2014 memoranda.

40. On November 24, 2014, Respondent Lesley Etheridge was issued a memorandum by Dr. Michael Parent, Principal, requesting justification for two "participation/discipline" assignments in her grade book. A response was expected by December 2, 2014.

41. On December 2, 2014, Respondent Lesley Etheridge was issued a memorandum informing her that due to a lack of response to previous grade justifications and because of her continued misuse of the district's grading system, Respondent Lesley Etheridge's privilege of recording grades via the district's Student Information System (PowerSchool) was being revoked for her Electronics I course. As per this memorandum, Respondent Lesley Etheridge was directed to provide her immediate supervisors with all grades and grade justifications each Thursday afternoon. Respondent Lesley Etheridge did not adhere to this directive.

42. On January 23, 2015, Respondent Lesley Etheridge was issued a memorandum by Dr. Parent, Principal, indicating that the directives outlined in the December 2 memorandum have not been followed.

43. On February 4, 2015 Respondent Lesley Etheridge met with Supervisor of Instruction Lydia Yikon'a and Assistant Principal Robert Gray to review all Marking Period 2 grades. Lydia Yikon'a entered all grades into the PowerSchool Student Information System.

44. On February 5, 2015, Respondent Lesley Etheridge was issued a memorandum by Dr. Parent, Principal, indicating that Respondent Lesley Etheridge was being given permission to again

post grades for the Electronics I course into the PowerSchool Student Information System.

45. The actions and conduct of the respondent constitutes Falsified and Inappropriate Grading Practices so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 3

CHARGE THREE

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

(Coercion of Students)

46. Complainant hereby repeats and realleges each and every allegation contained in paragraphs twenty-nine through forty-five of this complaint, and incorporates the same reference as if fully set forth herein and again.

47. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

48. On October 24, 2014, Respondent Lesley Etheridge sent an email to her immediate supervisor, Dr. Michael Parent, Principal, and the Chief School Administrator indicating that she had shared with her students a September 5, 2014 letter from Dr. Michael Parent, Principal, informing Respondent Lesley

Etheridge that funds previously held for the purchase of Electronics jackets were being returned to her.

49. On October 28, 2014, Respondent Lesley Etheridge was issued a letter by Dr. Michael Parent, Principal, indicating that Respondent Lesley Etheridge had engaged in unprofessional conduct with her students; students informed the administration that Respondent Lesley Etheridge had instructed her students to compose anonymous statements that were to be submitted to the principal and that Respondent Lesley Etheridge had coached the students on the contents of said statements.

50. A formal meeting with Respondent Lesley Etheridge was arranged for October 28, 2014. Respondent Lesley Etheridge refused to attend the meeting and directed the principal to place the letter in her mailbox.

51. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 4

CHARGE FOUR

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

**(Unprofessional Conduct During Affirmative Action Meeting)**

52. Complainant hereby repeats and realleges each and every allegation contained in paragraphs forty-seven through fifty-one of this complaint, and incorporates the same reference as if fully set forth herein and again.

53. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

54. On November 17, 2014, Respondent Lesley Etheridge was issued a memorandum citing unprofessional conduct during a meeting held with the district's Affirmative Action Officer, Joseph Sabbath. At that meeting, Respondent Lesley Etheridge had

been confrontational and had made inappropriate remarks about her immediate supervisor's ethnicity.

55. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 5

CHARGE FIVE

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

(Unprofessional Conduct During Parent-Teacher Meeting)

56. Complainant hereby repeats and realleges each and every allegation contained in paragraphs fifty-three through fifty-five of this complaint, and incorporates the same reference as if fully set forth herein and again.

57. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

58. On November 18, 2014 Assistant Principal Joseph Sabbath issued Respondent Lesley Etheridge a formal reprimand for exhibiting unprofessional conduct during a November 18 parent-teacher conference. At that meeting, Respondent Lesley

Etheridge became confrontational with the administration and parent and made disparaging remarks about the district and the administration.

59. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 6

CHARGE SIX

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

(Showing of an Unauthorized Film)

60. Complainant hereby repeats and realleges each and every allegation contained in paragraphs fifty-seven through fifty-nine of this complaint, and incorporates the same reference as if fully set forth herein and again.

61. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

62. On November 24 and 25, Respondent Lesley Etheridge had shown - without approval - the film "The Social Network" to her Electronics III students. The movie depicts alcohol consumption and contains foul language.

63. On December 8, 2014, Respondent Lesley Etheridge's immediate supervisor issued her a formal reprimand for Conduct Unbecoming.

64. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 7

CHARGE SEVEN

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

(Unprofessional Conduct During Parent-Teacher Meeting)

65. Complainant hereby repeats and realleges each and every allegation contained in paragraphs sixty-one through sixty-four of this complaint, and incorporates the same reference as if fully set forth herein and again.

66. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

67. On February 12, 2015, Respondent Lesley Etheridge was issued a memorandum by Dr. Michael Parent, Principal, rebuking her for false allegations, claims, and allegations presented to a parent during a meeting with a student's parent.

68. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 8

CHARGE EIGHT

DESERTION OF PROFESSIONAL RESPONSIBILITY

**(Conduct Unbecoming a Teaching Staff Member)**

69. Complainant hereby repeats and realleges each and every allegation contained in paragraphs sixty-six through sixty-eight of this complaint, and incorporates the same reference as if fully set forth herein and again.

70. On October 22, 2014, Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment.

71. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 9

CHARGE NINE

DESERTION OF PROFESSIONAL RESPONSIBILITY

(Conduct Unbecoming a Teaching Staff Member)

72. Complainant hereby repeats and realleges each and every allegation contained in paragraphs seventy through seventy-one of this complaint, and incorporates the same reference as if fully set forth herein and again.

73. On December 8, 2014, Respondent Lesley Etheridge left her period 2 students unattended without providing notice to her immediate supervisor or an administrator.

74. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 10

CHARGE TEN

DESERTION OF PROFESSIONAL RESPONSIBILITY

(Conduct Unbecoming a Teaching Staff Member)

75. Complainant hereby repeats and realleges each and every allegation contained in paragraphs seventy-three through sixty-four of this complaint, and incorporates the same reference as if fully set forth herein and again.

76. On February 4, 2015, Respondent Lesley Etheridge's immediate supervisor issued a memorandum indicating that Respondent Lesley Etheridge had left campus without permission or following proper notification and sign-out procedures.

77. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 11

CHARGE ELEVEN

DESERTION OF PROFESSIONAL RESPONSIBILITY

(Conduct Unbecoming a Teaching Staff Member)

78. Complainant hereby repeats and realleges each and every allegation contained in paragraphs seventy-six through seventy-seven of this complaint, and incorporates the same reference as if fully set forth herein and again.

79. On February 18, 2015, Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment.

80. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 12

CHARGE TWELVE

DESERTION OF PROFESSIONAL RESPONSIBILITY

(Conduct Unbecoming a Teaching Staff Member)

81. Complainant hereby repeats and realleges each and every allegation contained in paragraphs seventy-nine through eighty of this complaint, and incorporates the same reference as if fully set forth herein and again.

82. On February 19, 2015, Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment.

83. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 13

CHARGE THIRTEEN

DESERTION OF PROFESSIONAL RESPONSIBILITY

**(Conduct Unbecoming a Teaching Staff Member)**

84. Complainant hereby repeats and realleges each and every allegation contained in paragraphs eighty-two through eighty-three of this complaint, and incorporates the same reference as if fully set forth herein and again.

85. On March 9, 2015, March 10, 2015 Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment in a timely manner.

86. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 14

CHARGE FOURTEEN

DESERTION OF PROFESSIONAL RESPONSIBILITY

(Conduct Unbecoming a Teaching Staff Member)

87. Complainant hereby repeats and realleges each and every allegation contained in paragraphs eighty-five through eighty-six of this complaint, and incorporates the same reference as if fully set forth herein and again.

88. On March 10, 2015 Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment in a timely manner.

89. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 15

CHARGE FIFTEEN

DESERTION OF PROFESSIONAL RESPONSBILITY

**(Conduct Unbecoming a Teaching Staff Member)**

90. Complainant hereby repeats and realleges each and every allegation contained in paragraphs eighty-eight through eighty-nine of this complaint, and incorporates the same reference as if fully set forth herein and again.

91. On March 17, 2015, Respondent Lesley Etheridge failed to remain in her period 6B-7A co-teaching assignment.

92. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 16

CHARGE SIXTEEN

DESERTION OF PROFESSIONAL RESPONSBILITY

(Conduct Unbecoming a Teaching Staff Member)

93. Complainant hereby repeats and realleges each and every allegation contained in paragraphs ninety-one through ninety-two of this complaint, and incorporates the same reference as if fully set forth herein and again.

94. On March 19, 2015, Respondent Lesley Etheridge failed to report to her period 1 co-teaching assignment.

95. The actions and conduct of the respondent constitutes Desertion of Professional Responsibility so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 17

CHARGE SEVENTEEN

INSUBORDINATION/NEGLECT OF DUTY

(Conduct Unbecoming a Teaching Staff Member)

96. Complainant hereby repeats and realleges each and every allegation contained in paragraphs ninety-four through ninety-five of this complaint, and incorporates the same reference as if fully set forth herein and again.

97. Passaic County Technical Institute BOE Policy #3134 (Assignment of Additional Duties) states: " Any teaching staff member appointed to an extra duty position is expected to serve unless excused for extenuating circumstances. A member's refusal to serve or resignation from extra duty service without permission may constitute an act of insubordination subject to discipline" and "Performance in an extra duty position will be considered in a teacher staff member's evaluation, in determining whether to renew a nontenured member…"

98. On November 21, 2014, Respondent Lesley Etheridge failed to report to her hall duty on November 21.

99. The actions and conduct of the respondent constitutes Insubordination/Neglect of Duty so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE,** Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to

suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 18

CHARGE EIGHTEEN

INSUBORDINATION/NEGLECT OF DUTY

(Conduct Unbecoming a Teaching Staff Member)

100. Complainant hereby repeats and realleges each and every allegation contained in paragraphs ninety-seven through ninety-nine of this complaint, and incorporates the same reference as if fully set forth herein and again.

101. Passaic County Technical Institute BOE Policy #3134 (Assignment of Additional Duties) states: "Any teaching staff member appointed to an extra duty position is expected to serve unless excused for extenuating circumstances. A member's refusal to serve or resignation from extra duty service without permission may constitute an act of insubordination subject to discipline" and "Performance in an extra duty position will be considered in a teacher staff member's evaluation, in determining whether to renew a nontenured member…"

102. On November 24, 2014, Respondent Lesley Etheridge failed to report to her assigned hall duty.

103. The actions and conduct of the respondent constitutes Insubordination/Neglect of Duty so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to

suffer the loss of her tenure status, and be dismissed from her teaching position.

CHARGE NINETEEN

INSUBORDINATION/NEGLECT OF DUTY

(Conduct Unbecoming a Teaching Staff Member)

104. Complainant hereby repeats and realleges each and every allegation contained in paragraphs one hundred-one through one hundred-three of this complaint, and incorporates the same reference as if fully set forth herein and again.

105. Passaic County Technical Institute BOE Policy #3134 (Assignment of Additional Duties) states: "Any teaching staff member appointed to an extra duty position is expected to serve unless excused for extenuating circumstances. A member's refusal to serve or resignation from extra duty service without permission may constitute an act of insubordination subject to discipline" and "Performance in an extra duty position will be considered in a teacher staff member's evaluation, in determining whether to renew a nontenured member…"

106. On January 13, 2015, Respondent Lesley Etheridge failed to report to assigned her hall duty.

107. The actions and conduct of the respondent constitutes Insubordination/Neglect of Duty so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to

suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 20

CHARGE TWENTY

INSUBORDINATION

(Failure to Submit Lesson Plans)

(Conduct Unbecoming a Teaching Staff Member)

108. Complainant hereby repeats and realleges each and every allegation contained in paragraphs one hundred-five through one hundred-seven of this complaint, and incorporates the same reference as if fully set forth herein and again.

109. Passaic County Technical Institute BOE Policy #3270 (Lesson Plans and Plan Books) states: "The Board directs the Superintendent to require the preparation of lesson plans by each teacher that implement the goals and objectives of the educational program. Teachers shall also be responsible for providing adequate direction and guidance to substitutes. Lesson plans will be subject to periodic review by the principal or designee".

110. Passaic County Technical Institute BOE Policy Regulation #3270 (Lesson Plans and Plan Books) section A subsection 4 and 5 states: "Lesson plans will follow the format established at the building or departmental level, as appropriate. Lesson plans will ordinarily be prepared on a daily basis, but, if the format so dictates, may be prepared on a long-range unit basis… Lesson plans must be prepared with clarity and in sufficient detail to permit a person unacquainted

with the classroom to conduct the lesson efficiently and effectively."

111. On December 8, 2014, Respondent Lesley Etheridge was issued a formal reprimand by her immediate supervisor for failure to complete and submit lesson plans.

112. On December 17, 2014, Respondent Lesley Etheridge was issued a memorandum by Dr. Michael Parent, Principal, for insubordination. Respondent Lesley Etheridge had failed to adhere to the required lesson plan format and mandates outlined by her immediate supervisor.

113. On January 21, 2015, Respondent Lesley Etheridge was issued a memorandum by her immediate supervisor reminding her to complete and submit appropriate lesson plans. Respondent Lesley Etheridge refused to read or sign the memorandum.

114. The actions and conduct of the respondent constitutes Insubordination so egregious as to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

# Charge 21

CHARGE TWENTY-ONE

INAPPROPRIATE STAFF CONDUCT/CONDUCT UNBECOMING

(Unprofessional Communications With Administration)

(Conduct Unbecoming a Teaching Staff Member)

115. Complainant hereby repeats and realleges each and every allegation contained in paragraphs one hundred-nine through one hundred-fourteen of this complaint, and incorporates the same reference as if fully set forth herein and again.

116. Passaic County Technical Institute BOE Policy #3281 (Inappropriate Staff Conduct) states: "A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member."

117. Passaic County Technical Institute BOE Policy Regulation #3321 (Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members),

states: "Teaching staff members are responsible for good behavior on computer network(s)/computers. Communications on the computer network(s)/computers are often public in nature. Policies and Regulations governing teaching staff members behavior and communications apply. The school district's network(s), Internet access and computers are provided to conduct research and as a tool for instruction and to communicate with others. Access to computer network services/computers is given to teaching staff members who are expected to act in a considerate, responsible and professional manner."

118. On October 30, 2014, Dr. Michael Parent, Principal, sent an email to Respondent Lesley Etheridge regarding the time-stamps of her emails to administration. From September 2 through October 30, Respondent Lesley Etheridge had composed and sent 14 emails during scheduled instructional time.

119. On November 5, 2014, Respondent Lesley Etheridge was issued a memorandum by Dr. Michael Parent, Principal, regarding the tone of her emails that are sent to the administration.

120. On January 8, 2015, Dr. Michael Parent, Principal, issued a memorandum to Respondent Lesley Etheridge regarding the tone and demeanor of emails being sent to the administration.

121. The actions and conduct of the respondent constitutes Inappropriate Staff Conduct/Conduct Unbecoming so egregious as

to warrant dismissal from respondent's tenured teaching position.

**WHEREFORE**, Petitioner requests that the Tenure Charges against Respondent, Lesley Etheridge be certified and sustained by the Commissioner of Education, to require Respondent to suffer the loss of her tenure status, and be dismissed from her teaching position.

OMITTED

# Charge 23

**CHARGE TWENTY-THREE**

**CONDUCT UNBECOMING A TEACHING STAFF MEMBER AND OTHER JUST CAUSE**

130. Complainant hereby repeats and re-alleges each and every allegation contained in paragraphs one through one-hundred thirty-nine of this complaint, and incorporates the same by reference as if fully set forth herein and again.

131. In the event that any one of the foregoing Charges (One through Twenty-Two), does not constitute unbecoming conduct, all of these foregoing charges considered as a whole demonstrate a pattern of inappropriate and insubordinate behavior that is wholly improper in a public school setting and constitute(s) conduct unbecoming a teaching staff member and/or other just cause for termination.

**WHEREFORE,** Petitioner requests that the Tenure Charges against Respondent, LESLEY ETHERIDGE be certified and sustained by the Arbitrator who is appointed by the Commissioner of Education, to require Respondent to suffer the loss of her tenure.

BUGLIONE, HUTTON & DEYOE, LLC
**Attorneys Passaic County Technical Institute**

By: Albert C. Buglione
ALBERT C. BUGLIONE

Dated: April 23, 2015

**VERIFICATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE'S COMPLAINT TO ADVANCE TENURE CHARGES AGAINST RESPONDENT, LESLEY ETHERIDGE**

I, Dr. Michael Parent, of full age, herby certify and say:

1. I am the Principal at the Passaic County Technical Institute, and have served in this capacity for a period of three years.

2. I have read the foregoing Verified Complaint and I certify that the information contained in the Complaint is true based on my personal knowledge.

3. I certify that the foregoing statements made by me are true and I am aware that, if any of the foregoing statements made by me are willingly false I am subject to punishment.

Dated: April 23, 2015

DR. MICHAEL PARENT
Passaic County Technical Institute

STATE OF NEW JERSEY )
)SS
COUNTY OF PASSAIC )

Diana C. Lobosco, of full age, hereby says, under oath:

1. I am the Superintendent of Schools of Passaic County Technical Institute.

2. I have examined the charges annexed hereto together with the attached exhibits.

3. I hereby certify that in my opinion the actions of Respondent, Lesley Etheridge are of such seriousness that she should suffer loss of her tenure status and that tenure charges should be certified and should be sustained by the Commissioner of Education.

4. I certify that the above is true. If willingly false, I recognize that I am subject to punishment.

DIANA C. LOBOSCO
Chief School Administrator
Passaic County Technical
Institute

Dated: April 23, 2015

Sworn to and subscribed before
me this 23 day of April, 2015

ALBERT BUGLIONE
Attorney at Law State New Jersey

248-16

**BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION**

| | |
|---|---|
| **In the Matter of Tenure Charges**<br><br>**between**<br><br>**The Irvington Township Board of Education, Essex County, NJ,**<br><br>**Petitioner,**<br><br>**and**<br><br>**Roslyn Turner-Ince,**<br><br>**Respondent.**<br><br>**Agency Docket No. 42-2/16** | **MOTION-TO-DISMISS**<br><br>**Dr. Andrée Y. McKissick**<br>**Arbitrator** |

**APPEARANCES:**

**For the Petitioner:**
Ronald C. Hunt, Esquire
Hunt, Hamlin & Ridley
Military Park Building
60 Park Place, Suite 1602
Newark, New Jersey 07102

**For the Respondent:**
Nicholas Poberezhsky, Esquire
Caruso Smith Picini, PC
60 Route 46 East
Fairfield, New Jersey 07004

## STATEMENT OF FACTS

Respondent Roslyn Turner-Ince has been employed by the School District of the Township of Irvington since September 2003. She was assigned to the Grove Street School as a Fourth (4th) Grade school teacher. The charges at issue were served by the District on February 5, 2016. The Superintendent of Irvington Public School, Dr. Neely Hackett, charged Respondent Turner-Ince with the following charges:

1. **On or about October 1, 2003, the Respondent was reprimanded for hitting two (2) students.**
2. **On or about May 3, 2011, the Respondent was reprimanded for throwing coffee on a student.**
3. **On or about October 26, 2015, the Respondent was reprimanded for failing to provide proper treatment to her students.**
4. **On or about December 28, 2015, during the New Jersey Department of Child Protection and Permanency (DCPP) Investigative Unit, Investigation, at Grove Street Elementary School regarding an unrelated event, the Respondent was observed by the DCPP worker inappropriately handling a student.**
5. **As a result of the information set forth above, which some shall be specifically set forth below, the Respondent's conduct is in violation of various state and district laws and policies.**
6. **The Respondent's conduct constitutes just cause for her termination.**
7. **Moreover, the Petitioner believes that when staff members receive continuous reprimands for physically abusing children, such actions are unacceptable because it endangers the welfare of students, and it negatively affects the academic development of students.**
8. **Thus, there are just causes to terminate the Respondent by way of tenure charges.**

The record reflects that on February 18, 2016, Respondent Turner-Ince received a letter from Dr. Hackett indicating that the tenure charges were certified by the Board and that she was removed from the payroll. Yet on February 19, 2016, the record reveals that Respondent Turner-Ince submitted her answer through her attorney. Nonetheless a day before her answer, the Certificate of Determination had been forwarded to her in contravention to NJ.AC 6A: 3-5.1 (b) (4).

The record further reflects that on March 7, 2016, Respondent Turner-Ince submitted a timely-filed Answer to the tenure charges with a Motion-to-Dismiss for the Commissioner's consideration. This motion for dismissal was requested for two (2) reasons: the District apparently failed to consider the Respondent's Answer before certifying the tenure charges violative of NJ.AC, 6A: 3-5.1 (b) (4) and because charges

contained information relative to our Institutional Abuse Investigation Unit (IAIU) investigation without authorization were also violative of NJ.SA 9: 6-8.10 (a). The District submitted an Opposition to the Motion-to-Dismiss on March 10, 2016. On that date, the record further reflects that the Commissioner issued an Order sealing the tenure charges and any related IAIU records pending further action by the arbitrator.

On March 15, 2016, this Arbitrator was assigned this case. On March 17, 2016, the Commissioner formally forwarded the sealed charges with the Respondent's Answer and the Motion-to-Dismiss to the Arbitrator. The record further reflects that the Respondent has yet to receive the following: the record of evidence including the list of witnesses and a complete summary of this testimony at variance with NJ.SA 18A: 6-17.1 (b) (3), as required. Briefs regarding the Motion-to-Dismiss were to be mailed on April 18, 2016. The Arbitrator received the Respondent's brief on that date. However, the Petitioner was granted an extension to May 31, 2016, when his brief was submitted.

## ISSUE

**Whether or not the Motion-to-Dismiss should be granted without prejudice, allowing the Petitioner to re-file charges?**

**If not, what shall the remedy be?**

## PERTINENT PROVISIONS

**NJ.AC 6A: 3-5.1 (b) (4)**

**Upon receipt of the tenured employee's written statement of position and evidence under oath, or upon expiration of the allotted fifteen (15)-day time period, the District Board of Education shall determine by a majority vote of its full membership, or the State District Superintendent shall determine, within forty-five (45) days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary.**

**NJ.AC 6A: 3-5.1 (b) (3) states, in pertinent part:**

**An employee "shall have an opportunity to submit to the District Board of Education or the State District Superintendent a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within fifteen (15) days of receipt of the tenure charges."**

**NJ.SA 9: 6-8.10 (a)**

**Records of child abuse reports; confidentiality; disclosure.**

**"1.a. ... all records obtained by the Department of Children and Families in investigation ... such reports ... all reports of findings forwarded to the child abuse registry ... shall be kept confidential ...."**

**NJ.SA 18A: 6-17.1 (b) (3) states, in pertinent part:**

**Upon referral of the case to arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for the purposes of impeachment of witnesses.**

**NJ.SA 18A: 6-7 (a) states, in pertinent part:**

**When a complaint made against a school employee alleging child abuse or neglect is investigated by the Division of Youth and Family Services, the division shall notify the school district and the employee of its findings. Upon receipt of a finding by the division that such a complaint is unfounded, the**

**school district shall remove any references to the complaint and investigation by the division from the employee's personnel records. A complaint made by the Division of Youth and Family Services shall not be used against the employee for any purpose, relating to employment, including, but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuation of employment, termination of employment, or any right or privilege relating to employment.**

## POSITIONS OF THE PARTIES

It is the position of the Petitioner that the Motion-to-Dismiss should be granted, but without prejudice. That is, the Petitioner argues that this result would allow the District to re-file the charges and the Respondent should then submit an Answer consistent with NJ.SA 18A: 6-11. Moreover, the Petitioner also contends that the Respondent should be afforded the right to be heard. Specifically, the Petitioner agrees that she was deprived of the right due to an error in calculation as to when the charges were sent to the Respondent (see NJ.AC 6A: 3-51 (b) (3)).

In response to the Respondent's argument that the Petitioner failed to comply with disclosure obligations, the Petitioner disagrees (see NJ.SA 18A: 6-17.1 (3)). In addition, the Petitioner contends the procedural defects are generally dismissed without prejudice, which allows the District to remedy its defects (see I/M/O Frank King, Agency Docket No. 117-4/07).

The Petitioner argues that it is important to note that tenure charges against the Respondent can be filed, notwithstanding a determination of "unfounded" by the Department of Children and Families (DCF) regarding the Respondent's conduct. In support of this premise, the Petitioner cites In Re Young, 202 NJ 50 (2010).

Although the Respondent relies on I/M/O Kevin Garifine, Agency Docket No. 317-10/15 on the issue that a dismissal with prejudice is warranted, the Petitioner rebuts that the respondent Garifine differs significantly from our Respondent Turner-Ince. Here, the Petitioner notes, Respondent Turner-Ince has three (3) reprimands prior to the current October 2015 incident. Moreover, the "unfounded" determination from the DCF's Institutional Abuse Investigation Unit (IAIU) was uncontested in the Garifine case, unlike our case. Notwithstanding that the Garifine case was dismissed with prejudice, the Petitioner points out that it was not because of just the IAIU's finding solely. Instead, the case was dismissed with prejudice as the result of several investigations by the Board, the police, and the IAIU. That is, the Petitioner asserts, that Respondent Garifine did not commit any misconduct on the day at issue. The Petitioner reasons that the Respondent's request to dismiss Count 4 of the charges with prejudice should be denied for all the above reasons.

The Petitioner vehemently argues that the concept of industrial double jeopardy does not bar the consideration of prior reprimands, when analyzing the determinants of just cause in a termination case. The Petitioner relies on Linden Board of Education v. Linden Education Association John Mizichko, 202 NJ 268 at 267 (2010). In particular, the Petitioner maintains that progressive and corrective discipline is an integral part of the concept of just cause. As to a discussion on the applicability of progressive discipline, an element of just cause, the Petitioner points to I/M/O John Carlomagno, Agency Docket No. 180-8/13. In particular, the Petitioner asserts that all prior reprimands are relevant to the just cause determination in making an evaluation in a dismissal case. Based upon the foregoing, the Petitioner requests that the arbitrator should not dismiss Counts 1, 2, and 3, as the Respondent requests.

On the other hand, the Respondent contends that Respondent Turner-Ince's procedural due process rights have been breached. Although she submitted her statement of position to the District in a timely manner, nonetheless her tenure charges were certified by the Commissioner before her statement of position was even considered (see NJ.AC, 6A: 3-5.1 (b) (3)). Thus, the Respondent maintains that the tenure charges must be dismissed with prejudice and that Respondent Turner-Ince should be made whole for all compensation and benefits lost during the pendency of this proceeding. The Respondent relies on I/M/O Frank King, Agency Docket No. 117-4/07 as a comparable case. As to the application of NJ.AC, 6A: 3-5.1 (b) (3) and NJ.AC, 6A: 3-5.1 (b) (4) (5), the Respondent points to the mandatory language used as noted in Aponte-Correa v. Allstate Insurance Company, 162 NJ 318 (2000) citing Harvey v. Board of Chosen Freeholders of Essex County, 30 NJ 381 at 391 (1959).

The Respondent points out the Petitioner's failure to comply with the disclosure obligations as mandated by NJ.SA 18A: 6-17.1 (3). Specifically, the Respondent delineates the failure of the Petitioner to supply Respondent Turner-Ince the following: statement of witnesses, list of witnesses, and a complete summary of their testimony prior to the hearing. That is, the Respondent maintains, that the Board of Education must furnish the entire record of evidence on the date that this case was referred to this Arbitrator (March 17, 2016). However, the Respondent asserts that Respondent Turner-Ince was not advised of the list of witnesses nor was sent the complete summary of their testimony, as required. Thus, the Respondent reasons that these omissions to supply these statutorily-mandated disclosures renders the Respondent virtually impossible to mount a defense to the charges. Thus, for all the foregoing reasons, the Respondent requests the Arbitrator to grant this Motion-to-Dismiss with prejudice. The Respondent offers the I/M/O Michael Wilson,

Agency Docket No. 302-10/15 (final decision, December 12, 2015) as a comparable case on this issue.

In violation with NJ.SA 9: 6-8.10 (a), the Respondent notes that the investigative testimony may not be disclosed in a tenure proceeding (see also Tyler, 236 NJ Super 478 (App. Div. 1989 Certif. denied, 121 NJ 615 (1989)). In spite of this prohibition, Count 4 incorporates information relative to an investigation conducted by the IAIU, a division of DCF. Thus, the Respondent explains is prohibited information and must be dismissed with prejudice by this Arbitrator (also see NJ.SA 9: 6-8.10 (b), which prohibits dissemination and constitutes a punishable offense, up to three (3) years imprisonment).

Lastly, the Respondent adamantly urges the Arbitrator to dismiss Counts 1, 2, and 3 because they comprise the three (3) reprimands prior to the current charge of October 2015. Based on the concept of industrial double jeopardy, the Respondent reasons that these counts should be dismissed. That is, it would be unjust not to because it would subject Respondent Turner-Ince to being punished for the same offenses twice. The Respondent points to a line of cases such as: In the Matter of Victor Onwuzuruike (MSB, decided 2006); I/M/O John Carlomagno, Agency Docket No. 180-8/13 (December 20, 2013); I/M/O Jill Buglovsky, Agency Docket No. 265-9/12 (December 21, 2012) and I/M/O Nikita Clarke-Huff, Agency Docket No. 290-9/15 (November 16, 2015) as being exemplary of this issue. In summary, the Respondent maintains that it would be manifestly unfair to Respondent Turner-Ince for her to face additional punishment for the same underlying conduct.

## FINDINGS AND DISCUSSION

After a careful review of the briefs in support of your positions regarding the Motion-to-Dismiss, this Arbitrator finds that this motion should be granted but without prejudice for the following reasons, except as specified with prejudice.

First, the record reflects that NJ.AC 6A: 3-5.1 (b) (3) provides a fifteen (15)-day window for the Respondent to answer to the Charges presented. However, prior to Respondent Turner-Ince's Answer, the Board certified the tenure charges in contradistinction to the above regulation (see Exhibit I). That is, without considering Respondent Turner-Ince's Answer and prior to the fifteen (15)-day duration, the Board removed her from its payroll on the day of certification, February 18, 2016. Thus, such premature actions from the District are violative of NJ.AC 6A: 3-5.1 (b) (4).

Second, NJ.SA 18A: 6-17.1 (b) (3) provides that the District shall send a record of evidence which includes the following: a list of witnesses and a complete summary of their testimony. However, neither were provided to Respondent Turner-Ince violative of the above provision. Such submissions were to be presented on March 17, 2016, the date this grievance was sent to this Arbitrator (see Exhibit M). These omissions are significant because of its corrosive effects on the Respondent's ability to respond to the charges presented against her.

Third, as to whether the remedy shall be with or without prejudice due to procedural defects, let us look at the prevailing case law. For instance, In the Matter of Arbitration Regarding Tenure Charge for Inefficiency, Michael Wilson and the State-Operated School

District of the City of Newark, Essex County, Agency Docket No. 302-10/15, December 12, 2015, Arbitrator Amis held that some of the same safeguards were violated, namely the omission to supply the witness list and a summary of the testimony to be presented. However, the time requirements were not strictly complied with, as required. Since the District failed to observe statutory guidelines and offered no explanation for the delay, Arbitrator Amis also granted the dismissal for the District's violation of NJ.SA 18A: 6-17.1 (b) (3). Respondent Wilson was reinstated as a teacher with full back pay and benefits. Our Respondent correctly notes that the Wilson grievance was not nearly as egregious as here with Respondent Turner-Ince in terms of the gravity of omissions, as noted earlier.

In three (3) cases, all involving motions to dismiss, the arbitrators granted the motion, but without prejudice for various reasons. These cases are most analogous to our case involving Respondent Turner-Ince as it relates to statutory violations.

In the Matter of the Tenure Hearing of Carol Beam, School District of the Township of Mantua, this case is substantively related to our case because it was based on NJ.SA 18A: 6-11. In the Beam case, the respondent was not given time to answer the charges. Also, the certification was defective. In sum, the Board failed to comply with the procedural mandates. Since the tenure charges were improperly filed, the Arbitrator granted the Motion-to-Dismiss, but without prejudice.

Another case which dealt with the failure to comply with statutory mandates is: In the Matter of the Tenure Hearing of Frank King, School District of the City of Salem, Salem County, OAL DKT No. Edu. 448907: Agency Docket No. 117-4/07, 2007 NJ Agen Lexis 584, August 22, 2007. In King, no statement of evidence was submitted to the respondent, as required. Moreover, Respondent King was never served with charges prior

to the Board's consideration as required by NJ.SA 18A: 6-11. Thus, the Administrative Law Judge dismissed the charges but without prejudice.

Still another case, where the tenure charges were dismissed as premature, is: In the Matter of Marie Ebert State-Operated School District of the City of Newark, Essex County, Agency Docket No. 267-9/14. Here, Arbitrator Denenberg held that the District failed to provide a list of witnesses and no summary of testimony of witnesses until one (1) week before the scheduled hearing. It did not allow adequate time for the respondent to prepare a viable response. Thus, this was found to be in violation of NJ.SA 18A: 6-17.1 (b) (3). Accordingly, the arbitrator granted the Motion-to-Dismiss without prejudice on January 20, 2015. This allowed the District to re-file the charges. Based on this analysis of procedural defects, it seems fair to allow the District to remedy the violations by re-filing. Thus, these aforementioned statutory violations shall be dismissed without prejudice.

Fourth, in response to the Respondent's argument that Count Four should be stricken, this Arbitrator agrees. This count was derived from the investigation by the New Jersey Department of Child Protection and Permanency (DCPP) unit. The record reflects that the Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU) found that the evidence did not support a finding that a child was harmed or placed at risk of harm. Accordingly, the complaint was deemed "unfounded." NJ.SA 18A: 6-7 (a) governs this matter. It, in essence, asserts that such findings, characterized as "unfounded", are precluded from usage against Respondent Turner-Ince as it relates to her employment. This includes disciplinary actions.

In the Matter of the Tenure Charges of: Board of Education, City of Long Branch, Monmouth County v. Kevin Garifine, Agency Docket 317-10/15, February 15, 2016,

Arbitrator Weiss dismissed the tenure charges with prejudice based on NJ.SA 18A: 6-7 (a). In sum, this statute states as follows: "upon receipt of a finding by the Division [of Youth and Family Services] that such a complaint is unfounded, the school district shall remove any references to the complaint and investigation by the division from the employee's personnel records." Moreover, this statute goes on to say that a complaint "shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege relating to employment" (also see In Re Young, 202 NJ at 72). Based on the foregoing, this Arbitrator finds that Count 4 must be dismissed.

Fifth, in regards to the Petitioner's argument that Counts 1, 2 and 3 should not be dismissed, this Arbitrator must disagree as to Count 2, the coffee incident on May 3, 2011. Here, Counts 1, 2 and 3 are the specified reprimands delineated as three (3) separate charges. Since these are written reprimands, Respondent Turner-Ince has these reports in her permanent file. However, applying the doctrine of industrial double jeopardy, Respondent Turner-Ince was essentially disciplined twice for Count 2, when she was suspended and reassigned. Such actions are against the concept of fundamental fairness, the basis of just cause, because she is being punished twice for the same conduct involving the coffee incident of 2011 (see Exhibit D). Also see In the Matter of Victor Onwuzuruike Merit System Board, decided 2006; I/M/O Jill Buglovsky, Agency Docket No. 265-9/12, final decision (December 21, 2012) and I/M/O Nikita Clarke-Huff, Agency Docket No. 290-9/15, final decision (November 16, 2015).

Although the Petitioner rightly points out that prior disciplinary actions can be considered when making a determination of punishment, this Arbitrator fully agrees. Notice that Count 1 and Count 3 were written reprimands that were utilized only by keeping them in her permanent file. However, Respondent Turner-Ince was suspended and reassigned, solely for the coffee incident of May 3, 2011. Thus, Counts 1 and 3 are not dismissed and are viable (see Linden Board of Education v. Linden Education Association John Mizichko, 202 NJ 268 at 267 (2010); also see I/M/O John Carlomagno, Agency Docket No. 180-8/13, final decision (December 20, 2013)).

## AWARD

This Motion-to-Dismiss is granted without prejudice due to violations of the statutory mandates, as noted. Moreover, Count 4 is dismissed based upon the breach of NJ.SA 18A: 6-7 (a). Lastly, Count 2 shall be dismissed with prejudice, as violative of industrial double jeopardy for the reasons stated herein. However, Count 1 and Count 3 are not dismissed but remain viable. Accordingly, Respondent Turner-Ince shall be reinstated as a teacher with full back pay and benefits.

## AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

**DATE OF AWARD: June 25, 2016**

**ARBITRATOR**

C:\Roslyn Turner-Ince (New Jersey Panel) June 25, 2016.docx

247-16

State of New Jersey

Department of Education

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| In the Matter of the Tenure Charges Against Daniyelle Lyles-Barnes Pleasantville Board of Education (PBOE) Atlantic County | ) ) ) ) ) ) | Agency Docket No. 89.3/16 June 29, 2016 |

Issue: Did the School District have just cause to terminate the Respondent, a non-teaching tenured employee, for fighting with a fellow employee during school hours?

| | |
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| Location of Hearing: | Pleasantville, New Jersey |
| Date of Hearing: | May 24, 2016 |
| Record Closed: | June 7, 2016 |
| Appearances: | Michael B. Berman, Esquire<br>For the Respondent |
| | Benjamin Brenner, Esquire<br>For the PBOE |

Lewis R. Amis
Arbitrator

## BACKGROUND

The Pleasantville School District approved tenure charges pursuant to N.J.S.A 18A:6-10 and 6-11 against the Respondent, Daniyelle Lyles-Barnes, a tenured support staff member in the curriculum and instruction office, on December 15, 2015. The formal charge against Barnes placed before the Commissioner of Education and dated December 23, 2015 was that she engaged in conduct unbecoming a staff member. Specifically, she was accused of using "crass and vulgar language toward another staff member" which confrontation devolved into a physical altercation with that staff member. The incident leading to the Respondents tenure charges and termination occurred on September 14, 2015, and is described as follows in the formal charge:
During the lunch break the Respondent was in her normally assigned area, the office of the vice principal, Dr. Bailey. The other actor, Havanna Berry, had been asked by another employee, who otherwise is not involved in this matter, to deliver a bottle of salad dressing to Bailey. Berry in making her delivery entered Bailey's office. Berry recently had been promoted to the position of Director of the C.A.R.E. program in the district and had some control over who was assigned to work in the program.[1] While Berry was in the office, Barnes asked why she was not on the C.A.R.E provider list. Berry responded that everyone knows she (Barnes) does not like children. Berry then returned to the C.A.R.E. office.

[1] The C.A.R.E. Program conducts educational enrichment programs after school and at a summer camp under the auspices of the No Child Left Behind Act of 2001.

Shortly thereafter, Barnes went to the C.A.R.E. office and confronted Berry about the remark she had made that Barnes did not like children. According to Barnes, Berry said, "I'm a bitch that say what I mean and mean what I say." Berry then accused Barnes of speaking negatively about her. Barnes denied the accusation, saying, "Bitch, I don't give a fuck about you." Berry said, "Who are you talking to?" Barnes replied, "I'm talking to you."

Berry then got up from her desk, walked around a nearby credenza and headed toward Barnes, who was standing before the office door. Berry slapped Barnes in the face, and the two started to wrestle, punching, pushing, and pulling hair. The two shortly were separated by security employees.

The Petitioner School District concludes its charge:

> Respondent's vulgar and crash(sic)language and her participation in a physical altercation interfered with the quality of the educational and professional environment of the school, the students' education, and created an unsafe working environment for other District employees, and thus is conduct unbecoming a staff member.
> WHEREFORE, Respondent should be terminated for unbecoming conduct.
>
> December 23, 2015. /s/Leonard Fitts PhD
> Superintendent

Barnes filed assault charges against Berry with the local police, and the school district filed similar charges against Barnes. Both later dropped those charges. The School District, however, filed tenure charges against both employees, seeking to terminate their employment.

According to Barnes, her conversation with Berry about getting a position in the C.A.R.E. program and her remark about not liking children began as an innocent joke some weeks earlier and that Berry had said that when she returned from vacation she

would discuss Barnes' being placed on the program. It was with the thought of clarifying this matter, Barnes stated, that she approached Berry on September 14 following their exchange in the curriculum and instruction office. Barnes characterizes Berry's behavior as becoming more and more confrontational. Essentially, she does not contest the description of events as set forth by the district.

It is noted that the events described here took place away from the direct observation of students and teaching staff. The C.A.R.E. office, however, is located near at least two or three active classrooms. No evidence was presented showing any immediate disruption or disturbance of classroom routines because of the altercation between Barnes and Berry. I may be presumed, however, that knowledge of the matter spread quickly through the district.

The School District contends that following N.J.S.A. 18A:6-10 and 18A:6-11, there is probable cause to credit the evidence in support of the tenure charges against the Respondent, showing that she engaged in conduct unbecoming an employee and neglected her duties. Further, the School District argues that the charges and supporting evidence herein are sufficient to warrant dismissal.

The Respondent contends that there is no creditable evidence that she engaged in conduct unbecoming an employee or that she was negligent in her duties. Rather, the Respondent states, she became embroiled in the altercation described here only to defend herself from attack by the other employee. For that reason, Respondent would have all charges dropped and all lost wages and benefits reimbursed.

## DISCUSSION AND FINDINGS

This is one of those termination cases that did not have to happen. The issue here involves only one of the participants in the altercation here at issue, but it is clear from her behavior that she became too deeply embroiled in the argument preceding the fight to allow her to escape significant responsibility for the incident on September 14, 2015.

It was reasonable for the Respondent to inquire about a position in the C.A.R.E program while Berry was in the curriculum and instruction office. When Berry apparently brushed off her question, it was still reasonable for her to go to the C.A.R.E. office looking for an explanation. Her opening remark there was confrontational, but not on its face sufficient to warrant Berry's response: "I'm a bitch that say what I mean and mean what I say." That clearly crosses the line of acceptable behavior. Instead of backing off, however, the Respondent responded in kind, using "fighting words", and the matter escalated to physical violence. The evidence is clear enough that Berry threw the first punch or slap, but the Respondent also became fully engaged. She had plenty of opportunity to back off, not retaliate, verbally or physically. She did not choose the peaceful course; therefore, she cannot be exonerated or relieved of responsibility for engaging in the fight with Berry.

It goes without saying that violence in any workplace need not be tolerated. This principle is especially relevant in an educational setting where a core value should be the use of reason as opposed to irrational force to resolve differences. The Respondent's argument that there were no repercussions from the altercation that affected the pedagogical and administrative stability of the district, is without merit. Even though there

were no student witnesses, the fight was a public event in a public setting, and it was highly publicized. The district had no choice but to respond firmly, as it did. The Respondent's dismissal, therefore, will be upheld.

AWARD

The Petitioner, Pleasantville Board of Education, had probable cause under N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11 to institute tenure charges against the Respondent, Daniyelle Lyle-Barnes. The charges against the Respondent warrant dismissal; therefore, her appeal is denied.

Lewis R. Amis, Arbitrator

June 29, 2016

249-16

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|---|---|---|
| EDGARD CHAVEZ, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner sought reinstatement of his salary and benefits as a former teacher in the Newark School District, retroactive to the 121st day after he was suspended without pay while tenure arbitration proceedings were ongoing, as required by the plain language of *N.J.S.A.* 18A:6-14. The school district asserted that the Appellate Division's remand of this matter was not a reversal of the original arbitration decision, and that when tenure charges have been sustained on the original hearing, the suspension may be continued unless and until that determination is reversed. The parties filed cross motions for summary decision. The petitioner herein had been removed from his tenured position subsequent to an arbitrator's decision in February 2013, which sustained tenure charges of inefficiency. Following appeal proceedings, the Appellate Division issued a decision entitled *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark,* 440 *N.J. Super* 501 (App. Div. May 19, 2015), which remanded the matter to the Commissioner with directions to provide certain guidance to arbitrators in tenure cases. The Commissioner reassigned the petitioner's case to Arbitrator Timothy Brown, who had issued the original decision sustaining the tenure charges in 2013. In March 2016, Arbitrator Brown issued a second decision, which considered the tenure charges once again, sustained them once again, and removed the petitioner from his tenured position.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; *N.J.S.A.* 18A:6-14 provides that if a tenure charge is sustained on the original hearing or on an appeal therefrom, the suspension may be continued unless the determination is reversed; the Appellate Division did not question the arbitrator's decision to sustain the tenure charge, and never reversed that decision within the meaning of *N.J.S.A.* 18A:6-14; in fact, the same arbitrator revisited the matter on remand and once again sustained the charges of inefficiency; as the Commissioner previously found in a companion case, 120-day cases that preceded the implementation of TEACHNJ are inapposite in that administrative law judge decisions before TEACHNJ were recommendations rather than final decisions – unlike the final and binding decisions of arbitrators pursuant to TEACHNJ. Accordingly, as there has never been a dismissal of the charges before or after the Appellate Division decision regarding the petitioner, he is not entitled to the restoration of his pay under *N.J.S.A.* 18A:6-14. The ALJ concluded that the Board is entitled to summary decision in its favor.

Upon review, the Commissioner concurred with the ALJ's determination – for the reasons stated in the Initial Decision – that the petitioner is not entitled to restoration of his pay under *N.J.S.A.* 18A:6-14; further, the Commissioner determined that petitioner's exceptions were without merit, as the arguments advanced therein were considered and fully addressed by the ALJ in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision, and the petition was dismissed.

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

July 11, 2016

OAL DKT. NO. EDU 14440-15
AGENCY DKT. NO. 206-8/15

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|---|---|---|
| EDGARD CHAVEZ, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Edgard Chavez, and the State-Operated School District of the City of Newark's (District) reply thereto.

This matter involves a request by the petitioner for full salary and benefits retroactive to the 121st day after he was suspended without pay[1] while tenure arbitration proceedings are ongoing. The stipulated facts and the procedural history were thoroughly outlined in the Initial Decision and will not be repeated here; however, a brief summary of the procedural history is required to provide the necessary context for the instant matter. On February 6, 2013, Arbitrator Timothy Brown issued a decision sustaining tenure charges filed against the petitioner and removing the petitioner from his tenured position with the District. The petitioner appealed the February 6, 2013 decision to the New Jersey Superior Court Chancery Division, who confirmed Arbitrator Brown's award. Thereafter, the petitioner filed an appeal with the Superior Court, Appellate Division. On May 19, 2015, the Appellate Division

[1] The petitioner was provided with back pay from the 121st day of his suspension through the date of Arbitrator Brown's first decision.

issued a decision remanding the matter to the Commissioner with directions to provide certain guidance to arbitrators in tenure cases. *Felicia Pugliese v. State-Operated School District of the City of Newark and Edgard Chavez v. State-Operated School District of the City of Newark*, 440 *N.J. Super* 501 (App. Div. May 19, 2015). After receipt of the Appellate Division's decision, the Commissioner reassigned the tenure charges against the petitioner to Arbitrator Brown for further proceedings. On March 17, 2016, Arbitrator Brown issued a decision again sustaining the tenure charges filed against the petitioner and removing the petitioner from his tenured position with the District.

The Administrative Law Judge (ALJ) found that the petitioner is not entitled to the restoration of his pay under *N.J.S.A.* 18A:6-14 for the period from the 121st day of his suspension until Arbitrator Brown issued his second decision on March 17, 2016. The ALJ further found that the Commissioner's decision in *Felicia Pugliese v. State-Operated School District of the City of Newark, Essex County*, Commissioner Decision No. 144-16, decided April 12, 2016, is dispositive of the issues in this matter and as a result the District is entitled to summary decision.

In his exceptions, the petitioner reiterates the arguments advanced below to contend that the ALJ incorrectly interpreted the decision of the Appellate Division remanding the case to the Commissioner. The petitioner maintains that the February 6, 2013 decision of Arbitrator Brown was reversed by the Appellate Division, thereby rendering it of no force or effect. The petitioner emphasizes that upon remanding the matter, the court directed the Commissioner to "inform the arbitrator what legal standards to utilize, after which the arbitrators must review the facts anew within this legal framework." Therefore – because there was not a determination on the charges by Arbitrator Brown until March 17, 2016 – pursuant to

*N.J.S.A.* 18A:6-14, the District was without discretion to deny the restoration of the petitioner's salary starting on the 121st day of his suspension through March 17, 2016. As a result, the petitioner submits that the ALJ committed reversible error and the Initial Decision should be rejected.

Upon review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petitioner is not entitled to the restoration of his pay under *N.J.S.A.* 18A:6-14 for the period from the 121st day of his suspension until Arbitrator Brown issued his second decision on March 17, 2016. The Commissioner is also not persuaded that the exceptions submitted by the petitioner dictate a different result, as the arguments advanced by the petitioner in his exceptions were considered and fully addressed by the ALJ in the Initial Decision.

It is undisputed that under *N.J.S.A.* 18A:6-14, tenured employees are entitled to receive full salary and benefits starting with the 121st day of their suspension until a determination on the tenure charges is made by an arbitrator. *N.J.S.A.* 18A:6-14 also provides that, "[s]hould the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension." In this case, there was a determination by Arbitrator Brown on February 6, 2013 sustaining the charges of inefficiency at the original hearing. Those charges were not dismissed on appeal, and therefore did not trigger the reinstatement of the petitioner with full pay as of the time of her suspension pursuant to *N.J.S.A.* 18A:6-14; rather, the matter was remanded as a part of the petitioner's appeal process. As was stated in *Pugliese, supra*:

> A tenured employee who is appealing from sustained charges may not fall back on the 120-day provision during the appeal process;

> instead, if the employee is successful in getting charges dismissed the employee is entitled to be reinstated with full pay as of the date of suspension. Moreover, the Appellate Division's reversal and remand of these proceedings did not re-trigger the 120-day rule because there is no mechanism for such contained within *N.J.S.A.* 18A:6-14.

As a result, the petitioner is not entitled to the restoration of his pay under *N.J.S.A.* 18A:6-14 for the period from the 121st day of his suspension until Arbitrator Brown issued his second decision on March 17, 2016. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/11/16
Date of Mailing: 7/11/16

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 14440-15
AGENCY DKT. NO. 206-8/15

**EDGARD CHAVEZ,**

Petitioner,

v.

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

Respondent.

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**Jason E. Sokolowski**, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

**Brenda C. Liss**, Esq., for respondent (Riker, Danzig, Scherer, Hyland ,Perretti, attorneys)

Record Closed: May 24, 2016 Decided: May 25, 2016

BEFORE **JESSE H. STRAUSS**, ALJ t/a:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Edgard Chavez, seeks the reinstatement of his salary and benefits as a former teacher with the Newark Schools (District) retroactively to the 121st day from the start of his suspension without pay while appeals from an adverse arbitrator's opinion and order are pending.

Chavez filed his Petition with the Commissioner on or about July 31, 2015, to which the District filed an Answer on September 14, 2015. The Bureau of Controversies and Appeals transmitted the matter to the Office of Administrative Law (OAL) on September 17, 2015, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, for determination as a contested case. On December 24, 2015, Chavez filed a Motion for Summary Decision with supporting papers. The District filed a Cross-Motion for Summary Decision and Opposition to Chavez's Motion on January 15, 2016. On January 29, 2016, Chavez filed a Reply Brief and Opposition to the District's Motion. The record was closed on May 24, 2016.

## FACTUAL DISCUSSION

The parties have stipulated to the following **FACTS** in support of their respective Cross-Motions for Summary Decision:

1. Chavez is employed as a teacher with the District.
2. Chavez acquired tenure in the District.
3. The District filed tenure charges against Chavez on July 23, 2012.
4. In its tenure charges, the District alleged that Chavez was inefficient in the performance of his duties. Chavez opposed the tenure charges.
5. The District certified tenure charges against Chavez to the Commissioner of Education on or about September 13, 2012.
6. As a result, Chavez was suspended without pay effective September 12, 2012, has been suspended without pay since then, and remains suspended without pay to date.

7. The Commissioner of Education transferred the charges to Arbitrator Timothy J. Brown (Arbitrator) for disposition under the Teacher Effectiveness and Accountability for the Children of New Jersey Act (TEACHNJ), N.J.S.A. 18A:6-117 et. seq.
8. The arbitration hearing was held on November 23, 2012, December 20, 2012, December 21, 2012, and January 18, 2013, and the Arbitrator rendered a decision on February 6, 2013, that upheld the tenure charges and terminated Chavez's tenured employment with the District.
9. After the Arbitrator rendered his decision, Chavez filed a summary action in the Superior Court, Chancery Division, under N.J.S.A. 2A:24-7 to 10, seeking to vacate the Arbitrator's Award. The District filed a Motion to Dismiss and for Confirmation of the Arbitrator's Award in the same court.
10. On September 16, 2013, the Chancery Division Judge, in an oral bench decision, and in a signed Order, confirmed the Arbitrator's Award and dismissed Chavez's Complaint.
11. Petitioner then filed a timely appeal of the Chancery Division decision with the Superior Court, Appellate Division.
12. The Superior Court, Appellate Division, issued a decision on May 19, 2015.
13. After receiving the Appellate Division's decision, on June 1, 2015, the Commissioner of Education re-assigned the matter to Arbitrator Brown for further proceedings.
14. On July 13, 2015, the District filed a Petition for Certification with the New Jersey Supreme Court, seeking to reverse the Appellate Division's decision, and in response, on July 29, 2015, Petitioner filed opposition to the Petition for Certification.
15. The District requested that the Arbitrator hold the matter in abeyance pending a decision on the District's Petition for Certification. Chavez opposed the District's request.
16. In response to the District's request that the Arbitrator hold the matter that had been reassigned to him in abeyance, the Arbitrator agreed to hold the matter in abeyance pending a determination by the Supreme Court on the District's Petition for Certification.

17. The District filed a Notice of Appeal with the Appellate Division on July 14, 2015, challenging the Commissioner of Education's action referring the matter to arbitration. That appeal is pending before the Appellate Division.
18. On or about August 4, 2015, Chavez filed this Petition of Appeal with the Commissioner of Education.
19. After an extension to respond was granted, the District filed and Answer on September 14, 2015, asserting defenses and seeking dismissal of the Petition.
20. On October 26, 2015, the District's Petition for Certification was denied by the New Jersey Supreme Court.

As an additional undisputed **FACT**, Arbitrator Brown heard the matter as reassigned to him by the Commissioner of Education and issued a Decision Upon Remand on March 17, 2016, wherein he again sustained Chavez's discharge. Also, counsel for Chavez has represented that Chavez was provided with back pay from the 121st day of his suspension through the date of Arbitrator Brown's first Decision dated February 13, 2013.

## ANALYSIS AND CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c), which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can

only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citations omitted).

I **CONCLUDE**, and the parties agree, that this matter is ripe for summary disposition. There are no material disputed facts which require a plenary hearing.

N.J.S.A. 18A:6-14, which governs this matter, provides in relevant part as follows:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.
>
> Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension.
>
> Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension.

> Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.
> (emphasis added)

Chavez argues that, even if the arbitrator has made his determination within 120 calendar days, salary should be restored while an appeal is in progress particularly where, as he contends, the Appellate Division has vacated the Arbitrator's Decision thereby rendering it of no force or effect. Such was not the case. The Appellate Division did not reverse the Arbitrator's Decision sustaining the charge against Chavez. Pugliese and Chavez v. State-Operated Sch. Dist. of the City of Newark, 440 N.J.Super 501 (App. Div. 2015). The Appellate Division did not question the Arbitrator's Decision to sustain the charge or the Chancery Division's confirmation of that Decision. Rather, the Appellate Division focused on the Commissioner's action referring the matter to arbitration, and it remanded the matter in order for the Commissioner to provide additional guidance to the arbitrators. Again, the Appellate Division never reversed the Arbitrator's Decision. In fact, upon remand, the Commissioner returned the matter to Arbitrator Brown with the guidance required by the Appellate Division; Arbitrator Brown revisited the matter; and he issued a Decision Upon Remand once again sustaining the charge against Chavez. Although the Appellate Division decision concludes by saying "reversed and remanded [to the Commissioner rather than the Chancery Division]," the Decision cannot reasonably be characterized as a reversal within the meaning of N.J.S.A. 18A:6-14.

A companion case to this one involving back pay after 120 days that was similarly remanded to the Commissioner by the Appellate Division with the same directive was decided by the Commissioner on April 12, 2016, while the parties were awaiting a Decision on Remand from the original arbitrator. Pugliese v. Newark School District, EDU 14409-15, Final Decision, (April 12, 2016) http://njlaw.rutgers.edu/collections/oal/. The Commissioner focused on the last rather than the first portion of N.J.S.A. 18A:6-14.

> "In this case, there was a determination by [the arbitrator] sustaining the charges of inefficiency at the original hearing. Those charges have not been dismissed on appeal thereby triggering the reinstatement of the petitioner with full pay as of the time of her suspension pursuant to N.J.S.A. 18A:6-14; rather, the matter was remanded as part of the petitioner's appeal process." A tenured employee who is appealing from sustained charges may not fall back on the 120-day provision during the appeal process; instead, if the employee is successful in getting charges dismissed the employee is entitled to be reinstated with full pay as of the date of suspension. Moreover, the Appellate Division's reversal and remand of these proceedings did not re-trigger the 120-day rule because there is no mechanism for such contained within N.J.S.A. 18A:6-14. Therefore, the remedy available to the petitioner at this juncture is reinstatement and back pay if she is ultimately successful in having tenure charges dismissed.
>
> Pugliese v. Newark School District, supra at p. 5.

This procedural history is no different than that of Chavez with the exception that Arbitrator Brown has once again sustained the charge against Chavez. As found by the Commissioner, 120-day cases that preceded the implementation of TEACHNJ are inapposite in that administrative law judge decisions before TEACHNJ were recommendations rather than final decisions unlike the final and binding decisions of arbitrators pursuant to TEACHNJ.

As there has never been a dismissal of the charge before or after the Appellate Division Decision regarding Chavez, he is not entitled to the restoration of his pay under N.J.S.A. 18A:6-14. The Commissioner's Final Decision in Pugliese is dispositive of the issues in this matter. Accordingly, I **CONCLUDE** that the District, rather than Chavez, is entitled to Summary Decision in its favor.

## ORDER

It is hereby **ORDERED** that the District's Motion for Summary Decision be **GRANTED** and the petition of Chavez be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

May 25, 2016
DATE

**JESSE H. STRAUSS**, ALJ t/a

Date Received at Agency:

Date Mailed to Parties: MAY 26 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

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250-16

In the Matter of the Tenure Hearing of Carrie Osborne, State Operated School District of the City of Paterson, Passaic County, Agency Dkt. No. 288-9/15

# DECISION AND AWARD

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:
Brenda C. Liss, Esq.
Riker Danzig Scherer Hyland & Perretti

For Respondent Osborne:
Samuel Weinstein, Esq.
Oxfeld Cohen

The State-Operated School District of the City of Paterson ["District" or "Petitioner"] certified tenure charges of inefficiency against Respondent Curtis Osborne pursuant to *N.J.S.A. 18A:6-11* and *N.J.S.A. 18A:6-17.3*. The Respondent filed an Answer opposing the charges filed against her.

On October 26, 2015, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that the matter pertaining to Respondent Osborne was referred to me pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26* and *P.L. 2015, c. 1*.

> Please be advised that, following receipt of respondent's answer on October 16, 2015, the above-captioned tenure charges have been reviewed pursuant to *N.J.S.A. 18A:6-17.3c*. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to *N.J.S.A. 18A:6-17.2*, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator, including, but not limited to, whether *N.J.S.A. 18A:6-17.2* and *6-17.3* now provide the exclusive mechanism for bringing inefficiency charges. The arbitrator shall review those charges brought pursuant to *N.J.S.A. 18A:6-16* – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

With respect to Respondent Osborne, a settlement conference was conducted on November 5, 2015 at the Law Offices of Oxfeld Cohen in Newark, New Jersey. At that time the parties brought to my attention that there were global issues common to the cases of three (3) separate Respondents (Osborne, Long and Schaefer) that needed to be addressed. The Respondents' position is that "the manner in which Paterson Public Schools ("PPS") implemented its teacher evaluation system during the 2014-2015 school year violated New Jersey State evaluation statutes and regulations." (Respondents' brief, p. 1). More specifically:

> Respondents assert that PPS' actions in implementing Student Growth Objectives ("SGO") PPS' non-disclosure of key evaluation grading rubric information for its teachers' observations and evaluations, and PPS' failure to implement and enforce uniform and objective observation scoring rules all violated State statutes and regulations, thus bringing the integrity of all of PPS' 2014-2015 school year teacher evaluations into doubt. *Id.* at 2 (footnote omitted).

The parties mutually requested that I conduct a single hearing on the global issues in accordance with the following tentative schedule:

- Respondent will serve witness certification(s) in support of argument of defects in the District-wide implementation of its performance evaluation system and procedures by Monday, November 16th;
- Petitioner will serve witness certification(s) in support of the Paterson Public Schools' District-wide implementation of its

performance evaluation system and procedures by Monday, November 23rd;

- A hearing in the Osborne case will occur before Arbitrator Gifford on Wednesday, December 2nd. This hearing will be limited to cross-examination (and rebuttal testimony) of the witnesses;

- The parties will file briefs regarding this issue only, due one week after receipt of expedited transcripts;

- Arbitrator Gifford will issue a decision regarding District-wide implementation of its performance evaluation system and procedures by January 13, 2016. (Ex. J-1, p. 1).

The parties and the Arbitrators who were addressing the charges against the other Respondents (Long and Schaefer) agreed to rely upon my interim decision for the District-wide implementation of its performance evaluation system and procedures, and for each case to then sequentially address the remaining issues.[2] (Ex. J-1, p. 2).[3]

The Respondents submitted certifications from Mary Chowhan – Treasurer of Paterson Education Association ("PEA") Executive of PEA Evaluation Committee, and Math Teacher; and Sasha Wolf – NJEA Field Representative. The District submitted a certification from Sandra Diodonet – Acting Associate Chief Academic Officer. The parties timely exchanged their witness certifications. (Exs. R-1 (Chowhan) R-2 (Wolf), SD-1 & SD-2 (Diodonet)). Then,

[2] The parties did not object to my request for an additional day to render the decision.

[3] The parties notified Director Duncan of the agreed upon tentative schedule. Director Duncan granted an extension of time for each Arbitrator to issue an Award.

two (2) days of hearing took place on December 2 and 8, 2015 in Paterson, New Jersey. A stenographic recording of the proceedings was taken in accordance with the tentative schedule above. Sworn testimony was received Chowhan, Wolf and Diedonet. The parties submitted post-hearing briefs on December 21, 2015. The record was closed upon receipt of the parties' briefs.

On January 14, 2016 I issued an Interim Decision that included findings of fact and addressed the global issues raised by the Respondent. After careful consideration I concluded that there was insufficient evidence in the record at that time to conclude that the District failed to satisfy the legal requirements of *N.J.S.A.* 18A:6-10, and, therefore the arbitration proceedings for each individual Respondent would move forward. The interim decision is posted on the New Jersey Department of Education's website at http://www.state.nj.us/education/legal/tenching/2016/.

On April 3, 2016 Arbitrator Joel M. Weisblatt issued his Decision and Award (#168-16) with respect to Respondent Long. On April 30, 2016, Arbitrator Jeannette F. Drucker, Esq. issued her Decision and Award (#168-16) with respect to Respondent Schaefer. In each case, the Arbitrator sustained the charge of "inefficiency" and upheld the Respondent's dismissal after concluding that the District met its burden of proving that the Respondent received "partially effective" annual summative evaluations in 2013-2014 and 2014-2015 and that

The District properly conducted the evaluations under the applicable laws and regulations. The decisions are posted on the New Jersey Department of Education's website at http://www.state.nj.us/education/legal/tenure/2016/.

With respect to Respondent Osborne, hearings were held on January 28, 2016, February 4, 2016, February 11, 2016, March 15, 2016, April 11, 2016, and April 15, 2016. A stenographic recording of the proceedings was taken. Testimony was received from Respondent Osborne, Principal Boris Simon, Vice-Principal Charla Holder, Kimberly Riedel – Supervisor of Literacy, and Principal Courtney Grover. Time extensions to hear and decide this matter were timely requested and granted.

## RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf or in any other educational institution conducted under the supervision of the commissioner

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing

held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

N.J.S.A. 18A:6-17.2. **Considerations for arbitrator in rendering decision.**

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

N.J.S.A. 18A:6-17.3. **Evaluation process, determination of charges.**

25. a. Notwithstanding the provisions of N.J.S. 18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provision of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

## TENURE CHARGE

The District raised the following charges and specifications against the Respondent:

### Tenure Charge: Inefficiency

1. Respondent has been rated Partially Effective in two consecutive annual summative evaluations, as follows:

   a. Respondent was rated Partially Effective in her 2013-2014 annual summative evaluation. This rating was based on a teacher practice score of 2.00 and a student growth objective score of 1.80 for an overall score of 1.90.

b. Respondent was rated Partially Effective in her 2014-2015 annual summative evaluation. This rating was based on a teacher practice score of 2.00 and a student growth objective score of 3.60 for an overall score of 0.73 for an overall score of 2.53.

2. Respondent has demonstrated an inability to effective perform the duties of a teacher.

3. Respondent has failed to effectively prepare for instruction.

4. Respondent has failed to effectively use data to inform instruction.

5. Respondent has failed to effectively deliver quality instruction to her students.

6. Respondent has failed to effectively intervene to meet the diverse needs of her students.

7. Respondent has failed to effectively foster a safe, effective, respectful and collaborative classroom environment.

8. Respondent has failed to effectively exhibit leadership.

The parties presented proposed findings of fact in their post-hearing briefs. Having reviewed the entire record, I have adopted the proposed findings as modified below.

1. Respondent Carrie Osborne has been employed by the District as a teacher at School 26 since September 2001. (T3:362). Respondent earned tenure rights on or about the first day of the 2004-2005 school year. (T3:363). From 2012 through the filing of the tenure charges Respondent taught first grade at School 26. (T3:364).

2. To comply with the mandates of *TEACHNJ, N.J.S.A. 18A:6-123(c)*, the School District developed, and the State District Superintendent adopted, a teacher evaluation rubric to be followed beginning in the 2013-2014 school year. (*Id.* at ¶4). The New Jersey Department of Education ("NJDOE") approved the School District's teacher evaluation rubric by letters dated September 7, 2012 and October 4, 2012. (Ex. SD-1(A)). NJDOE notified the District that "[i]f you release a new version [of the Teaching Practice Evaluation Instrument] or if a district employing your instrument makes substantial modifications to the approved version, this information must be submitted through the next review cycle for potential inclusion on the approved list." (*Id.*).

3. In 2013, the District held staff development programming regarding *TEACHNJ* and *AchieveNJ*. (Ex. SD-2, PPS SD-103). The staff was provided

with an opportunity to submit questions to the District. On June 24, 2013 Deputy Superintendent Eileen Shafer provided staff members with a copy of the questions and answers. (Ex. SD-2 PPS-SD-104-152). The District later provided another opportunity for questions. The answers were provided in a September update. (Ex. SD-2 PPS-SD-104-153-157).

4. Pursuant to the District's teacher evaluation system, teachers are evaluated on either two or three components: Teacher Practice, Student Growth Objectives ("SGO" or "SGOs"), and Student Growth Percentages ("SGP"). (*Wolf Certification* Ex. 9-2 ¶ 13). For most teachers, the Teacher Practice Score ("TPS") and the SGO are the two components used to determine the summative ratings. ("2365" Ex. SD-2, 2014-2015 Guidebook PPS-SD-256). Teachers assigned to teach a non-tested area (subjects other than grades 4-8 math and English Language Arts) receive annual summative evaluation ratings comprised of two parts: (i) a teacher practice score based on their performance on the evaluation instrument; and (ii) an SGO score based on the academic growth shown by their students over the course of the school year. (Ex. SD-1 ¶ 10).

5. Teacher Practice Scores are calculated through the use of an evaluation rubric by measuring teaching performance according to seven components: (1) Preparation for Instruction, (2) Use of Data to Inform Instruction, (3) Delivers Quality Instruction, (4) Interventions to Meet Diverse Needs, (5) Classroom Environment, (6) Leadership, and (7) Professionalism.

(Ex. SD-1, PPS-SD-11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-11; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-257.) Each standard is comprised of several indicators:

Standard 1: Preparation for Instruction

- Indicator 1a. Establish a culture of high expectations for learning and achievement.
- Indicator 1b. Use district-adopted curriculum and content knowledge to design coherent lessons.
- Indicator 1c. Post aligned lesson objectives and plan for demonstrations of learning.

Standard 2: Use of Data to Inform Instruction

- Indicator 2a. Focus on improving instruction using data.
- Indicator 2b. Use a variety of assessment methods when designing classroom assessments.
- Indicator 2c. Involve students in assessing their own learning.

Standard 3: Delivers Quality Instruction

- Indicator 3a. Instruct bell to bell.
- Indicator 3b. Use a variety of instructional strategies to focus instruction.
- Indicator 3c. Engages students in learning.
- Indicator 3d. Continually checks for understanding.
- Indicator 3e. Deliver rigorous and relevant content.
- Indicator 3f. Integrate 21st Century Skills in instruction.
- Indicator 3g. Provides feedback about student proficiency.

Standard 4: Interventions to Meet Diverse Needs

- Indicator 4a. Differentiate instruction based on student needs and background.
- Indicator 4b. Implements interventions with fidelity and adjusts interventions based on results.
- Indicator 4c. Adapt and modify instruction for the unique needs of learners.

Standard 5: Classroom Environment

- Indicator 5a. Contribute to a safe and orderly learning environment.
- Indicator 5b. Use effective classroom management procedures.
- Indicator 5c. Effectively manage student behavior.
- Indicator 5d. Foster collaboration and self-regulation in students.
- Indicator 5e. Promote positive and respectful rapport.

Standard 6: Leadership

- Indicator 6a. Understand their role and responsibility in implementing the District and/or Building Action Plan.
- Indicator 6b. Promote the concept of Professional Learning Communities/ Professional Forums through collaboration and purposeful involvement.
- Indicator 6c. Continue professional growth.

Standard 7: Professionalism

- Indicator 7a. Adhere to federal laws, state statutes and regulations pertaining to education, Board of Education (BOE) policies and school rules.
- Indicator 7b. Demonstrate professionalism.
- Indicator 7c. Effectively communicates and solves problems.

(Ex. SD-1, ¶11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-10 through 38; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-169, 257).

6. For each sub-indicator, there are three (3) sub-indicators. (Ex. SD-2, 2013-2014 Guidebook, PPS-SD-10 through 38; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-196 through 222).

7. In order to evaluate teacher performance observed in classroom observations, the administrators (i.e. principal) assigned ratings for each of the indicators being measured in that observation. (Ex. SD-1, ¶12; Ex. SD-2,

2013-2014 Guidebook, PPS-SD-64). The ratings ranged from "exemplary" (or highly effective) to "unsatisfactory" (or ineffective). Evaluation categories were as follows:

> Unsatisfactory (Ineffective, 1 point)
> Progressing I (Partially Effective, 2 points)
> Progressing II (Partially Effective, 3 points)
> Proficient I (Effective, 4 points)
> Proficient II (Effective, 5 points)
> Proficient III (Highly Effective, 6 points)
> "Exemplary" (Highly Effective, 7 points)

(Ex. SD-1, ¶12; Ex. SD-1(H), p. 11; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-64 & 66).

3. The numerical ratings for the seven performance standards (based on the rating of each component indicator) were then weighted with one to three points based on the following weights:

> Standard 1: Preparation for Instruction (2)
> Standard 2: Use of Data to Inform Instruction (2)
> Standard 3: Delivers Quality Instruction (3)
> Standard 4: Interventions to Meet Diverse Needs (3)
> Standard 5: Classroom Environment (2)
> Standard 6: Leadership (1)
> Standard 7: Professionalism (1)

(Ex. SD-1, ¶13; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-51 & 52; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-167). Performance Standard 6 (Leadership) was initially weighted once, but later changed to a weight of two (2) in the Spring of 2014:

> Standard 1: Preparation for Instruction (2)
> Standard 2: Use of Data to Inform Instruction (2)
> Standard 3: Delivers Quality Instruction (3)

Standard 4: Interventions to Meet Diverse Needs (3)
Standard 5: Classroom Environment (2)
Standard 6: Leadership (2)
Standard 7: Professionalism (1)

(Ex. SD-1 ¶13; T2:321; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-255 through 257).

9. With respect to the rubric, the decision between a Proficient 3 or Proficient 2 or other scores is left to the principal's/evaluator's discretion. (T2:277).

10. In order to calculate the annual Teacher Practice Score, the teacher's ratings in each observation were averaged, and the total point values in each of the seven standards were weighted as outlined above. (Ex. SD-1, ¶14; Ex. SD-1P4)). That final sum was then applied to the following chart:

| PPS Weighted Sum Intervals | Score |
|---|---|
| 14-27 | 1 |
| 28-55 | 2 |
| 56-83 | 3 |
| 84-105 | 4 |

(Ex. SD-1 ¶¶ 14 & 23.)

The same point values and weights were applied to calculate the summative ratings in the 2013-2014 and 2014-2015 school years. (*Id.* at ¶¶ 26 & 27). The ratings were inputted by the administrators into a computer software program ("Media-X") that was approved by the Commissioner of Education. (T7:1102-1103, 1160). The software program performed the necessary calculations and then generated an annual summative report. (T7:1102-1103).

11. In the Spring of 2014, teachers were given a PowerPoint presentation concerning the implementation of the teacher observation and evaluation system, specifically with respect to the weighting of the teacher practice standards. (Ex. SD-1(H)). The presentation explained how each of the seven (7) standards were weighed, the scoring of the summative rating, and when a particular standard was rated in more than one observation that the scores for the standard were added and averaged. (Ex. SD-1(H), p. 11).

12. In addition to evaluating their practice, teachers are evaluated on the extent to which they meet their SGOs each school year. *N.J.A.C.* 6A:10-1.2 defines "Student growth objective" as "an academic goal that teachers and evaluators set for groups of students." "SGOs are long-term academic goals for groups of students set by teachers in consultation with their supervisors." (See https://www.nj.gov/education/AchieveNJ/teacher/objectives.shtml). SGOs are required to be set by each teacher in collaboration with the principal or supervisor, with the principal having the authority to make the final determination. (*N.J.A.C.* 6A:10-4(c)3; Ex. SD-1 ¶17; T2:219-220; 267-268.) The teacher determines annual academic goals for a class or group of students and tracks the academic progress of that class or group toward the assigned goals during the school year. (Ex. SD-1, ¶17.) These goals are aligned with Common Core Standards, Core Curriculum

Content Standards and school goals, and are based on student learning data from pre-assessments and post-assessments. (*Id.*). Student progress on an identified SGO is determined by an assessment of the increase in learning between two points in time, as indicated by: (i) acquisition of knowledge or skill from a particular starting point or readiness level; or (ii) development of a portfolio indicating a change in skill or knowledge over a period of time; and (iii) difference in learning on pre-assessments and post-assessments. (*Id.* at ¶ 18). Additional information concerning SGOs can be found on the New Jersey Department of Education's website in the *AchieveNJ* Home section.

13. On October 1, 2013 Assistant Superintendents Maria Santa and Aubrey Johnson issued a memorandum to all principals regarding the SGO Professional Development scheduled for October 4, 2013. (Ex. SD-113). The memorandum included an agenda for the October 4th meeting. Attached thereto were comprehensive materials related to the SGO PowerPoint presentation including, but not limited to, an SGO planning calendar, information addressing SGO specific best practices, SGO samples, and other SGO information from the New Jersey Department of Education. (*Id.*) The memorandum indicated that the purpose of the half day of development was "for teachers to actually write SGOs". (*Id.*). The training session was then held.

14. The Annual Summary Conference Form is the document that reports a teacher's annual summative evaluation rating. The form includes both the Teacher Practice Score and SGO score. In the 2013-2014 school year, teacher practice scores counted for 85% of a teacher's overall rating and SGO scores counted for the remaining 15%. In the 2014-2015 school year, teacher practice scores counted for 80% of a teacher's overall rating and SGO scores counted for the remaining 20%.

15. On the 2013-2014 Annual Summary Conference Form, the Teacher Practice Score and the SGO are listed in their raw data form, and the form indicates the weight given to each piece of data in the calculation of the final rating: 85% for the Teacher Practice Score, and 15% for the SGO. (Ex. SD-1, ¶21). Those scores were then weighted and the annual summative score determined. (*Id.*). The form also includes a summative rating scale in order to show teachers how this numerical summative rating ranks them as highly effective, effective, partially effective or ineffective. (*Id.*).

16. The data to establish the Teacher Practice Score is summarized in the Teacher Practice Summary Report that accompanies the Annual Summary Conference Form which shows the teacher's average scores in each of the seven performance standards from observations throughout the year. (Ex. SD-1, ¶22). This report also shows the weight given to each performance standard and includes a weighted sum interval chart. (See SD-2, PPS SD-256).

17. In the 2014-2015 school year, the District continued to use the evaluation rubric that had been approved previously by the Commissioner of Education. (Ex. SD-1, ¶26). The framework for evaluation was outlined again for teachers in the 2014-2015 Guidebook. (*Id.*; Ex. SD-2, 2014-2015 Guidebook) The point values assigned to each indicator were the same as those that had been used in the 2013-2014 school year, as the 2013-2014 Guidebook had set forth. (Ex. SD-1, ¶27). The same calculation method was used in both 2013-2014 and 2014-2015. (Ex. SD-1, ¶15; T2:321).

18. As in the 2013-2014 school year, the 2014-2015 Annual Summary Conference Form contained a Teacher Practice Score and SGO score. (Ex. SD-1, ¶29). Also as in the 2013-2014 school year, the TPS was determined based on the ratings assigned for each performance indicator in classroom observations throughout the school year, and the weights assigned to each performance standard, while the SGO score was determined based on the calculations in the teacher's SGO goal-setting process. (*Id.*). On the 2014-2015 Annual Summary Conference Form, the Teacher Practice Score and SGO were listed as *weighted* data, rather than in their raw data form as in 2013-2014. (*Id.* at ¶30). The form also indicated the 60% weight given to teaching performance and 20% to student growth in the calculation of the final rating. (*Id.*). The weighted Teacher Practice and the SGO scores were added together to determine the summative evaluation score. (*Id.*).

19. In addition to formal classroom observations that were rated, the rubric requires administrators to observe teacher performance informally by doing informal "walkthroughs". (*Id.* at ¶34). A walkthrough identifies and informs teacher practice in the areas of classroom environment, instruction and student engagement. (*Id.*). Trained administrators debrief with the teacher and provide feedback and recommendations to improve teaching and learning. (*Id.*; SD-2, 2013-2014 Guidebook, PPS-SD-44-47). A walkthrough is a non-evaluative classroom visit of no more than ten (10) minutes. (Ex. SD-1, ¶34; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-163).

20. Toward the end of the 2013-2014 school year, principals, supervisors and teachers in the Paterson Public Schools were directed to begin drafting Corrective Action Plans ("CAPs") for those teachers who did not earn a summative rating of "effective" or "highly effective." (Ex. SD-1, ¶35). A CAP requires "[t]he teaching staff member to work with their supervisor to create a plan of professional development that is designed to correct the [] identified in their evaluation. The CAP includes timelines for corrective action and clearly delineates responsibilities of the teaching staff member versus the district in implementing the plan." http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuide.pdf. CAPs were to be drafted by principals in collaboration with teachers and supervisors, meaning that the teachers were to be provided with an

opportunity to provide input into the content of their individual CAPs. (Ex. SD-1, ¶25).

21. The 2014-2015 Guidebook originally required that eight walkthroughs be conducted each year for teachers on a CAP, an expectation which was reduced later in the 2014-2015 school year. (Ex. SD-1, ¶35; Ex. SD-2, 2014-2015 Guidebook, PPS-SD-183).

22. As reflected by the guidebooks, training and guidance with respect to implementation of the new evaluation system was initially provided to teaching staff members, including school administrators and teachers, in the 2012-2013 school year and continued during the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶¶5, 8, 28). As a reference, the District produced manuals describing each aspect of the evaluation framework, which were distributed to all teaching staff in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶9; Ex. SD-2, 2013-2014 Guidebook and 2014-2015 Guidebook). The District also distributed "District Updates" to further inform teachers on the new evaluation system. (Ex. SD-1, ¶7; Ex. SD-1(D); SD-2, 2013-2014 Guidebook, PPS-SD-87-100).

23. Teachers received training from the District's Office of Accountability during the 2012-2013 school year. (Ex. SD-1, ¶6; Ex. SD-1(B) & (C)). In the trainings conducted in May and June 2013, teachers were informed that the new framework would be the basis on which their performance would be evaluated beginning in the 2013-2014 school year. (Ex. SD-1(B) & (C)).

During these sessions, teachers were informed that at the end of the 2013-2014 school year, and in following years, each teacher would receive an annual summative rating of "highly effective," "effective," "partially effective," or "ineffective" based on a points rating system; and that if any teacher earned a summative rating of "ineffective" or "partially effective" in both the 2013-2014 and 2014-2015 school years, the District would be required to file a tenure charge of inefficiency after the 2014-2015 school year. (*Id.*).

24. Additional training sessions were conducted over several days in preparation for rollout of the system in the 2013-2014 school year. (Ex. SD-1, ¶5). At multiple training sessions, principals were instructed on how to train teachers on the purpose and implementation of the new evaluation framework. (*Id.*; T2:243-245). Principals were directed to train their teachers on the evaluation system. (*Id.* at ¶6; T2:243-245). Training was also conducted throughout the 2013-2014 school year for teachers and school administrators. (Ex. SD-1 ¶18; Ex. SD-1 (E), (F), (G), (H) & (I)).

25. The point values and the weights given to the performance standards were communicated to teachers in the 2012-2013 school year, prior to implementation of the evaluation system, and again in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶¶15, 27; Ex. SD-2, 2013-2014 Guidebook, PPS-SD-51-52 and 2014-2015 Guidebook, PPS-SD-167).

26. As to training on SGOs in particular, information about SGOs was delivered to all District principals on October 1, 2013. On October 4, 2013, a half day was devoted to district-wide professional development for the purpose of teachers drafting their SGOs with principals and supervisors. (Ex. SD-1, ¶19; Ex. SD-1(J)). The materials used on that training day are attached to Diodonet's Certification, Ex. SD-1(F). (T2:315-316). Additionally, information about SGOs was distributed to teachers in the 2013-2014 and 2014-2015 school years. (Ex. SD-1, ¶16; SD-2 2013-2014 Guidebook, PPS-SD-70 through 85, 2014-2015 Guidebook, PPS-SD-171 through 175).

27. The calculation of the Teacher Practice Score was explained in a March 2014 training provided by the District, which is a Junket PowerPoint slides with an audio explanation. (Ex. SD-1(H), Slides 10, 11, and 12; T2:326-327). In the 2014-2015 school year, principals and central office administrators continued to train teachers on the evaluation framework. (Ex. SD-1, ¶28; Ex. SD-1(K), (L) & (M)). The District also provided training to principals and that principals trained their teachers in March 2014 on the evaluation framework. (T2:326).

28. During the 2013-2014 school year, the District provided its teachers and the PEA with written explanations of how the District would calculate the TPS for annual summative evaluations. (Ex. R-2, ¶15). For instance, the

2013-2014 guide included a chart for calculating the raw scores for each of the seven Standards considered for the TPS. (Ex. SD-2, PPS-SD-64).

29. In both the 2013-2014 and 2014-2015 school years, Respondent was assigned to teach first grade at School 26 in the Paterson Public Schools. Her annual summative evaluation was conducted in both school years by Principal Courtney Glover. In both years, the District's teacher evaluation system provided for an annual summative evaluation rating for each teacher, consisting of a TPS and an SGO score. In 2013-2014, the teacher practice portion of Respondent's evaluation was based on observations conducted by Glover and Boris Simon who was an Assistant Principal at that time. In 2014-2015, the teacher practice portion was based on observations conducted by Glover, Assistant Principal Chaitu Holder and Kimberley Rieder - Supervisor of Literacy.

30. In addition to the formal observations conducted in 2013-2014 and 2014-2015, informal walkthrough observations of the Respondent occurred throughout each school year. Some of walkthroughs were documented, and others were not.

31. Glover, Simon, Holder and Rieder received all of the training for administrators outlined and described in paragraphs 2-28 above. They testified to their familiarity with and use of the rubric. They described their frequent reference to the rubric and their reliance on it in rating teacher performance. They provided similar explanations of how ratings within the

categories of "Progressing" or "Proficient" would be given, i.e., the differences between "Progressing 1" and "Progressing 2" and between "Proficient 1" and "Progressing 2". As testified, the differences in the ratings were a matter of judgment, degree and consistency. Their ratings of the Respondent were based on their professional judgment and application of the rubric, reflecting evidence obtained in the observations and/or presented by Respondent during post-observation conferences. They also described how co-observations required "calibration" to ensure consistency in observation ratings.

32. Respondent received all of the training for teachers outlined and described in paragraphs 2-28 above.

33. Respondent has been a member of the Paterson Education Association. She has served as an Association building representative since around the 2004-2005 school year. (T3:365). The Respondent claims that her union activity caused members of the District's administration to have "negative feelings" towards her. (T3:367). More specifically, she recalled during the 2011-2012 school year that Principal David Cozart stated to her in the presence of students and Holder, "You're a union rep. You should know better." (T3:367). The Respondent felt berated. She testified that Holder never disapproved, disavowed or apologized to the Respondent for Cozart's actions. (T3:370). Holder and Glover both testified that they were not aware of the Respondent's union activities. (T5:760; T7:1048).

34. Respondent received a summative evaluation rating of "partially effective" for the 2013-2014 school year. (Ex. SD-3(6)). This rating was based on the weighted average scores in seven standards (each with several indicators) and a measure of the SGOs. The scores were reflective of three (3) formal observations conducted during the 2013-2014 school year on October 18, 2013, January 27, 2014, and March 19, 2014. (Exs. SD-3(3); SD-3(3A); SD-3(4); SD-3(5)). Glover conducted the first two (2) observations, one (1) of which she was accompanied by Simon as a co-observer. (T.3:683). Simon conducted the third observation. Post-observation conferences occurred on October 23, 2013 (first observation), January 31, 2014 (second observation), and April 1, 2014 (third observation). Glover and Simon testified that during the post-observation conferences they afforded the Respondent with an opportunity to rebut the ratings and that her input, if any, was considered. The Respondent did not submit a written rebuttal to any of the 2013-2014 evaluations. (T.3:1275).

35. Respondent's rating of "partially effective" for 2013-2014 was based on a teacher practice score of 2.00, given 85% weight, and an SGO score of 1.30, given 15% weight, for an overall score of 1.90. The score of 1.90 was within the "partially effective" range, which was from 1.85 to 2.64.

36. Respondent's 2013-2014 IPS of 2.00 reflects the calculation required by the District's teacher evaluation process: the total of the weighted

average scores received by Respondent on seven teacher practice standards. Her total score was 32.67, within the PPS weighted sum interval of 2 (on a scale of 1 to 4), which resulted in the IPS of 2.00. (Exs. SD-2; SD-3(6)).

35. Respondent's 2013-2014 SGO score of 1.30 reflects the calculation required by the District's teacher evaluation process for teachers assigned to grades and subjects in which no standardized tests were given: the average of two SGOs, based on objectives chosen by the teacher, either in math or language arts or both, based on a data set (whole group or [illegible] chosen by the teacher. (Ex. SD-2; T4:529-536, 547, 561-565).

36. Respondent testified that there were issues with her SGO for 2013-2014 that negatively impacted her summative evaluation ratings. The STAR assessment is a test given to students three (3) times per year in order to collect data and formulate the teachers' SGOs. (T3:371). The Respondent claims that the timed STAR assessment testing was flawed because she was directed to switch from English Language Arts ("ELA") testing to Math after the students had submitted completion codes stating the test. The Respondent indicated that her "lower achieving students" were unable to complete the testing and, therefore, were excluded from her baseline scores. As a result, her SGO goals were set artificially high. (T3:374-377). The Respondent claims that she was deprived of an opportunity to establish SGOs of her choosing (i.e. two (2) in Math or ELA.

or one (1) in each). The Respondent also points out that she did not have the same complement of students from the beginning to the end of the school year given that students moved in and out of the district. (T3:382-387). Holder and Glover testified that teachers were aware that they could request a re-test of their students. (T5:784-786, T7:1068-1069). The Respondent claimed that she was not initially aware of this option. (T4:540). Holder testified that the State's system has accounted for transiency. (T5:784). Glover testified that the Respondent's classroom did not experience higher transiency than others in the district. (T7:1049-1050). The Respondent eventually had her class retake the ELA assessment, but the test results were not obtained in time to use in the development of her SGO. (T3:375-376).

39. Respondent's summative evaluation rating of "partially effective," would not have changed even if she received the highest SGO score in the 2013-2014 school year. Her summative evaluation score would have been 2.30 calculated as follows:

Teacher Practice 1.7 [2.00 x 85%] + SGO .60 [4.0 x 15%] = 2.30.

40. Spencer testified that he mistakenly provided the Respondent with a higher score for Standard 5, Classroom Environment, as he inputted a rating of "Proficient 2" rather than "Progressing 2". (See SD-3(5), T5:739-740).

41. The Respondent testified that during 2013-2014 she had an unusually high number of student disciplinary problems in her classroom and this negatively impacted her overall rating for Classroom Environment. (T3:391-394). Simon testified that the disciplinary issues that the Respondent faced in her classroom were no different from those encountered by other teachers. (T4:599).

42. The Respondent was placed on a Corrective Action Plan ["CAP"] because of her "partially effective" rating for 2013-2014. Glover was the Respondent's CAP supervisor responsible for monitoring the Respondent's progress. (Ex. SD-3(7); T6:1128-1129, 1226). Glover met with the Respondent in June 2014 to discuss her CAP. (Ex. SD-3(7)). Three (3) areas for improvement were identified: planning and preparation, use data to inform instruction, and intervention to meet diverse needs. (Ex. SD-3(7)). The CAP also identified goals and the professional responsibilities of the Respondent and her supervisor. Glover discussed the CAP with the Respondent and she sought her input. (T7:1110, 1220-1221). The Respondent expressed some disagreement with the plan but did not suggest any alternatives. (T3:398; T4:571, 575, 595; T7:1117). Glover indicated that the Respondent did not express a lack of understanding of the plan. (T7:1119). The CAP form bears signatures from Glover and the Respondent. Expressly written above the signature lines provides, "My signature below indicates that I have received a copy of this Corrective

Action Plan and that I understand and contributed to its contents." (Ex. SD-3(7)). The Respondent claims that she was not given an opportunity to make changes to the CAP or to provide any input into the contents of the CAP. (T3:398, T4:625). The Respondent also claims that she did not know that Glover was her CAP supervisor. (T3:402).

43. Rieder testified that Glover asked her to support the Respondent with the areas listed in the CAP. (T6:864).

44. Glover met with the Respondent to develop her SGO for 2014-2015 in the Fall of 2014. Despite Glover's testimony to the contrary, the Respondent claims that she was not given an opportunity to provide input into the SGO process. (T3:462, 465). Although Glover could not recall if the Respondent requested an amendment to her SGO, the evidence shows that the Respondent made such a request on February 13, 2015, and Glover approved it on February 17, 2015. (Ex. SD-3(11)).

45. Respondent received a summative evaluation rating of "partially effective" for the 2014-2015 school year. (Ex. SD-3(13)). This rating was based on a TPS of 1.60, given 80% weight, and an SGO of 0.73, given 20% weight, for an overall score of 2.33. The score of 1.60 was within the "partially effective" range, which was the same as in the 2013-2014 school year, from 1.85 to 2.64. This rating was based on the weighted average scores in seven standards (each with several indicators) and a measure of the SGOs. The scores were reflective of four (4) formal observations

conducted during the 2014-2015 school year on September 23, 2014, November 20, 2014, January 21, 2015 and April 21, 2015. (Exs. SD-3(8); SD-3(9); SD-3(10); SD-3(12). Holder conducted the first observation, Glover conducted the second and fourth observations, and Rieder conducted the third observation. Post-observation conferences occurred on September 30, 2014 (first observation), November 20, 2014 (second observation), February 6, 2015 (third observation), and no later than May 18, 2015 (fourth observation).

46. Respondent's 2014-2015 SGO score of 3.625 (shown as 0.73 on the Annual Summary Conference Form, reflecting 20% weight) reflects the calculation required by the School District's teacher evaluation process, which was the same as in the 2013-2014 school year except for the increased weight given to the SGO score from 15% to 20%. (Ex. SD-3(11)).

47. Respondent's 2014-2015 teacher practice score of 2.00 (shown as 1.60 on her Annual Summary Conference Form, reflecting 80% weight) reflects the calculation required by the School District's teacher evaluation process, which was the same in 2014-2015 as in 2013-2014. The total score, based on the scores received by Respondent on all of the seven teacher practice standards, was 51.26. (T7:1182).

48. Respondent identified certain individual scores that she disagreed with and/or appeared to her to be incorrectly calculated for the formal observations in 2014-2015. (See generally T3:421-425, 439-440, 457-458; Exs.

SD-3(8), SD-3(10), SD-3(12)). Even assuming the individual scores had been as Respondent claimed they should be, the total of the weighted average scores received by Respondent on the seven teacher practice standards still would have been within the PPS weighted sum interval of 28 to 55, resulting in a TPS of 2. (Ex. SD-3(13) T4:600-601; see Exs. SD-5, P-12, R-14). Therefore, the Respondent's summative evaluation rating still would have been "partially effective". When asked on re-cross whether she knew that the adjustments to the purported errors "would have been enough for you to have obtained a rating of Effective rather than Partially Effective," the Respondent replied "I do not...." (T8:1352-1353; see T4:602-603). The Respondent did not submit a written rebuttal to any of her 2014-2015 evaluations. (T8:1275).

47. The Respondent claims that her formal observations on September 23, 2014, January 21, 2015 and April 21, 2015 were negatively impacted by the fact that during each observation there was an infusion of students into her classroom that she did not normally teach. The Respondent testified that these actions occurred with little or no notice. (T3:413-415, 433-441).

48. The observation form used in 2014-2015 shows the teacher's overall rating for each sub-standard (i.a., I.b., I.c., etc.) but does not show the overall score for each standard. Glover testified that the sub-standard ratings

provided sufficient information for the Respondent to be aware of her progress:

> The obvious thing is ... if you have any progressing areas on your observations throughout the year, that would be an indication that, I'm not proficient, I'm not doing well. It's progressing. And you would see that ... at the post-conference, and note that progressing means progressing, progressing means not proficient.... That's an issue that should raise a flag or a level of concern. (T7:1167-1168).

51. Pindar testified that the Respondent was "upset" during the post-observation conference for the February 2015 observation "because there were a lot of progressings." (T6:943-944).

52. Each of Respondent's observations was followed by a post-observation conference. Post-observation conferences are supposed to be conducted within 15 school days after the observation. (See *N.J.A.C.* 6A:10-4.4(b)(1)). Two (2) out of the four (4) observations clearly complied with this requirement. As to the others, and assuming that there were no holidays between each formal observation and the post-observation conference, the post-observation for the formal observation in January 2015 took place two (2) school days beyond the 15 school day period, and the post-observation (assuming May 18th to be correct) for the formal observation in April 2015 took place four (4) school days beyond the 15 school day period. The Respondent claims that the delay affected the value of the conference because "the recall wasn't really there".

(T3:456). Rieder testified that the Respondent was upset about the "progressing" ratings. Rieder further testified that she agreed to change a few of the ratings based upon the input the Respondent provided during the post-observation conference. (T6:943-944).

53. The deadline for the Respondent's Interim CAP review was February 15, 2015. Glover did not conduct the Respondent's review until February 26, 2015. (Ex. SD-3(14)). The document that Glover used during the review was not presented during the hearing, but as the Respondent testified, it was similar to the Interim CAP review sheet that the Respondent signed in June 2015. (See Ex. SD-3(14), T4:592-594). The Respondent testified that her CAP did not change as a result of the meeting with Glover. (T3:412). She also testified that she did not propose any changes to Glover. (T4:595).

54. The Respondent contends that the District did not fulfill its obligations under the CAP. One of the tasks listed in the CAP is "Teacher will collaborate with data coach to develop data binders" and, correspondingly, "Data coach will assist Ms. Osborne with creating data binder." (Ex. SD-3(7)). Respondent claims that the data coach did not assist her in this task, but admitted that she had not collaborated with the data coach either, admitted that she needed no help in creating a data binder, and admitted that in any event she received assistance in this task from the math supervisor. (T4:590-592, 599). She also admitted that she

had no evidence that her evaluation rating would have been higher if someone had met with her regarding the data binder. (T4:629). Rieder testified that she provided guidance to the Respondent on the data binder. (T6:868-869).

56. Other tasks listed in the CAP is "review plans and provide feedback using Lesson Plan Review Memo" and assistance on differentiated instruction. (ex. SD-3(7)). Rieder testified at length regarding the assistance and feedback she provided to the Respondent in these areas. (*See generally testimony of Rieder*, i.e. 16:864-869, 875-896, 909-919, 952-953). Respondent contends that the District did not satisfy its CAP responsibilities in the review of lesson plans because the five-hour estimate that Glover provided in the CAP had not been reached, the "Lesson Plan Review Memo" had not been used as often as was required under the CAP, and that Rieder's lesson plan reviews did not contain what Glover was looking for. Respondent admitted that she did not have evidence to show that her evaluation rating would have been higher if additional lesson plan reviews had been provided. (T4:629).

57. Another task listed in the CAP is "Conduct walk throughs (2 per month)." Glover testified that a "walk-through" is "about a 10 minute snapshot of what's happening in the classroom during that time." (T6:870). Although Glover testified that walk-throughs should be documented, Rieder sometimes created a written report of a walk-through and others times

she would simply "take a pad and just write down some suggestions for the teacher". (T7:1138, T6:870). Rieder further testified that she conducted walk-throughs of Respondent's classroom "maybe twice a month." (T6:872). Respondent claims that this CAP requirement was not met because only seven (7) walk-throughs were documented. Rieder testified that, in her opinion, Respondent received sufficient support:

> Q. Were you able to tell whether it was a matter of Ms. Osborne not getting enough support or training on those issues and that's why she was not incorporating the strategies you had been working on into her teaching?
>
> * * *
>
> A. In my opinion, I think that she was provided enough support to be able to. She did make an improvement in multiple response strategies and I think that she could have also improved on those questions. She had the Bloom's Taxonomy.... I explained to her how to put it in the book, how to put the different questions in there, into her read-aloud books. So I feel that, in my opinion, I think that she could have made more progress in differentiated instruction, in Ragan student engagement the questioning. Because she did it in multiple response strategies, so I really feel she could have. (T6:956-957).

57. The Respondent was required under the CAP to have monthly peer-to-peer lesson plan implementation observations. (Ex. SD-3(7)). She was only able to observe one other first grade teacher because of the fact that all of the first grade teachers had the same lunch and special subjects

periods. (T8:1330). The Respondent addressed this issue with Glover. (T8:1328-1330).

## The District's Position

The following is a summary of the legal arguments and conclusions of law that were presented in the District's post-hearing brief.

The District's evaluations of the Respondent, including her observations, SGOs, and CAO, substantially adhered to the evaluation process. Any deficiencies did not materially affect the outcome of the Respondent's evaluations in either 2013-2014 or 2014-2015. The evaluations did not contain significant mistakes of fact. Even assuming there were miscalculations in the Respondent's IPS for 2014-2015 they did not materially affect the outcome of her evaluation because her rating would not have improved from being "partially effective". Further, the tenure charges against the Respondent were not motivated by her union activity. The District's actions were not arbitrary or capricious as they were "consistent with the mandate of [E]ACHN[.] 'to raise student achievement by improving instruction.'" (District Brief p. 19).

The District has satisfied its burden of showing that the statutory criteria for the sole charge of "inefficiency" has been met. The evidence shows that the Respondent received two (2) consecutive "partially effective" summative ratings. The Respondent was provided with a full and fair opportunity to rebut

the District's case, but she failed to show that she is entitled to the available defenses in N.J.S.A. 18A:6-17.2a.

It is for the reasons above, and the entire record, that "the tenure charge of inefficiency against Respondent Carrie Osborne should be upheld, and Respondent should be dismissed from her employment with the School District." (District Brief, p. 19).

## The Respondents' Position

The following is a summary of the legal arguments and conclusions of law that were been presented in the Respondents' post-hearing brief.

The District is required to provide the Respondent with a list of witnesses with a complete summary of their testimony upon referral of the case for arbitration. (See N.J.S.A. 18A:6-17.1(b)(3)). In Wilson, Agency Dkt. No. 302-10/15 the arbitrator strictly applied the statute and dismissed the charges due to the school district's 14 day delay between the charges being referred to arbitration and presenting the list and summary. The arbitrator indicated that "any significant delay in the presentation of salient evidence by one party prejudices the other party's ability to represent its client." He concluded that the 14 day delay "significantly curtailed the time Respondent had to prepare and present

its evidence which was due within ten days of the first hearing – a hearing that must be and was scheduled forty-five days after the arbitrator's appointment as provided in 18A:6-17.(b)(1)." *Wilson* at 7; see *also Ebert*, Agency Dkt. No. 267-9/14.

Similar to *Wilson*, the District in this case did not submit a witness list until two (2) weeks after the referral for arbitration. Even when the list was submitted it was incomplete because it lacked specificity as to the descriptions of the expected testimony from the District's witnesses. As a result the Respondent was denied "a meaningful opportunity to prepare against those witnesses expected to testify against [her]...." (Respondent's Brief, p. 4). For this reason, the District's non-compliance requires dismissal of the charges against the Respondent.

Aside from the procedural issue discussed above, there were issues with the District's evaluation system that materially affected the outcome of the Respondent's evaluations, caused the District to fail to adhere substantially to the evaluation process, and/or resulted in arbitrary and capricious actions. Additionally, the Respondent's evaluation ratings were "attributable at least in part" to the Respondent's union activity. (*Id.* at 53).

To begin, there were District-wide issues with the manner in which the District implemented and administered its evaluations that violated the minimum statutory and regulatory standards. The District failed to produce adequate documentary evidence to show how the rubric standards and scores therein were calculated. The District's reliance on witness testimony was insufficient as they simply did not explain how the MeriaX program calculated the scores. Consequently, the District failed to develop an effective scoring guide as is required by *N.J.A.C.* 6A:10-1.2. The District failed "to share adequate information regarding the scoring of its evaluation standards." (*Id.* at 45).

There was also a lack of adequate training. The District's witnesses acknowledged that the grading rubric itself did not expressly describe how to differentiate between two scores such as a "Progressing I" and a "Progressing II". Further, there is nothing expressly written in the training materials that provide such an explanation.

The District also unilaterally implemented the Respondent's SGO. The evidence shows that Glover "did not include any outside input by Respondent or consider any outside factors which could have affected the SGO." (*Id.* at 46).

There were several problems with the SGO for 2013-2014 including, but not limited to the District "neglect[ing] to inform [Respondent] of the opportunity to

amend the SGO", the Respondent being directed to switch test subjects during the middle of the STAR assessment rather than to reschedule the test, and "numerous changes in Respondent's class roster". (*Id.* at 49). As a result, the "Respondent's SGO goals bore no relationship to her teaching performance...." (*Id.* at 51).

The District's observations of the Respondent during the 2013-2014 school year failed to comply with State requirements. Glover and Simon lacked specific recollection of their formal observations and post-observations conferences. It is therefore "proper to conclude that Respondent did dispute her observation scores and that Simon was informed of Respondent talking outside classes relevant to her employment." (*Id.* at 52). The lack of consideration to these areas resulted in lower observations scores.

The Respondent's evaluation results were negatively impacted by her union activity as a building representative. This is shown through the scores in Holder's September 2014 observation report that "were far lower than any other observation report from the 14-15 school year." (*Id.* at 54). Had these scores been "even remotely close to the scores from the other observation reports, Respondent would have receive at least a 3 for the TPS and an overall effective rating." (*Id.*). Holder's consideration of the Respondent's union activity must be treated as inappropriate retaliation.

The Respondent's evaluations were also negatively impacted by the District's failure to support her with student discipline. The Respondent made efforts to control her students by sending them to the office. Rather than keeping them away from her classroom for the remainder of the day, as the District did with students with disciplinary issues in other classes, the District repeatedly sent the students back to the Respondent's classroom.

The District committed multiple violations in the creation and administration of the Respondent's CAP. Glover drafted the Respondent's CAP without her input, deprived the Respondent with an opportunity to amend the CAP by ignoring her suggested changes and failed to identify herself as the Respondent's CAP supervisor. Even if Glover was the CAP supervisor she neglected her duty to participate in all of the post-observation conferences (*See* N.J.A.C. 6A:10-4.4). By her own admission Glover only participated in two (2) of the Respondent's observations thus depriving the Respondent of the opportunity to receive feedback of her progress. The CAP simply was not tailored to the Respondent's deficiencies. In addition, the District never discussed the Respondent's CAP during her post-observation conferences which is a requirement of *N.J.A.C.* 6A:10-2.5(f). Further, her interim CAP review took place 13 days after the February 15th deadline in violation of *N.J.A.C.* 6A:10-2.5(j) – an issue that has been previously cited a deficiency by other arbitrators. (See

*Ehrart*, Agency Dkt. No. 49-3/15 and *Ojomoh*, Agency Dkt. No. 239-9/15). The District did not provide an explanation for the delay.

The District did not perform the requisite number of walkthroughs that were expressly required in the Respondent's CAP. Although 20 were required, only seven (7) were documented. This was particularly troublesome given that only two (2) of the walkthroughs occurred in the second semester of 2014-2015 and they took place less than a week apart. The Respondent simply was not provided with the feedback that was needed for her professional development.

The District did not comply with the "supervisor responsibilities" outlined in the CAP. The Respondent only received two (2) lesson plan reviews in 2014-2015 rather than the required amount under her CAP. The Respondent provided lesson plans to Holder bi-weekly, but Holder never provided her with feedback.

The District also failed to assist the Respondent in the model lesson plan implementation. Riedel provided materials to the Respondent, but she did not testify "to modelling how to implement the lesson plans". (Resp. Brief, p. 65). Nor did Riedel's directive to visit another classroom nor her abbreviated visit to the Respondent's classroom fulfills the obligation to model. Riedel's lack of classroom supervisory school experience must also factor into whether she had the skill to assist the Respondent.

The District also failed to assist the Respondent with the creation of her data binder as evidenced by the fact that her data coach never reached out to her.

The CAP placed responsibilities on the Respondent and her supervisors. The evidence shows that the Respondent made good faith efforts to comply with the CAP but the District did not.

Turning to the District's observations during 2014-2015, they did not accurately capture the Respondent's teaching performance. They are flawed for the reasons that follow. The initial observation took place on September 23, 2014, which was only a few weeks into the school year. This did not give the Respondent sufficient time to implement her lesson plans, particularly in light of the fact that Rieder did not provide and review the lesson plans with the Respondent until September 26th. The initial observation also did not appropriately account for the Respondent's handling of a new student during the beginning of class or the lack of technology in the classroom.

As to the second observation, it took place before the Respondent was afforded an opportunity to meet with a supervisor to go over her CAP. And despite this, the Respondent "received superb marks in this observation". *Id.* at 72).

With respect to the third observation Rieder failed to take into consideration the fact that special education students were not pulled from her class as scheduled. The observation report is also unreliable because the post-observation conference, without any justification, did not occur within 15 working days of the observation. The Respondent's recall of her observed lesson was affected by the delay.

As to the fourth observation, Glover inappropriately criticized the Respondent's handling of middle school students in her classroom who were not her students. Further, this post-observation conference took place nearly four (4) weeks after the observation. It is emphasized that the fourth observation was the only time that the Respondent was rated on Standard 6.

The District violated *N.J.A.C.* 6A:10-2.5(1) when it failed to provide multiple observers during the Respondent's observations in 2014-2015. It is undisputed that none of the Respondent's observations in 2014-2015 were conducted by co-observers and had that occurred it is likely that more consistency would have been provided to the "wild disparities, such as Holder's scoring in the September 2014 observation". (Resp. Brief, p. 77).

The observations in 2014-2015 also contain multiple calculation errors that reduced her weighted ratings by more than one (1) point. These errors must call all of Media-X's calculations into question. The following must be emphasized:

> Respondent was never provided a Teacher Practice Summary Report at the end of the 14-15 school year instead receiving only the Performance Standard and the Annual Summary Conference Form. (SD3-6; SD3-13). As Respondent never received official scores for her Standards, it is impossible for Respondent to verify if Media-X's calculations for Respondent's Standard scores were otherwise accurate or if it made even more mistakes in the process. Comparing the Performance Standard to the Annual Summary Conference form, though, must lead to the conclusion that Media-X made additional errors with Respondent's evaluation. (Resp. Brief, p. 78-79).

When all of the District's deficiencies and errors are considered, the Respondent's SGO score for 2014-2015, notwithstanding the District's unilateral reclassification of the objectives, is the "most trustworthy and objective measurement of Respondent's performance from the 2014-2015 school year" and "undeniable proof that Respondent could and did perform at an effective level throughout the school year". (Id. at 80). Further, if it were not for the District's "widespread failures" the Respondent would have received overall "effective" ratings. The cumulative effect of these errors require dismissal of the tenure charges. (*See Ragland*, Agency Dkt. No. 285-9/14). To summarize:

Upon reflection of the totality of District's actions, the only reasonable conclusion is that the District's actions materially affected the outcome of Respondent's 14-15 evaluation. The District admitted to violating numerous State statutes and regulations during the course of the 14-15 school year. Respondent has demonstrated numerous other violations by the District. The State statutes and regulations were drafted to ensure the conducting of a fair evaluation process and that teachers are given a fair opportunity to try to improve their teaching performance. Each statute and regulation must be found to have some impact on teaching performance or else that language is rendered meaningless. Even if each of the District's violations are treated as having had a minimal impact on Respondent's teaching performance, that would be enough to have cumulatively negatively impacted Respondent's sum of weighted ratings by more than 2 or 3 percent.

Respondent was an effective teacher during the past two school years, especially so during the 14-15 school year when even Respondent's supervisor acknowledged Respondent's improved performance. But for the District's non-compliance with State evaluation procedures, Respondent's evaluation reports would have reflected this truth. Thus, the only acceptable determination is that in consideration of N.J.S.A. 18A:6-17.2(a) and (b), the entirety of the problems related to the District's evaluations of Respondent materially affected the outcomes of Respondent's 13-14 and 14-15 evaluations, requiring the dismissal of Respondent's tenure charge. (Resp. Brief p. 83-84).

## DISCUSSION

I have carefully reviewed the entire record of this proceeding. N.J.S.A. 18A:6-17.2 sets forth the "[c]onsiderations for arbitrator in rendering decision":

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.
>
> b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.
>
> c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.
>
> d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

The New Jersey Department of Education has published on its website a document entitled "Summary of Legal Requirements for Teacher Evaluation and Tenure Cases". This document can be found at www.nj.gov/education/AchieveNJ/implementation/legalrequirements.pdf. As indicated therein, "this guide outlines the actions required in law before bringing an inefficiency charge based on the new tenure revocation process, including the following elements:

A. Minimum Requirements to Ensure Compliance with Evaluation Procedures
   I. Observation Requirements
   II. Student Achievement Requirements
   III. Summative Evaluation Requirements
   IV. Corrective Action Plan (CAP) Requirements
   V. Additional Requirements

B. Requirements for Filing an Inefficiency Tenure Charge

C. Streamlined Tenure Revocation Process."

[A] guide must be read in conjunction with the applicable laws, rules and regulations. (See *N.J.A.C.* 6A:10 *et seq.* ("Educator Effectiveness"); Title 18A of the New Jersey Statutes ("Education")).

*N.J.A.C.* 6A:10-4.4 provides for the observation requirements for tenured teachers. The minimum observation schedule requires three (3) observations per year, [] at least 20 minutes (one in the first semester/first half of the year, one in

first set and semester. One of these observations must be preceded by a pre-conference which must occur at least one but not more than seven work days prior to the observation. Each observation must be followed by a post-conference within 15 teacher work days where the teacher and supervisor/observer discuss data and evidence collected from the observation, as well as additional evidence brought to the conference related to the district's teacher practice instrument and the teacher's PDP or progress on a CAP, where applicable. An observation report is required for each observation and is signed by the observer and the teacher. The teacher may attach a written objection within 10 work days. The observers must be employed by the District, serve in a supervisory role, and possess an administrative certificate. For teachers on a CAP, there must be one extra observation for a minimum of 20 minutes with a post-conference, and at least two (2) observers must be used throughout the year.

With respect to the 2013-2014 school year, the evidence shows that the Respondent received three (3) observations: an unannounced 20 minute co-observation by Glover and Simon on October 18, 2013, followed by a timely post-conference [Ex. SD-3(3)&(3A)]; an announced 40 minute observation by Simon on January 27, 2014 preceded by a timely pre-conference and followed by a timely post conference [Ex. SD-3(4)]; and a 20 minute observation by Simon on March 19, 2014, followed by a timely post-conference [Ex. SD-3(5)]. The

observation reports were signed by an observer and the Respondent. The Respondent did not file written objections to the contents of the observation reports.

With respect to the 2014-2015 school year, the Respondent was on a CAP. The evidence shows that the Respondent received four (4) observations required under the CAP: an announced 40 minute observation by Holder on September 23, 2014, preceded by a timely pre-conference and followed by a timely post-conference [Ex. SD-3(8)], an unannounced 20 minute observation by Glover on November 20, 2014 followed by a timely post-conference [Ex. SD-3(9)], an announced 40 minute observation by Rieder on January 21, 2015, preceded by a timely pre-conference and followed by a post-conference on or about February 13, 2015 [Ex. SD-3(10)] and an unannounced 20 minute CAP round observation by Glover on April 21, 2015, followed by a post-observation conference on May 18, 2015 [Ex. SD-3(12)]. The observation reports were signed by an observer and the Respondent.[4] The Respondent did not file written objections to the contents of the observation reports or to any delay in the post-observation conferences beyond the 15 work day period. The only concerns that the Respondent raised about time limitations during the post-observation conference process pertained to those in the collective bargaining agreement which she addressed orally. As noted by Arbitrator Weisblatt, "[t]he Arbitrator's

[4] Glover may not have signed the April 21st observation report, but it is undisputed that the report includes her ratings of the Respondent.

jurisdiction in this dispute is derived from the *TEACHNJ* statute and the determinations herein are made within that structure." *Weisblatt* at 31.

Glover, Simon, Holder and Riedel are employed by the District, serve in a supervisory role, and possess administrative certificates. The evidence also shows that they were thoroughly trained by the District to conduct observations, discussed their ratings with the Respondent, considered the Respondent's concerns over her ratings and appropriately exercised their discretion and judgment in providing such ratings. Multiple observers were used in each year – two (2) in 2013-2014 and three (3) in 2014-2015.[1] The evidence does not support any claim that the observers failed to discuss the data and evidence they collected or to consider the Respondent's input concerning the ratings that they received. The evaluation documents include commentary and cite areas needing improvement. I conclude that the District satisfied the observation requirements under the rules and regulations. Respondent's evaluations in 2013-2014 and 2014-2015 were based on information collected in observations conducted in accordance with applicable rules by appropriately qualified and trained District employees who exercised their best judgment in each instance. There is a lack of evidence to support any claim that the delay in any post-observation conference had a material effect upon the Respondent's ratings. With respect to 2014-2015, I am satisfied that the Respondent could

[1] N.J.A.C. 6A:10-2.3(p) on its face does not require 3 observers for teachers on a CAP. It only requires that multiple observers be used during the CAP period.

have anticipated her annual evaluation rating (i.e. progressing, proficient) by noting the ratings given in each observation, because the overall scores are the result of the ratings given on each indicator in each observation. Furthermore, the observers discussed their ratings with the Respondent who was provided with an opportunity to ask questions and, if necessary, rebut the ratings. I also conclude that the observers objectively considered the Respondent's classroom issues (i.e. student behavior) in their ratings.

The Respondent claims that the District unilaterally implemented Student Growth Objectives. *N.J.A.C. 6A:10-4.2(e)* provides:

> (e) Student growth objectives for teachers shall be developed and measured according to the following procedures:
>
> 1. The chief school administrator shall determine the number of required student growth objectives for teachers, including teachers with a student growth percentile. A teacher with a student growth percentile shall have at least one and not more than four student growth objectives. A teacher without a student growth percentile shall have at least two and maximum of four student growth objectives. By August 31 prior to the academic year in which the evaluation rubric applies, the Department shall provide on its website the minimum and maximum number of required student growth objectives within this range.
>
> 2. A teacher with a student growth percentile shall not use the standardized assessment used in determining the student growth percentile to measure progress toward a student growth objective.

3. Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each student growth objective. If the teacher does not agree with the student growth objectives, the principal shall make the final determination.

4. Student growth objectives and the criteria for assessing teacher performance based on the objectives shall be determined, recorded, and retained by the teacher and his or her supervisor by October 31 of each academic year, or within 20 work days of the teacher's start date if the teacher begins work after October 1.

5. Adjustments to student growth objectives may be made by the teacher in consultation with his or her supervisor only when approved by the chief school administrator or designee. Adjustments shall be recorded in the teacher's personnel file on or before February 15.

   i. If the SGO covers only the second semester of the school year, or if a teacher begins work after October 1, adjustments shall be recorded before the mid-point of the second semester.

6. The teacher's designated supervisor shall calculate each teacher's student growth objective score. The teacher's student growth objective score, if available, shall be discussed at the teacher's annual summary conference and recorded in the teacher's personnel file.

Section 3 above requires collaboration between the teacher and his/her principal or supervisor before an SGO is set. Establishing an SGO without input from the individual teacher would be inconsistent with the requirements of this provision. The evidence shows that the Respondent had the requisite number of SGOs in 2013-2014 and 2014-2015. The evidence also shows that the

Respondent's SGOs were initially drafted by the District but that the Respondent was afforded with opportunities to provide input in both 2013-2014 and 2014-2015. In fact, the Respondent's request to amend her SGO in 2014-2015 was approved by Glover. The Respondent raised several issues concerning the development and implementation of her SGOs. Having reviewed the entire record the evidence does not show that the District failed to consider any of the concerns that the Respondent raised during the evaluation process. The Respondent's claims of deficiencies in her SGOs are unsupported by the evidence.

I now turn my attention to the Respondents' claims pertaining to the calculation of teacher observation and evaluation scores. To summarize, the Respondents claim that the District failed to disclose scoring rubric information utilized to explain the calculation of Standard scores for observations and the Annual Summary Report, and failed to implement and enforce objective observation scoring rules. With respect to the scoring on the evaluation rubric, N.J.A.C. 6A:10-1.3 defines and expresses the purposes of a "scoring guide":

> "Scoring guide" means a set of rules or criteria used to evaluate a performance, product, or project. The purpose of a scoring guide is to provide a transparent and reliable evaluation process. Educator practice instruments include a scoring guide that an evaluator uses to structure his or her assessments and ratings of professional practice.

N.J.S.A. 18A:6-17.2, paragraph 23(a) provides that "the evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." However, the District must comply with fourteen (14) minimum standards set forth in N.J.S.A. 18A:6-123, paragraph 17.b including, but not limited to, "guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation"; "a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently"; and "a performance framework, associated evaluation tools, and observation protocol, including training and observer calibration resources".

During the arbitration proceedings, the District provided extensive information concerning the training that was provided to teachers during the 2013-2014 and 2014-2015 school years. The District indicated that the evaluators received training on how to evaluate the teachers, and the use of the rubric. The District's witnesses testified to the training they received and how they were trained to use judgment in determining how to rate the Respondent which was a combination of degree and consistency. The Respondent testified that she did not agree with all of the ratings she received, but she did not file a single a written objection as is her right under the applicable rules and regulations. The

evidence shows that the Respondent's input was considered by each evaluator and, at times, resulted in improved ratings.

As to the calculation of the scoring on the rubric, I am satisfied that the District's witnesses received appropriate training, exercised their professional judgment, and considered the Respondent's input. The Respondent challenged several ratings that were provided by Media-X, a software program approved by the Commissioner of Education. Although there appears to be some discrepancies in the scoring, the evidence does not show that the program is wholly unreliable. Moreover, even assuming the Respondent's ratings should have been higher in the areas that she testified to, the evidence does not support the assertion that her overall rating of "partially effective" for 2014-2015 would have changed.

Clover, Simon, Holder and Rieder were credible, persuasive witnesses notwithstanding the fact that they did not always have an independent recollection of the Respondent's performance during the formal observations that led to her ratings. Clover provided detailed testimony concerning the overall rating process and how it applied to the Respondent. (See generally, Testimony of Clover, T7:1041-T8:1313). The formal observation ratings included detailed commentary and suggestions. I am satisfied that the Respondent's ratings of the Respondent were based upon the judgment appropriately

exercised by Glover, Simon, Holder and Rieder and represent an accurate reflection the Respondent's teaching performance.

The Respondent claims that her union activity had a negative impact upon her ratings. Holder and Glover both denied any knowledge of the Respondent's role with the PEA. I reject the Respondent's claim as it is speculative and unsupported by the evidence. I do not reach a conclusion that the Respondent's role with the PEA negatively impacted her ratings.

I have also thoroughly considered the Respondent's CAP concerns. I conclude that Glover afforded the Respondent with an opportunity during the CAP meeting to discuss the proposed CAP and provide input into the process, but I find that the Respondent simply did not avail herself of this opportunity. The Respondent's claim that she did not know that Glover was her CAP supervisor is simply unsupported by the evidence. I also conclude that the Respondent was provided with ample support during the CAP period as demonstrated through Rieder's testimony and the training opportunities that were readily available. The Respondent's CAP review did not occur on or before February 15th, but there is no evidence to support the assertion that the delay until February 26th had a negative impact on her final evaluation ratings as there was ample opportunity for her to improve her teaching performance before her fourth (and

final) observation that did not occur until April 21, 2015. I have also considered the fact that there were only seven (7) documented walkthroughs in 2014-2015. The number of documented walkthroughs did not satisfy Glover's guidelines in the CAP, but I do not consider this to be a contributing factor in the Respondent's "partially effective" rating for 2014-2015.

Based upon the above, and the entire record, I conclude that the employee's evaluations adhered substantially to the evaluation process, there are no mistakes of fact in the evaluations that would have altered the Respondent's overall ratings of "partially effective," the charges were not brought as a result of the Respondent's union activities or any other prohibited basis, and the District's actions were neither arbitrary nor capricious. I have considered such factors as the timelines that the District may have missed (i.e. the CAP review, post-observations), but I do not conclude that these or other alleged deficiencies, either individually or their cumulative effect, had a material effect on the outcome of the Respondent's evaluations.

The parties filed motions (i.e. motion to dismiss, summary judgment) during these proceedings upon which I reserved judgment. In particular, the Respondent claims that the delay in the District's witness list requires dismissal of the tenure charges. I reject this motion because even assuming this was a procedural error on the part of the District I cannot conclude that it had a

material effect upon this matter, particularly in light of the extensions of time provided and the Respondent's full and fair opportunity to develop the record in this case. I reject all of other motions as well and conclude that my discussion and analysis above amply addresses the District's tenure charges and the Respondent's defenses.

Accordingly, based upon the foregoing and the entire record, the District has met the burden of proving that the Respondent received "partially effective" annual summative evaluation ratings in 2013-2014 and 2014-2015. The District provided convincing evidence that the evaluations were properly conducted under TEACHNJ. The charge of "inefficiency" is sustained and the dismissal of the Respondent is upheld.

## AWARD

For the reasons set forth in this Decision and Award, the Arbitrator finds that the District has met its burden of proving that the Respondent received "partially effective" annual summative evaluations for two (2) consecutive school years 2013-2014 and 2014-2015, and that the evaluations were properly conducted under the applicable laws and regulations. Therefore, the charge of "Inefficiency" is sustained and the dismissal of the Respondent is upheld.

Dated: July 11, 2015
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 11th day of July, 2016, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L. Gifford
Notary Public
Expires 1-10-2021

252-16

OAL DKT. NO. EDU 02570-15
AGENCY DKT. NO. 18-1/15

| | | |
|---|---|---|
| ELIUD AMAYA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/16

Date of Mailing: 7/13/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**DISMISSAL**

OAL DKT. EDU 02570-15

AGENCY DKT. NO. 18-1/15

**ELIUD AMAYA,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,**

Respondent.

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**Philip Feintuch**, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

**Michael A. Pattanite**, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Caseyy, LLC, attorneys)

Record Closed: April 28, 2016 Decided: June 1, 2016

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 20, 2015, for resolution as a contested case under to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The parties have agreed to settle this case and have entered into an agreement. Their agreement is attached to this decision.

Having reviewed the terms of their agreement, I **FIND** that the parties have agreed to enter into the settlement voluntarily as evidenced by their signatures or the signatures of their representatives on the agreement.

I **CONCLUDE** that the settlement disposes all of the issues in controversy between the parties and that the agreement is consistent with law.

Given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of the settlement agreement.

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

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

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

6/1/16
DATE

**BARRY E. MOSCOWITZ**, ALJ

Date Received at Agency: 6-1-16

Date Mailed to Parties: JUN 2 2016
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

**LENOX, SOCEY, FORMIDONI, GIORDANO, COOLEY, LANG & CASEY, LLC**
**Michael A. Pattanite, Jr. Esq. No. 019212010**
**3131 Princeton Pike, Building 1B**
**Trenton, New Jersey 08648**
**(609) 896-2000**
Attorney(s) for: **Respondent, Jersey City Public Schools District**

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STATE OF NEW JERSEY
OFFICE OF ADMIN...

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| Eliud Amaya,<br><br>Petitioner,<br>vs.<br><br>Jersey City Public Schools District.<br><br>Respondent. | BEFORE THE COMISSIONER OF EDUCATION<br><br>NEW JERSEY OFFICE OF ADMINISTRATIVE LAW<br><br>Docket No.: EDU 02570-2015N<br><br>**STIPULATION OF DISMISSAL WITH PREJUDICE** |

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice without costs against either party and including any and all cross claims.

Michael A Pattanite

**MICHAEL A PATTANITE, ESQ.**
**LENOX, SOCEY, FORMIDONI, GIORDANO, COOLEY, LANG CASEY**
Attorney(s) for Respondent

DATED: 4/20/16

**Philip Feintuch, Esq.**
**Feintuch, Porwich, Feintuch**

Attorney(s) for Petitioner

DATED: 3/1/16

2-53-16

OAL DKT. NO. EDU 01161-16
(EDU 19228-15 ON REMAND)
AGENCY DKT. NO. 361-12/15

| | | |
|---|---|---|
| D.J., on behalf of minor child, D.B.J. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record, proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's January 19, 2016 determination that the prior settlement agreement submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the settlement agreement on its behalf. Since there is now a Board resolution approving the settlement, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/16
Date of Mailing: 7/13/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 01161-16 (On Remand EDU 19228-15)
AGENCY DKT. NO. 361-12/15

**D.J. ON BEHALF OF**
**MINOR CHILD, D.B.J.,**
Petitioner,
v.
**BOARD OF EDUCATION OF**
**THE TOWNSHIP OF FLORENCE,**
**BURLINGTON COUNTY,**
Respondent.

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**D.J.,** petitioner, pro se

**Sanmathi Dev,** Esq. for respondent (Capehart & Scatchard, attorneys)

Record Closed: May 27, 2016 Decided: May 31, 2016

BEFORE **ROBERT BINGHAM II**, ALJ:

This matter was transmitted to the Office of Administrative Law as a remanded matter on January 20, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Revised Settlement Agreement (J-1), along with a copy of the Board Resolution (J-2) approving this settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the Revised Settlement Agreement.

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

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

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

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

May 31, 2016
DATE

**ROBERT BINGHAM II**, ~~ALJ~~

Date Received at Agency: 6/3/16

Date Mailed to Parties: 6/3/16

/lam

## APPENDIX

## EXHIBITS

**Joint:**

J-1 Revised Settlement Agreement

J-2 Board Resolution

**For Petitioner:**

None

**For Respondent:**

None

J-1

Sanmathi Dev, Esq.
CAPEHART & SCATCHARD, P.A.
Laurel Corporate Center, Suite 300S
8000 Midlantic Drive
Mount Laurel, New Jersey 08054
(856) 380-6709
Attorneys for Respondent, Florence Township Board of Education

| | | |
|---|---|---|
| D.J. o/b/o D.B.J.,<br><br>Petitioner,<br><br>vs.<br><br>FLORENCE TOWNSHIP BOARD OF EDUCATION,<br><br>Respondent. | : | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>OAL DOCKET NO. EDU 01161-2016<br>OAL DOCKET NO. EDU 19228-2015<br>AGENCY REF. NO. 361-12/15<br><br>**REVISED SETTLEMENT AGREEMENT** |

The parties hereby agree to the following in order to resolve all issues pertaining to Petitioner D.J. o/b/o D.B.J.'s Petition of Appeal and Request for Emergent Relief bearing OAL Docket No. 01161-2016, OAL Docket No. 19228-2015, and Agency Ref. No. 361-12/15:

1. The parties hereby incorporate by reference the Settlement Agreement Regarding Emergent Relief dated December 14, 2015, which was approved by the Florence Township Board of Education, Board Resolution #15/16-025-R-457, attached hereto as J-1 and Exhibit A, respectively.
2. Student D.B.J. returned to school on December 15, 2015 without signing the "last chance agreement."
3. The parties agree that this Agreement resolves all issues presented in the Petition of Appeal and Request for Emergent Relief and that there are no further issues for adjudication.
4. The parties agree that this Agreement shall be kept confidential consistent with state and federal regulations.

David L. Johnson, father of student D.B.J. — 5/13/2016 Date

Emma Cartier, Board President
Florence Township Board of Education — 5-23-16 Date

J-2

TOWNSHIP OF FLORENCE BOARD OF EDUCATION

# RESOLUTION #15/16-144-R-782

**RESOLUTION APPROVING THE REVISED SETTLEMENT OF EMERGENT RELIEF AND AUTHORIZATION FOR SCHOOL BOARD PRESIDENT TO EXECUTE AND THAT THE SUBJECT RESOLUTION IS IDENTIFIED WITH THE SPONSOR CODE P**

***WHEREAS***, the Township of Florence Board of Education approves the Revised Settlement Agreement Regarding Emergent Relief involving student 1802296; and

***WHEREAS***, the Township of Florence Board of Education authorizing the School Board President to execute same on the Board's behalf; and

***WHEREAS***, the following Board of Education comments and/or discussion was had, if any, on the matter of this Resolution:

***NOW, THEREFORE, BE IT RESOLVED*** by the Township of Florence Board of Education, County of Burlington, State of New Jersey, that settlement is approved.

********** ********** **********

**TOWNSHIP OF FLORENCE**
**BOARD OF EDUCATION**

Emma A. Cartier

**Emma A. Cartier, President**

ATTEST:

Melissa Livengood
Business Administrator/Board Secretary

********** *CERTIFICATION OF THE BOARD SECRETARY* **********

IT IS HEREBY CERTIFIED that the foregoing Resolution was duly adopted by the Florence Township Board of Education, by the vote below indicated, at the **Regular Meeting held on Monday, May 23, 2016** in the Florence Township Memorial High School, 1050 Cedar Lane, Florence, New Jersey.

| BOARD OF EDUCATION MEMBER | Mtn | Snd | Aye | Nay | Abn | Abs | Nvt |
|---|---|---|---|---|---|---|---|

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 1 Christopher R. Conti | ___ | _X_ | _X_ | ___ | ___ | ___ | ___ | 1 |
| 2 Anne T. Lipsett | ___ | ___ | ___ | ___ | ___ | _X_ | ___ | 2 |
| 3 Tina Lloyd | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 3 |
| 4 Anthony Nutter | _X_ | ___ | _X_ | ___ | ___ | ___ | ___ | 4 |
| 5 Toby Popso | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 5 |
| 6 Debbie Reyes | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 6 |
| 7 Christine S. Skinner, Vice President | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 7 |
| 8 Laurie Tindall | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 8 |
| 9 Emma A. Cartier, President | ___ | ___ | _X_ | ___ | ___ | ___ | ___ | 9 |

Legend: Mtn = Motion; Snd = Second; Aye = Aye; Nay = Nay;
Abn = Abstain; Abs = Absent; Nvt = Not Voting

FLORENCE TOWNSHIP
BOARD OF EDUCATION

Melissa Livengood
Business Administrator/Secretary to the Board

{OFFICIAL SEAL}

Resolution Distribution List:

[x] Donna L. Ambrosius, Superintendent of Schools
[ ] Melissa Livengood, Business Administrator/Board Secretary
[ ] Brian Richardson, Educational Facilities Manager
[ ] Caitlin Cavagnaro, Director of Special Services
[ ] Jamie Mungo, Assistant Principal/Athletic Director
[ ] John M. Cogan, Principal - Memorial High School
[ ] Kristine Height, Principal - Roebling Elementary School
[ ] Maria E. Sadar, Vice-Principal - High School
[ ] Rosario Casiano, Principal - Riverfront School
[ ] Rick Lee, Vice-Principal - Riverfront School
[ ] Linda M. Garganio, Administrative Secretary to the Superintendent
[ ] Valerie E. Wolensky, Business Office Manager
[ ] Katelyn McArdle, Payroll Clerk
[ ] Lisa A. McCarthy, Accounts Payable Clerk
[ ] Wendy Spera, Administrative Secretary
[ ] Sharon L. Chadwick, Coordinator - Extended Day Program
[ ] Donna L. Taylor, Transportation Supervisor
[ ] Lonney Brown, Director of Security
[ ] Donald J. Cammus, Treasurer of School Monies
[ ] Mukesh G. Gupta, District Technology Coordinator
[ ] Sanmath Dev, Esq., Board Solicitor
[ ] John J. Maley, Jr., Board Auditor
[ ] Dante Guzzi, Board Architect/Engineer
[ ] Timothy C. Irons, Insurance Broker
[ ] Subject Employee
[ ] File (specify):
[o] Other (specify): Capehart & Scatchard, P.A.

254-16

| | | |
|---|---|---|
| STEPHEN GIBBLE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner herein is a teacher employed by the respondent Board, and formerly a wrestling coach for the school district. Petitioner appealed the Board's finding that he committed an act of Harassment, Intimidation or Bullying (HIB) pursuant to New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board alleged that on two occasions during a summer wrestling camp, petitioner stated to one of the student wrestlers – a special education student – that he hoped the student "did not have access to any weapons or keys to the gun closet." Petitioner contended that the Board's determination was arbitrary, capricious and unreasonable, and that the HIB investigation was improperly conducted. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the issues presented here are whether the conduct engaged in by the petitioner rose to the level of HIB as defined by law, and whether petitioner was afforded adequate due process during the course of the Board's investigation of the charges filed against him; an HIB investigation was conducted after the student's parents contacted the school principal to complain about the incident involving the petitioner; petitioner admitted making the alleged comments; the HIB investigation report concluded that the petitioner's conduct met the statutory definition of HIB, as petitioner was deemed to have made insulting or demeaning comments that publicly humiliated a student; petitioner requested a Board-level hearing in accordance with *N.J.S.A.* 18A:37-15b(6)(d); the Board advised petitioner that neither Board policy nor regulation provided a procedure for anyone other than a parent or guardian of students to request a hearing, however the Board did – as a courtesy – extend an invitation to petitioner to appear before the Board for a twenty minute period to make a statement, but with no opportunity to offer witnesses; the Commissioner has recognized that the HIB investigatory requirements outlined in regulations have equal applicability when a bullying charge is directed against a staff member; petitioner had a right to defend the charges against him, but was not afforded the due process rights guaranteed by statute. Accordingly, the ALJ concluded that because the Board failed to comply with the required investigatory process, any reference to HIB should be expunged from petitioner's personnel files. The ALJ granted petitioner's motion for summary decision.

Upon comprehensive review, the Commissioner concurred with the ALJ's determination that staff members accused of committing an act of HIB are entitled to the due process guaranteed by the Act, including the right to a hearing before the board of education. However, the Commissioner found that the ALJ erred in ordering that all references to HIB be removed from petitioner's file, and instead remanded the matter to the respondent with orders to provide the petitioner with a hearing before the Board.

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

Issued 7/13/16

OAL DKT. NO. EDU 2767-15
AGENCY DKT. NO. 20-2/15

| | | |
|---|---|---|
| STEPHEN GIBBLE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board of Education of the Hunterdon Central Regional School District (Board), and Petitioner Stephen Gibble's reply thereto. This case involves a challenge by the petitioner, a former wrestling coach, to the Board's determination that he committed an act of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board alleges that on two occasions during a summer wrestling camp, in the presence of others, the petitioner stated to R.F. – a special education student – that he hoped that R.F. did not have access to any weapons or keys to the gun closet. The Administrative Law Judge (ALJ) found that the Board failed to comply with the investigatory process outlined in the Act, and therefore, granted summary decision in favor of the petitioner.

In its exceptions the Board contends that the ALJ improperly granted summary decision in favor of the petitioner, and that the ALJ's conclusions of law are contrary to the express terms found in the Act. The Board maintains that under *N.J.S.A.* 18A:37-15(b)(6)(d), only a parent or a guardian may request a hearing before the board of education in connection

with an HIB investigation and there is no provision giving a wrestling coach who is accused of committing an act of HIB a right to hearing before the board of education. In fact, neither the Act nor the associated regulation, *N.J.A.C.* 6A:16-7.7(1)(2)(viii), include any mention whatsoever of anyone other than a parent or guardian having a right to request a board hearing. The Board also maintains that, at the time of the incident in this matter, the Department of Education's Guidance for Schools in Implementing the Anti-bullying Bill of Rights Act made it clear that staff can commit acts of HIB against students, but it made no mention of anyone other than a parent or guardian having a right to a hearing. *See*, New Jersey Department of Education, *Guidance for Parents on the Anti-Bullying Bill of Rights Act*, dated September 2012, pgs. 17-19.[1] Accordingly, the Board contends that the documentation cited in the Initial Decision does not make it clear that the Act "must ... apply to [petitioner] for every aspect of the HIB investigation process, including his right to a hearing before the local board."

The Board also argues that the Initial Decision is incorrect and should be reversed, because – despite the language in the Act – the petitioner was provided with the entire investigatory file and was offered the opportunity to appear before the Board, which he declined. Although the Commissioner recently commented in *Edward Sadloch, et al. v. Board of Education of the Township of Cedar Grove, Bergan County*, Commissioner Decision No. 216-15, decided June 23, 2015, that coaches accused of HIB should be given an opportunity to appear before the Board, nowhere in the final decision or the OAL's Initial Decision does it state that this opportunity includes a full adversarial hearing, including the right to call witnesses.

[1] The Board acknowledges that in November 2015, the Department revised the "Questions and Answers" concerning the Act. Without directly addressing whether a staff member had a right to a hearing before the board, the Department commented that "[a]ll of the procedural requirements in the ABR apply regardless of whether the alleged offender is an adult or youth." *See* New Jersey Department of Education, *Anti-Bulling Bill of Rights Act (N.J.S.A. 18A:37-13 et seq.), Questions and Answers*, dated November 2015, pg. 12.

As such, the Initial Decision is inappropriately extending the terms of the Act to require an adversarial hearing, which was not the Legislature's intent. Although the Initial Decision implied that the 20 minute appearance offered to the petitioner was insufficient, there is again no legal support for this holding.

Alternatively, the Board contends that even if the petitioner was entitled to a hearing, the ALJ should have remanded the matter to the Board. In the Initial Decision, the ALJ wrongfully concluded "that because the Board failed to comply with the investigatory process contained in statute, any reference to HIB should be expunged from petitioner's personnel files maintained by the Board." The Board maintains that the Commissioner's decision to remove any reference of HIB from the coaches' files in *Sadloch*, *supra*, without remanding the matter for a proper investigation is not applicable in this case. In *Sadloch*, *supra*, at page 1-2, the Commissioner stated that he was in accord with the ALJ's conclusions that, in light of the lack of documentation and the state of the record, there could not be a proper determination as to whether there was an act of HIB committed. The Board argues that the facts in this matter are extremely different because – as opposed to the inaction of the Cedar Grove Board – in this matter, a thorough investigation was conducted in compliance with the procedural requirements of the Act. Notably, the petitioner was sent numerous letters concerning the HIB allegations and investigation; the Board provided the petitioner an opportunity to respond to the charges; the petitioner was provided with the entire investigatory file; the Board discussed petitioner's HIB investigation at three board meetings where petitioner received *Rice* notices of such; and the Board promptly advised the petitioner of the disposition of the allegations against him. Thus, the record is extensive in this case and all of the steps in the investigation have been memorialized in writing and are well documented; therefore, a remand in this matter is appropriate.

In reply, the petitioner argues that the Initial Decision should be adopted because the ALJ correctly held that the HIB charges should be dismissed in light of the fact that the petitioner was not afforded the due process guaranteed by the Act. The petitioner contends that staff members and students have the same rights and obligations under the Act. The ALJ properly reasoned that if the petitioner can be found to have violated the Act, then the Act "must apply to him for every aspect of the HIB investigation process, including his right to a hearing before the local board." The petitioner also notes that the Board's assertion to the contrary is inconsistent with its letter to the petitioner, dated September 8, 2014, where it stated that the petitioner was entitled to the investigation information and a hearing. The petitioner further argues that the Commissioner's decision in *K.T., on behalf of minor children K.H. and T.D. v. Board of Education of the Township of Deerfield, Cumberland County*, Commissioner Decision No. 278-13, decided July 30, 2013, expressly confirmed that the manifest intent of the Legislature was that the Act and school HIB policies would apply equally to adults. Further, "Based on the established case law since at least 2013, and the overwhelming evidence of congressional intent, anyone accused of an HIB violation is entitled to the Act's due process protections," which includes a hearing before the Board. (Petitioner's Reply Exceptions at 9)

The petitioner also argues that the Board's assertion that this matter should be remanded for a hearing is inappropriate and would be highly prejudicial to the petitioner. The petitioner contends that the Board's failure to provide the petitioner with a hearing during the relevant time period irrevocably tainted and effectively nullified the investigation. The petitioner argues that if the remedy in these types of cases is to give boards of education a "do-over" then there will be no incentive to get it right the first time. Further, approximately two years have passed since the incident in question and the petitioner continues to spend attorney's fees

defending his reputation from this reckless attack. Finally, the petitioner reiterated the arguments advanced below to suggest that he did not commit an act of HIB against R.F.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's determination that staff members who are accused of committing an act of HIB are entitled to the due process guaranteed by the Act, including the right to a hearing before the board of education. In *Sadloch, supra,* the Commissioner adopted the ALJ's determination that while *N.J.S.A.* 18A:37-15(b)(6)(d) provides that "parents or guardians of the students who are parties to the investigation" must receive written information about that investigation, this requirement must be held to extend to staff members and volunteers whose conduct is implicated by a bullying allegation. It is only reasonable that this due process protection also includes the same right to a hearing before the Board that is provided under *N.J.S.A.* 18A:37-15(b)(6)(d) to parents or guardians of students involved in HIB investigations.

Although the Board failed to provide the petitioner with a hearing, the Commissioner disagrees with the ALJ's determination that the petitioner is entitled to summary decision and all references of HIB should be expunged from his personnel file. Instead, this matter shall be remanded to the Board to give the petitioner a hearing. *See also, D.M., on behalf of minor child, K.B. v. Board of Education of the Township of West Milford, Passaic County*, Commissioner Decision No. 468-14, decided November 24, 2014 (The matter was remanded to the Board to conduct the required investigation and to issue a report in compliance with *N.J.S.A.* 18A:37-13 *et seq.*).

It is important to recognize that the decision not to remand the matter for a determination as to whether an act of HIB was committed in *Sadloch, supra,* was based on a unique set of circumstances, and the fact that the state of the record in that case made it

impossible for a determination to ever be reached. Remarkably, in *Sadloch, supra,* the coaches could not even parse out the basis for the determination that they engaged in HIB and the ALJ was similarly left perplexed as to the basis of the charges. The procedures followed by the Board here are not analogous to the lack of any meaningful investigation conducted in *Sadloch, supra.* Unlike in *Sadloch, supra*, the Board gave the petitioner notice of the allegations; it conducted an investigation and completed an investigation report; and it also afforded the petitioner with an opportunity to appear before the board.[2] Therefore, the Commissioner finds that the ALJ erroneously ordered that all references to HIB be removed from the petitioner's file and instead that the appropriate disposition in this case is to order the Board to provide the petitioner with a hearing on the HIB allegations.

Accordingly, the recommended decision of the ALJ is modified as stated above and the Board is directed to provide the petitioner with a hearing before the Board.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/16

Date of Mailing: 7/13/16

[2] Further, at the time of the investigation in this matter in 2014 it was not abundantly clear from the statutory and regulatory provisions and the guidance documents as to whether local boards of education were required to provide a staff member accused of HIB with a hearing before the board. However, as boards of education began implementing the provisions in the Act and the case law evolved, it became apparent that denying a staff member the same due process opportunities that are provided to parents and guardian of students faced with bullying allegations would be inconsistent with the spirit of the Act's investigatory requirements.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 02767-15
AGENCY DKT. NO. 20-2/15

**STEPHEN P. GIBBLE,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,**
Respondent.

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**Steven D. Farsiou,** Esq., for petitioner (Kelly, Trinity & Farsiou, attorneys)

**Brandon R. Crocker,** Esq., for respondents (Comegno Law Group, PC, attorneys)

Record Closed: February 18, 2016 Decided: April 12, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 4, 2015, the petitioner filed a Petition of Appeal to the Commissioner of Education, in which he disputes respondent's finding that he

committed an act of harassment, intimidation or bullying ("HIB") pursuant to N.J.S.A. 18A:37-13.2 et seq. and requests that the Commissioner overturn such finding on the grounds that respondent, Board of Education of the Hunterdon Central Regional School District ("the Board) was arbitrary, capricious or unreasonable in its determination and that the HIB investigation was not conducted properly. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 25, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Board and petitioner have cross-moved for summary decision having each filed initial briefs on October 2, 2015, and oral argument was heard on February 18, 2016. The record closed on that date.

## FACTUAL DISCUSSION

The following facts are stipulated to, by, and between the parties, and I therefore **FIND** them as **FACT**:

1. Petitioner is a teacher employed by the Board who previously held a stipend position as the Head Coach of the Hunterdon Central Wrestling Team.

2. Petitioner attended the 2014 Scarlet Knights Wrestling Team Camp ("the camp") which took place between June 30, 2014, and July 3, 2014, along with approximately fifteen Hunterdon Central students who, at the time, were current and prospective members of the Hunterdon Central Wrestling Team.

3. R.F., an incoming freshman at Hunterdon Central attended the camp and participated in camp activities as part of the Hunterdon Central Wrestling Team.

4. Unbeknownst to petitioner at the time, R.F. was a classified special education student.

5. On two occasions during the first several days of the camp, petitioner stated to R.F., in the presence of other members of the Hunterdon Central Wrestling Team, that he hoped R.F. did not have access to any weapons or keys to the gun closet.

6. As a result of these comments, R.F. was embarrassed and felt that petitioner thought he was crazy and did not like him. After the second time petitioner made these comments to R.F., the student called his mother and asked to be removed from the wrestling camp.

7. When R.F.'s mother arrived to take him home from camp, petitioner went to R.F. before he left and told him he was just kidding and that is the way petitioner is.

8. An HIB investigation was conducted after R.F.'s parents contacted the school principal to complain about the incident.

9. Petitioner admitted making these comments to R.F.

10. The HIB investigation concluded that petitioner's conduct met the statutory definition of HIB, as set forth in N.J.S.A. 18A:37-14. The District concluded that petitioner committed HIB against R.F. who is "a classified student, quiet in nature and slight in build." See ABC Manfredi Cert. at ¶ 16.

11. The HIB Investigation Report noted petitioner had made insulting or demeaning comments and publicly humiliated a pupil.

12. The findings of the HIB investigation were reported to the Board at its next meeting on October 20, 2014. At that meeting, the Board took action to suspend petitioner, with pay, from all coaching activities.

13. Notice of the finding and information on the outcome, pursuant to N.J.S.A. 18A:37-15b(6)(d), was sent home to the parents of R.F., dated October 22, 2014.

14. Thereafter, petitioner requested a Board-level hearing in accordance with N.J.S.A. 18A:37-15b(6)(d). The Board advised petitioner that neither Board policy nor regulation provides a procedure for anyone other than a parent or guardian of students to request a hearing.

15. The Board, solely as a courtesy, permitted petitioner and his attorney to appear before the Board at their November 17, 2014, meeting to make a

statement. See Comegno letter, dated November 12, 2014. This appearance was limited to twenty minutes and petitioner was not permitted to offer witnesses. Id.

16. Petitioner's attorney objected to the limitations of the Board meeting and petitioner did not attend the meeting.

17. During the November 17, 2014, meeting, the Board took action to affirm the administration's findings concerning petitioner's HIB offense.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The parties stipulate that there are no material facts in dispute, and this matter is ripe for determination on cross-motions for summary decision, with one party or the other being entitled to decision, as a matter of law, depending on the resolution of the sole legal issue in dispute above.

This appeal asks that I consider whether the conduct engaged in by petitioner rose to bullying, as defined by law, and whether he was afforded adequate due process during the course of the Board's investigation of the charges filed against him by R.F. N.J.S.A. 18A:37-14 defines HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and create procedures for reporting HIB related concerns. N.J.S.A. 18A:37-15. A school anti-bullying specialist must be assigned to each school, and the results of HIB

investigations must be shared with the Superintendent of Schools and the Board of Education. Moreover, the law specifically requires as follows:

> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision . . . .
>
> [N.J.S.A. 18A:37-15 (emphasis supplied).]

Regulations promulgated by the Department of Education further assist local districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9. The Commissioner has recognized that these requirements have equal applicability when a bullying charge is directed against a staff member. See K.T. on behalf of K.H. and T.D. v. Deerfield Bd. of Educ., EDU 00489-13, Initial Decision (June 19, 2013), rev'd and remanded, Comm'r

(July 30, 2013), http://njlaw.rutgers.edu/collections/oal/> (where, in the context of a claim that a teacher bullied a kindergarten student, the Commissioner confirmed that the internal HIB investigation mandated by law is not discretionary).

Petitioner in this case was not afforded the due process guaranteed by statute. While the law provides that "parents or guardians of the students who are parties to the investigation" may request a hearing before the board, this requirement must be held to extend to staff members whose conduct is implicated by a bullying allegation. The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real of intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). Here, the bullying statute can only be interpreted to give a staff member the opportunity to defend himself at a board hearing. Otherwise how can a staff member be assured that the local board has been provided with all of the facts it needs to render an informed decision?

Respondent concedes in it's Brief in Support of Summary Decision, at page thirty-four, that "while the Anti-Bullying Bill of Rights only addresses HIB committed against students and does not address acts committed against adults, it applies to all persons, including staff members, who commits an act of HIB against a student." In support of this statement, respondent cites the New Jersey Department of Education's Guidance for Schools in Implementing the Anti-Bullying Bill of Rights Act (P.L.2010,c.122), http://www.state.nj.us/education/students/safety/behavior/hib/guidance.pdf at 7 and 27, Dec. 2011. While this statement was made in an attempt to persuade this tribunal that the alleged prohibited act which occurred off school grounds applies to the petitioner, it is clear that if the Anti-Bullying Bill of Rights applies to petitioner for that purpose, so too must it apply to him for every aspect of the HIB investigation process, including his right to a hearing before the local board.

Petitioner had a right to defend the charges against him. Only as a courtesy did the Board offer petitioner an opportunity to make a statement at a Board meeting. This courtesy cannot be considered to rise to the level of the Board level hearing outlined in

the Anti-Bullying Bill of Rights when petitioner was not permitted to offer witnesses and his time before the Board was limited to twenty minutes. I **CONCLUDE** that because the Board failed to comply with the investigatory process contained in statute, any reference to HIB should be expunged from petitioner's personnel files maintained by the Board.

## ORDER

Base on the foregoing, it is **ORDERED** that any reference to HIB be deleted from the personnel files maintained by the Board in regard to the petitioner.

It is further **ORDERED** that:

1. Petitioner's motion for summary decision is **GRANTED;**

2. Respondent's cross-motion is **DENIED;** and

3. The petition in this matter is **DISMISSED.**

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

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

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

April 12, 2016
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency: 4/12/16

Date Mailed to Parties: 4/12/16

JSK/vj

255-16

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|---|---|---|
| T.L., ON BEHALF OF MINOR CHILD, A.B., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, A.B., was not entitled to a free public education in Union Township schools. Petitioner asserted that she has lived on M. Place in Union, with her mother and daughter, since 2008 and has lived nowhere else. Petitioner does own a house in Hillside, in which she lived between 2001 and 2008; she described this house as an investment property, but has never rented the property to tenants. The Board contended that A.B. is not domiciled at the Union address provided by the petitioner and sought tuition reimbursement for the period of A.B.'s ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; in the instant case, the Board had good cause to question the residency of A.B. after she informed her teacher, during a social studies lesson, that the house on M. Place in Union Township is her grandmother's house and that A.B. does not live there; results of the Board's residency investigation revealed that neither T.L. or A.B. resided at M. Place in Union; rather, the surveillance and testimony demonstrated that A.B. was transported from L. Avenue in Hillside to school in Union Township; no documentation was offered to support T.L.'s claim that she shares expenses with her mother at the Union Township address; additionally, no documentation was supplied to prove that T.L. receives bills for various accounts in her name at the Union Township address; petitioner did supply documentation regarding utility usage at the Hillside address, which were inconsistent with her claim that no one resides there; and T.L. failed to demonstrate by a preponderance of the credible evidence that A.B. is entitled to a free public education in Union Township. The ALJ concluded that A.B. was not entitled to attend school in Union Township during the period in question, and the Board is entitled to tuition reimbursement from T.L. in the sum of $13,642 for the 2014-2015 school year, and the sum of $7,666.32 for the 2015-2016 school year through February 26, 2016, plus a per-diem rate of $75.16 for each day beyond February 26, 2016 that A.B. remained in the district schools.

Upon review, the Commissioner concurred with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that petitioner failed to sustain her burden of establishing that she was a domiciliary of Union Township during the period in question. Further, the Commissioner found petitioner's exceptions to be without merit. Accordingly, the Initial Decision was adopted as the final decision in this matter and petitioner was directed to reimburse the Board in the amount of $ 21,308.32, plus $75.16 for each day beyond February 26, 2016 that A.B. remains enrolled in Union Township schools. The petition was dismissed.

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

July 13, 2016

OAL DKT. NO. EDU 04708-15
AGENCY DKT. NO. 38-2/15

| | | |
|---|---|---|
| T.L., ON BEHALF OF MINOR CHILD, A.B., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by petitioner and the Board of Education's (Board) reply thereto.

In her exceptions, petitioner argues that the Administrative Law Judge (ALJ) failed to consider the evidence she presented. Specifically, petitioner contends that she testified that she was at work – as evidenced by time sheets – on several days that the residency investigator saw her leaving the Hillside residence. Accordingly, petitioner argues that the investigator's testimony should not be given any credibility. Petitioner further points out that she submitted at least ten documents reflecting her address in Union Township, and that the ALJ erred by ignoring the submissions and failing to afford them any weight.

Petitioner asserts that the ALJ failed to address the testimony of two witnesses – T.L.'s mother and T.L.'s neighbor at the Hillside property. Petitioner maintains that these witnesses testified that she did not live at the Hillside property, and the ALJ disregarded their testimony without assessing their credibility as witnesses. Petitioner also contends that the ALJ should not have relied upon the comments that A.B. – a first grader – made to her teacher stating that she did not live in her grandmother's home in Union Township.

Petitioner further asserts that the ALJ erred by giving weight to the fact that petitioner did not submit her tax returns, W-2 forms, or pay stubs, and could not remember which address she had used on them. As districts cannot request this information as a condition of enrollment in school, it was improper for the ALJ to fault petitioner for not submitting them. Further, the ALJ erred by twisting the evidence submitted by petitioner – *i.e.*, minimal utility bills to show that she did not live in Hillside – into proof that she lived at the Hillside home.

In reply, the Board contends that the ALJ properly found that petitioner failed to demonstrate by a preponderance of the evidence that she is domiciled in Union Township, and therefore petitioner must reimburse the Board for the cost of tuition for the period that A.B. was ineligible to attend school in Union Township. The Board argues that petitioner's exceptions should be rejected because the ALJ made credibility determinations and detailed the reasoning for her findings. Further, the Board notes that the ALJ's credibility findings do not need to be "explicitly enunciated," provided that the record as a whole makes them clear. (Board's reply at 3).

The Board points out that the ALJ determined that petitioner's testimony and documentary evidence were not credible, the testimony of the Board's teaching staff member was credible, and the testimony of the Board's investigators was credible. The Board urges that such credibility assessments should be given deference and were supported by the evidence in the record. Specifically, the Board emphasizes that petitioner failed to produce credible evidence of a domicile in Union Township – including a lack of proof that she assists with bills in Union Township, tax returns, W-2 forms, recent paystubs, and bills and statements – whereas the Board presented evidence of petitioner's domicile in Hillside. Further, the Board contends that the testimony of the investigators and teaching staff member were consistent with the evidence.

Additionally, the Board disagrees with petitioner's argument that the ALJ erred in giving weight to petitioner's failure to produce filed income tax returns. Specifically, the Board maintains that although Boards cannot condition enrollment based on tax returns, there is nothing prohibiting the Commissioner from considering them on a residency appeal, which is done regularly. As an ALJ is

permitted to draw a negative inference from a party's failure to produce evidence of domicile, the Board argues – to the extent that the ALJ placed weight on the fact that petitioner did not submit tax returns – the ALJ acted appropriately and lawfully.

Upon review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that petitioner failed to sustain her burden of establishing that she was a domiciliary of Union Township. At the outset, the Commissioner notes that there is sufficient credible evidence in the record to support the ALJ's finding that petitioner was not domiciled in Union Township for the 2014-2015 and 2015-2016 school years and that the minor child was, therefore, not entitled to a free public education in the District's schools during that time. Notwithstanding the petitioner's contentions to the contrary, the Commissioner finds no basis in the record – which includes more than thirty exhibits and a transcript of the hearing – to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.
> [*N.J.S.A.* 52:14B-10(c)].

A review of the record herein makes clear that the ALJ's factual findings are well supported by same. The record includes: surveillance conducted over a two week period in which the Board's investigator observed T.L. leave the Hillside address and drive her daughter to school on five occasions, which is consistent with school attendance records; surveillance during the same period in which an investigator observed that neither T.L. nor A.B. left the Union Township home in the morning; testimony from A.B.'s teacher as to A.B.'s comments about not living in Union Township; no evidence to support T.L.'s testimony that she assists with utilities at the Union Township home; and utility bills that

T.L. pays for at the Hillside home that are inconsistent with her claim that no one lives there. As such, the evidence in the record supports the ALJ's finding that T.L. is not a domiciliary of Union Township.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against T.L. for the time period during which the minor child was ineligible to attend school in Union Township. Therefore, the Commissioner concurs with the ALJ that the Board is entitled to tuition reimbursement in the amount of $21,308.32 ($13,642.00 for the 2014-2015 school year and $7,666.32 for the 2015-2016 school year through February 26, 2016, during which time petitioner's minor child was ineligible to attend) plus $75.16 for each day beyond February 26, 2016 that the minor child remains in Union Township's schools.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $21,308.32 – plus $75.16 for each day beyond February 26, 2016 that A.B. remains enrolled in the District's schools – for tuition costs incurred during the time period that A.B. was ineligible to attend school in Union Township. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/16

Date of Mailing: 7/13/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 04708-15
AGENCY DKT. 938-2/15

**T.L. ON BEHALF OF MINOR CHILD, A.B.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,**
Respondent.

---

**Marvin T. Braker**, Esq., for petitioner

**Neha Patel**, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: April 14, 2016 Decided: April 15, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner T.L., the mother of the minor child A.B., appeals the determination of the Union Township Board of Education (the "Board") that A.B. does not reside within the Union Township school district and that tuition reimbursement is required. The Board alleges that the minor child A.B. was not residing at the address provided by the

petitioner and seeks repayment of tuition. At issue is whether A.B. is entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1.

On February 20, 2015, the Board notified T.L. that the child was ineligible to continue to attend school within the district. The petitioner filed a timely notice of appeal on or about February 27, 2015. The Board filed an answer on April 1, 2015. On April 17, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on December 7, 2015, and following the receipt of the post-hearing submissions and copies of all exhibits, the record closed.

## TESTIMONY

T.L.

T.L. testified that she lives at 1224 M. Place in Union, N.J., with her mother and daughter A.B., who is seven years old. She testified that she has lived there since 2008 and has not lived anywhere else. A.B. has never lived with her father and he lives elsewhere.

She learned that A.B. had been questioned at school about where she lives and that Ms. Conneely, A.B.'s first-grade teacher at Livingston Elementary School, had pulled up her students' addresses from the internet. When the teacher located the M. Place house, A.B. indicated that was her grandmother's home. She refers to her grandmother as "Meema."

T.L. testified that she works at Newark Beth Israel Hospital as a respiratory therapist three or four days a week, for twelve-and-a-half-hour shifts. She testified that there are numerous errors in the investigative reports (P-1; P-2), and asserted that she was actually at work on many of the dates and times that the investigator reported she was coming out of 1486 L. Avenue in Hillside with her daughter. She typically works from 7:00 a.m. until 7:30 p.m. The errors she referred to included December 16 and 17,

2014, where the reports indicate that she left the Hillside property after 9:00 a.m., and yet she punched in at work at 7:12 or 7:13 a.m. on each of those days. On another day she had punched in at 6:51 a.m. and departed at 7:31 p.m. from work, yet the investigative report indicates she was seen at the Hillside property at 8:40 a.m. T.L. agreed that her daughter has been late to school at times and she was asked at the district residency hearing about this, and thereafter provided emergency-room reports. She stated that the investigators came to her home, checked the bedrooms, and left. The day after Mr. Martino came to her home Mr. Sheridan came to the Hillside property, and once again checked the bedrooms and left.

The second report (P-2), dated February 10, 2015, and prepared by Mr. Sheridan, indicates that one bedroom at the Hillside property had a lot of bags on the floor, which she testified were storage items because no one lives there. In Mr. Sheridan's December 8, 2014, report (P-1), the entry says that petitioner left in a silver Hyundai, yet she has a green Hyundai SUV. Moreover, she testified that there are many African-American families on that block with kids, and the units are all townhomes and very closely spaced together. She said that there are probably two or three other women with kids her daughter's age, including one next door. T.L. testified that all of their clothes are in Union and that A.B. has lived there since she was born. She indicated that Mr. Sheridan also said at the Board hearing that he had seen A.B. leave a few times with a man, yet A.B.'s father does not live there and T.L. is single.

T.L. indicated that her driver's license and registration are at the Union address and that her paystubs, credit-card statements, and hospital bills all show a Union address.

T.L. testified that her daughter visits with her father every Tuesday night and every other weekend from Friday to Sunday, and that when Mr. Martino came to the Union home A.B. was with her father. She testified that she lived at the Hillside address before 2008; however, since then she has lived exclusively at the Union Township address. She indicates that she shares expenses with her mother, including groceries and other bills, but had no documentation with her to substantiate that. She indicated that she has no receipts and uses cash to pay for everything, and that everything is in

her mother's name at that home. She testified that her car-payment statements are received at the Union address; however, she did not have any statements with her. Her Verizon cell phone is also billed to the Union address; however, she did not have any statements with her. She also testified that she banks at Wells Fargo and that her statements go to the Union Township address, but had none of those with her. Her American Express statements also go to the Union address, but she had no statements with her.

T.L. testified that A.B. is driven to school by either her father, her grandmother, or T.L. Her father takes her Wednesday mornings; otherwise, her grandmother takes her or T.L. does.

She testified that she purchased the Hillside property in approximately 2001 for $115,000 and that she pays a monthly mortgage of $1,178 and quarterly insurance payments of approximately $200. She described the property as an investment property, but indicates that no one else has ever lived there and she has never had a tenant and never collected any rent. She has not lived there since 2008.

Regarding the annual renewal of her license with the State Board of Respiratory Care and the requirement that she provide a change of address if she moves, T.L. testified that she does not believe she ever gave them a different address, and that explains why the State website reflects her address as in Hillside, N.J. She agreed that her February 27, 2015, letter (R-1) indicates that the property is "currently rented to family on an as needed basis," and stated that was "not entirely accurate." T.L. testified that relatives from out of state stay there when they are here in New Jersey, instead of staying in hotels.

T.L. agreed that she did not provide her tax returns and does not recall the address she has used each year, but agrees it is possible she has used the Hillside address. She also agreed that she did not provide W2 Forms or current paystubs.

PSE&G bills reflect that petitioner was assessed electricity-usage charges for the 1486A L. Avenue Property in Hillside in the following amounts: September 2014,

$116.04; October 2014, $56.84; November 2014, $56.32; December 2014, $54.85; January 2015, $48.34; and February 2015, $49.93.

T.L. explained these electric-usage charges by indicating that the refrigerator is plugged in and the porch lights are on, and the washer and dryer are plugged in. She testified that no one lives at the Hillside property.

Bills from Elizabethtown Gas reflect gas-usage charges for the Hillside property in the amount of $18.55 on October 31, 2014; $19.49 on December 3, 2014; $20.57 on January 2, 2015; and $18.50 on January 30, 2015. Bills from N.J. American Water reflect that there were water-usage charges for the Hillside property of $18.86 on October 30, 2014; $24.86 on December 1, 2014; $25.55 on February 2, 2015; $19.55 on March 4, 2015; and $25.15 on March 31, 2015. She indicated that she had high water and electric bills because she "had things plugged in."

Kathleen Lawson

Ms. Lawson, T.L.'s mother, testified that her daughter and granddaughter have lived with her in Union for many years. She stated that her daughter leaves there for school every day, and that they share the upkeep of the home and share costs for food and oil. There are no checks written between them. She indicated that her granddaughter has never lived anywhere else.

M.K.

M.K. testified that she lives at 1486B L. Avenue in Hillside, next door to 1486A. She indicated that she sees T.L. occasionally but not every day, perhaps once or twice a month. She testified that she watches the house and sees the lights on, but at night only the porch lights are on. M.K. testified that T.L. does not live there.

Lindsay Conneely

Ms. Conneely has been a first-grade teacher in Union since 2005. Teachers are instructed to report if they suspect that a student does not live in town, and they serve as the eyes and ears of the school. An October 2014 lesson required students to memorize their home address in case of an emergency, and also places around their address. After everyone memorized their address she would show them their house on Google Earth. This lesson has been part of the social-studies-unit lesson plan regarding families and neighbors for several years.

The students are instructed to prepare a map of their neighborhood, including streets, favorite locations, and parks, and then a writing activity involves describing the types of building and drawing a map of the school and important things nearby. In the map-and-globe skills lesson, A.B. went first because she knew her address in Union, and Ms. Conneely matched her list from the student database and the house came up on the screen. When that happened, A.B. reported, "that's not my house, that's my Meema's house." Ms. Conneely testified that she then said, "well that's where you live though," and A.B. responded, "no that's not where I live." A.B. did not know the address of what she said was her house, but said it was past a Popeyes restaurant, and offered landmarks and attempted to give directions. There is no Popeyes in Union Township, but there is one in Hillside on L. Avenue, and Ms. Conneely testified that she has driven past it. A.B. indicated that her house was "past Popeyes through a tunnel," and Conneely knows of a large overpass near the Popeyes, and assumed that is the location A.B. was describing.

Ms. Conneely filled out a residency form and indicated what she had learned, as there is a requirement to report potential residency issues. (R-5.) She completed the form at the end of the day. At some point A.B. said to her that she cannot talk about her house, but was supposed to say Meema's house is her house, and that if there are any questions they should be directed to T.L.

Ms. Conneely indicated that she never discussed this again with A.B., who had said she wanted to tell her things but was not allowed to. The guidance counselor

heard this information also. Thereafter, Ms. Conneely received a call from the residency office and relayed what A.B. had told her. She indicated that she has done other residency reports over the years.

Ms. Conneely identified A.B.'s attendance records (R-6; R-7; R-8), which revealed that there were no absences in December 2014, but that A.B. was late on December 12, arriving at 9:25 a.m.; on December 16, arriving at 9:16 a.m.; and on December 17, arriving at 9:08 a.m. This was three late arrivals in five school days. She also stated that she was never informed that A.B. had "bad asthma." She knows that A.B. did sit out of gym maybe twice, but she was not on the "medical list"; indeed, R-7 and R-8 say nothing about a medical alert.

Ms. Conneely agreed that a handful of students are late at times, and that this could be an indication of residency issues. A.B. had a lot of late arrivals prior to the commencement of the investigation, and in October, up to October 27, 2014, she was late seven days. (R-5.) Letters are typically sent to the parents when this happens.

Ms. Conneely also testified that there was a reading unit later on that required the student to make a mural of their neighborhood, and A.B. prepared one at home that reflected her Union neighborhood, but prepared another one in class that showed the Popeyes in the picture. The purpose of the maps was to emphasize to the students the importance of knowing their address and places around where they live.

Thomas Sheridan

Mr. Sheridan is a residency investigator for the Union Board of Education. He was asked to investigate A.B.'s residency by the residency office, and did so in December 2014. He went to both the Hillside address and the Union address, and saw a metallic-color Hyundai SUV at the Hillside property. He conducted surveillance there over a ten-day period from December 8 through December 19 and arrived before 7:00 a.m. each day. T.L.'s house has off-street parking so it was easy to watch the driveway. He observed the car and the front door, some days until after 9:00 a.m. Sheridan testified that he saw T.L. and A.B. emerge from the house and drive to school on

December 8, 9, 15, 18 and 19. He followed them as they left on December 8 and 9 and lost them in traffic, but called the school and learned that they had arrived. On December 15, 18 and 19 he observed them leave the Hillside residence and arrive at school. He said that on the remaining days he observed the car there but did not see T.L. leave, and the car remained at the property.

Mr. Sheridan refreshed his recollection by looking at his reports, and noted that on December 10 he did not see the car at the Hillside residence.[1] On December 11 he observed the car there but had to leave, and did not see them leave the home. On December 12 he had to leave and the car was still there; he later checked with the school and learned that they had arrived late that day. On December 15 they left at 8:35 a.m., and on December 16 he left at 9:00 a.m. and the car was still there; the school records note that A.B. was late for school on December 16. On December 17 the car was not there when he did his observation, and A.B. was late for school.[2] On December 18 T.L. and A.B. left the Hillside property at 8:15 a.m. and arrived at school, where T.L. had a conference scheduled. On December 19 he saw them leave at 8:40 a.m.

While he was doing this surveillance, Mr. Martino, another investigator, was surveilling the Union property.

Anthony Martino

Anthony Martino is a residency investigator for the Township of Union and has conducted a few hundred investigations. He was asked to investigate A.B.'s residency, and he observed the M. Place address in Union on December 8, 9, 12, 15, 16, 17 and 19. He would typically arrive each day between 7:15 and 7:30 a.m. and remain until 9:30 or 9:45 a.m., and he never once saw T.L. or A.B. exit the house on any of those days. A maroon car was in the driveway, and it never left during those hours on any of those days.

[1] December 10, 2014, was a Wednesday.
[2] December 17, 2014, was a Wednesday.

A.B.'s attendance records (R-6) confirmed that she was in attendance at school on those days.

## FINDINGS OF FACT

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. The Board had good cause to question the residency of A.B. During a social-studies lesson, A.B. informed her teacher that the house at 1224 M. Place in Union Township is her grandmother's house and that A.B. does not live there.

2. T.L. was provided notice of the Board challenge to residency in December 2014.

3. Surveillance conducted over several days at 1224 M. Place in Union Township revealed that neither T.L. or A.B. resided there. The surveillance and the testimony demonstrated that the child was transported from 1486A L. Avenue, Hillside, N.J., to school in Union Township. The school attendance records amply supported the credible testimony of the residency investigators.

4. At all times at issue herein, A.B. resided with her mother in Hillside, N.J.

## LEGAL ANALYSIS AND CONCLUSIONS

The issue in this appeal is whether A.B. had been a domiciled student in the Union Township school district during the period of attending school in Union Township.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.

State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

From the evidence submitted, it is clear that A.B has been domiciled in Hillside while attending school in Union Township. A.B. admitted to her teacher that she does not live at the Union address. Respondent's investigator observed T.L. and A.B. leaving the Hillside address and driving to Livingston Elementary School on five separate school days in December 2014. No documentation was offered to support T.L.'s claim that she shares expenses with her mother at the Union Township address. The evidence includes numerous bills from Elizabethtown Gas, PSE&G, and NJ American Water reflecting usage charges for the Hillside property that are entirely inconsistent with T.L.'s claim that no one resides there. T.L. failed to demonstrate, by a preponderance of the credible evidence, that A.B. is entitled to a free public education in Union Township. To the contrary, the Board has proven that she is not, as she is not domiciled there. N.J.A.C. 6A:22-3.1(a)(1) provides:

> A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

As found above, A.B. was domiciled in Hillside during the days she attended school in Union. She was observed leaving the Hillside address early in the morning, over the course of several days during an investigation conducted in December 2014, and being driven to Union Township to attend school. Accordingly, I **CONCLUDE** that A.B. was not entitled to attend school in Union Township and receive a free public education there pursuant to N.J.S.A. 18A:38-1(a).

A school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). A.B. was not entitled to a free public education in Union Township based upon the above. Tuition for school year 2014–2015 was $13,642.00, and the per-diem rate for school year 2015–2016 is $75.16. Accordingly, respondent is entitled to reimbursement from T.L. for the

cost of providing a public education to A.B. in the sum of $13,642.00 for the 2014–2015 school year and in the sum of $7,666.32 for the current school year until February 26, 2016, plus a per-diem rate of $75.16 for each day beyond February 26, 2016, that A.B. remains in district schools, and I so **CONCLUDE**.

## ORDER

Based upon the foregoing, it is hereby **ORDERED** that the petition of petitioner, T.L., be and is hereby **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that T.L. reimburse respondent the total sum of $21,308.32 for tuition costs associated with the attendance of A.B. in Union for the entire 2014–2015 school year, and for the 2015–2016 school year through February 26, 2016, as well as an additional $75.16 for each day that A.S. remains in the district school beyond February 26, 2016.

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

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

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

April 15, 2016
DATE

**LESLIE Z. CELENTANO**, ALJ

Date Received at Agency: 4-15-16

Date Mailed to Parties: APR 18 2016
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

# APPENDIX

## Witnesses

For Petitioner:

T.L.

Kathleen Lawson

M.K.

For Respondent:

Lindsay Conneely

Thomas Sheridan

Anthony Martino

## Exhibits

For Petitioner:

| | |
|---|---|
| P-1 | Investigator's Report dated 12-8-14 |
| P-2 | Investigator's report dated 2-10-15 |
| P-3 | Timecard dated from 12-8-14 to 12-18-14 |
| P-4 | Paystub dated 2-21-13 |
| P-5 | Priority mail receipt |
| P-6 | Federal Credit Union Statement |
| P-7 | Macy's statement |
| P-8 | St. Barnabas statement |
| P-9 | Driver's License |
| P-10 | Voter registration |
| P-11 | Letter from Gregory Tatum, Superintendent, to T.L. dated 2-20-15 |
| P-12 | Letter from St. Barnabas to T.L. |
| P-13 | Elizabethtown Gas statement |
| P-14 | NJ American Water statement |

For Respondent:

R-1 Petition of Appeal filed with Commissioner of Education

R-2 Respondent's Interrogatories to petitioner

R-2B Petitioner's Interrogatory Responses

R-2C Petitioner's Supplemental Interrogatory Responses

R-3 Respondent's document demands to petitioner

R-4 Lesson Plans for October 2014

R-5 Residency Investigation Request Form

R-6 A.B.'s attendance records for December 2014

R-7 Enrollment Information for A.B. for school year 2014–2015

R-8 Enrollment Information for A.B. for school year 2015–2016

R-9 Investigator Thomas Sheridan's Report of December 2014

R-10 Investigator Thomas Sheridan's Report of February 2015

R-11 Investigator Anthony Martino's Report of December 2014

R-12 Investigator Anthony Martino's Report of February 2015

R-13 Board of Education's correspondence to and from petitioner

R-14 Board of Education Resolution adopting tuition rates for school year 2014–2015

R-15 Board of Education Resolution adopting tuition rates for school year 2015–2016

R-16 License information for T.L.

R-17 PSE&G statements

256-16

256-16L


CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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

DAVID C. HESPE
*Commissioner*


July 14, 2016

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Westmont, New Jersey 08108

Re: *In the Matter of the Tenure Hearing of Tracey Pitts, State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 132-5/16.*

Dear Counsel:

I have reviewed the materials filed in connection with the respondent, Tracey Pitts' Motion to Dismiss the tenure charges filed by the State-Operated School District of the City of Camden (District). In her papers, the respondent contends that since the District has taken the position that the respondent resigned from her position as a teacher, the tenure charges should therefore be dismissed as moot. Additionally, the respondent argues that the tenure charges should be dismissed because the District failed to comply with the statutory procedural requirements. Specifically, the District asserts that pursuant to *N.J.S.A.* 18A:6-17.3(b) and *N.J.A.C.* 6A:3-5.1(c)(4), the District must forward tenure charges to the Commissioner within 30 days of filing, while the tenure charges here were sent to the Commissioner 255 days after the statutory deadline.

On the other hand, the District maintains that the tenure charges cannot be dismissed as moot, as the respondent contests that she resigned. Further, the District contends that the respondent is estopped from relying on the 30-day period to submit tenure charges because the District relied upon her assertion that she would resign when it waited to certify the charges with the Commissioner. Alternatively, the District argues that the motion to dismiss should be stayed pending the resolution of the settlement action in the Superior Court.

Upon review and consideration of the submissions, I find that the tenure charges filed in this matter do not comply with *N.J.S.A.* 18A:6-17.3(b) and *N.J.A.C.* 6A:3-5.1(c)(4), which specify the time frame in which tenure charges must be certified with the Commissioner. Here, the District served the respondent with tenure charges on August 21, 2015; however, the charges were not certified to the Commissioner until May 6, 2016. The applicable statutory and regulatory provisions clearly outline the process for the proper filing of tenure charges, and charges that do not adhere to those requirements will not proceed.

Accordingly, the Motion to Dismiss is hereby GRANTED, and the tenure charges are dismissed without prejudice.[1]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

**Via Regular Mail**

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

259-16

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE TEACHING CERTIFICATE | : | COMMISSIONER OF EDUCATION |
| OF MOHAMMAD MARZABADI, | : | DECISION |
| SCHOOL DISTRICT OF THE TOWNSHIP | : | |
| OF PISCATAWAY, MIDDLESEX COUNTY. | : | |

## SYNOPSIS

In April 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning his position without giving the notice required by his contract with the Board. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Issued 7/15/16

AGENCY DKT. NO. 127-5/16

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|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE TEACHING CERTIFICATE | : | COMMISSIONER OF EDUCATION |
| OF MOHAMMAD MARZABADI, | : | DECISION |
| SCHOOL DISTRICT OF THE TOWNSHIP | : | |
| OF PISCATAWAY, MIDDLESEX COUNTY. | : | |

For Petitioner, David B. Rubin, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on May 3, 2016, by way of an Order to Show Cause served by petitioner (School District of the Township of Piscataway) upon respondent (Mohammad Marzabadi), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated May 3, 2016, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on May 26, 2016, the Bureau sent respondent a second and final notice – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the May 26, 2016 notice was delivered on May 28, 2016. No answer to the Order to Show Cause has been filed as of this date.[1]

[1] Respondent submitted an answer on April 4, 2016 – prior to the date that the Order to Show Cause was signed by the Commissioner. By letter dated April 5, 2016, the Bureau informed respondent that his answer was premature

The certification submitted by the petitioner in this matter states that: respondent entered into a contract for the 2014-2015 school year, which was renewed for the 2015-2016 school year; that on March 16, 2016, respondent submitted his resignation, effective May 16, 2016; that two days later, on March 18, 2016, respondent modified the effective date of his resignation to April 1, 2016, giving only 14 days notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/16

Date of Mailing: 7/15/16

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and there was also no proof of service of his answer upon the District. As such, the respondent was directed – should he wish for the Bureau to move forward with the answer that he already filed – to file his answer and proof of service on the District after he was served with the signed Order to Show Cause. The April 4, 2016 answer indicates that respondent does not object to a one-year suspension of his teaching certification, but would object to a suspension for an unlimited period of time.

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

2-60-16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF LYNN McKNIGHT, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE CITY OF PLEASANTVILLE, | : | DECISION |
| ATLANTIC COUNTY. | : | |

## SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct, incapacity, and neglect of duty against respondent – a tenured teacher under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and overwhelmingly warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 7/15/16

AGENCY DKT NO. 154-5/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF LYNN McKNIGHT, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE CITY OF PLEASANTVILLE, | : | DECISION |
| ATLANTIC COUNTY. | : | |

For the Petitioner, Benjamin B. Brenner, Esq.
No appearance by or on behalf of Respondent, Lynn McKnight

This matter was opened before the Commissioner of Education on May 27, 2016, through tenure charges of conduct unbecoming and incapacity certified by Dr. Leonard Fitts, Superintendent of the Pleasantville School District ("District"), together with supporting evidence against respondent, Lynn McKnight, a tenured teachering staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via certified mail, on May 24, 2016.

On May 27, 2016, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail return receipt card indicates that the May 27, 2016 notice was delivered to the respondent on June 3, 2016. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate the respondent has been employed by the District as a tenured teacher since the 2006-07 school year. The respondent has been absent for 79 days in the 2009-10 school year; 46 days in the 2010-11 school year; 21 days in the 2011-12 school year; 92 days in the 2012-13 school year; 19 days in the 2013-14 school year and 92 days in the 2014-15 school year. Additionally, the charges state that the respondent was counseled several times concerning to her poor attendance, and she signed multiple Professional Improvement Plans that stated that attendance was an area in need of improvement.

Deeming the allegations to be admitted – and noting that respondent has failed to respond to the charges certified against her – the Commissioner finds that petitioner's charges of incapacity and conduct unbecoming a teaching staff member have been proven, and overwhelmingly warrant the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/16

Date of Mailing: 7/15/16

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

261-16

M.A., ON BEHALF OF MINOR CHILD, M.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his daughter in June 2014, challenging the respondent Board's determination that M.A. was not entitled to a free education in Ewing Public Schools. The Board counterclaimed for tuition for the period from October 3, 2013 through May 19, 2014, based on the results of a residency investigation. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case. Petitioner failed to appear at the hearing, and provided no explanation for his non-appearance. The Board did appear, and provided documentary and testimonial evidence in support of its claim for tuition reimbursement.

The ALJ found, *inter alia,* that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free public education to individuals between the ages of five and twenty years who are domiciled within the school district; the domicile of an unemancipated child is that of her parent or guardian; *N.J.S.A.* 18A:38-1(b)(2) provides parents with the right to appeal a residency determination by a Board of Education; petitioner herein failed to appear and prosecute his appeal, and offered no explanation of his failure to do so; accordingly, the ALJ concluded that the Board's determination that M.A. was not domiciled in Ewing during the period in question should be upheld, and the petition dismissed pursuant to *N.J.A.C.* 1:1-14.4. The ALJ further granted the Board's application for tuition reimbursement in the amount of $10,354.18.

Upon review, the Commissioner concurred with the ALJ findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. Petitioner was directed to pay the Board $10,354.18 in tuition for his child's ineligible attendance in Ewing Schools during the 2013-2014 school year.

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

ISSUED 7/15/16

OAL DKT. NO. EDU 08374-14
AGENCY DKT. NO. 141-6/14

M.A., ON BEHALF OF MINOR CHILD, M.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Administrative Law Judge's (ALJ) recommended decision in this matter dismissed petitioner's residency appeal as a consequence of his failure to appear at the hearing scheduled for this matter without providing any explanation for the non-appearance. The ALJ further concluded that petitioner should be assessed tuition costs in the amount of $10,354.18. The parties did not file exceptions to the Initial Decision. [1]

In accordance with *N.J.A.C.* 1:1-14.4(d), an ex parte hearing was held during which the Board presented the testimony of David Mikalauskas, the district's residency officer, respecting the tuition due the Board for M.A.'s ineligible attendance in its schools. Based upon Mr. Mikalauskas' undisputed testimony, the ALJ found that the school district's total annual per pupil cost for the 2013-2014 school year was $13,908.00. The ALJ further found that the minor child was ineligible to attend school in Ewing for a total of 134 days, from October 3, 2013 through May 19, 2014. Accordingly, petitioner was ordered to pay the Board tuition in the

[1] The Commissioner was not provided with a transcript of the June 3, 2016 hearing at the OAL.

amount of $10,354.18 ($77.27 per day for 134 days) for the time period of the minor child's ineligible attendance in Ewing's schools.

The Commissioner fully concurs with the ALJ's determination and recommendation that petitioner's failure to prosecute this matter necessitates its dismissal and the award of tuition to the Board. Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and petitioner is hereby directed to pay the Board $10,354.18 in tuition for his child's ineligible attendance in Ewing during the 2013-2014 school year.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/16

Date of Mailing: 7/15/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 8374-14
AGENCY DKT. NO. 141-6/14

**M.A., ON BEHALF OF MINOR CHILD,**
**M.A.,**[1]
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY**
Respondent.

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**No appearance by M.A. on behalf of minor child, M.A.,** pro se

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

Record Closed: June 2, 2016 Decided: June 8, 2016

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the determination of the respondent, Ewing Board of Education ("the Board"), that M.A. is not domiciled in its district. The Board initially

[1] This case was originally captioned as M.A. on behalf of minor children, M.A., J.C., and J.C. v. Township of Ewing Board of Education, Mercer County. Students J.C. and J.C. have been resolved in another case.

sought to remove petitioner's child, M.A., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demanded tuition reimbursement based on petitioner having moved out of its district on June 25, 2014. The Board demands tuition reimbursement from October 3, 2013, the date on which the residency investigation began, until May 19, 2014, the day on which M.A. was removed from the Board's attendance rolls.

Petitioner filed an appeal with the Department of Education ("the Department") on June 2, 2014. The Board filed an answer on July 1, 2014. The matter was transmitted and filed at the Office of Administrative Law (OAL) as a contested case on July 7, 2014.

The matter was assigned to John Russo, Jr., ALJ, and a prehearing conference was scheduled for October 1, 2014. The OAL was unable to reach M.A. for the conference call on that date. Judge Russo, at that time, directed the Board attorney to find out if M.A. still wanted to pursue his appeal and if he was willing to do so on the papers. The Board sent in a certification attesting to the amount of tuition owed. A letter was sent to the Board's counsel on September 2, 2105, requesting the Board file a motion to grant their counterclaim for tuition based on the parent's failure to appear. Failure to provide a motion would result in the scheduling of a hearing date. No motion was received from the Board.

Prior to scheduling a hearing date, Judge Russo was appointed to the Superior Court and on December 23, 2015, the case was reassigned to the undersigned. A notice of plenary hearing, dated March 8, 2016, was sent to the parties advising them of the June 3, 2016, hearing date. Counsel for the Board appeared on June 3, 2016. Petitioner failed to appear and did not contact the OAL to provide a reason for his nonappearance.

## FINDINGS OF FACT

At hearing, the Board offered a packet of documentary evidence (R-1; R-2), and the testimony of its Residency Officer, David Mikalauskas in support of its claim to tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I **FIND** the following **FACTS**:

1. M.A. was a general education school student in the Ewing schools.

2. The Board determined that petitioner was not domiciled in Ewing commencing October 3, 2013.

3. During the time period from October 3, 2013 through May 19, 2014, when petitioner was not domiciled in Ewing, M.A. attended school for 134 days.

4. The annual per pupil cost for a general education school student in the same grade as petitioner's children is $13,908.

5. The daily tuition rate for a general education school student in the same grade as petitioner's children is $77.27. This is calculated by dividing the per pupil cost by 180. David Mikalauskas calculated a daily tuition rate of $75.58. This was apparently based incorrectly on using a divisor of 184 days rather than 180.

6. As of June 3, 2016, the amount of tuition owed to the Board for M.A.'s period of ineligible attendance is $10,354.18.

## LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner has failed to appear and prosecute his appeal of the Board's decision. He has failed to advise me of the reason for the nonappearance. Therefore, I **CONCLUDE** that the determination of the Board that M.A. was not domiciled in Ewing during the period of time from October 3, 2013 to May 19, 2014, should be upheld and the petition of appeal dismissed pursuant to N.J.A.C. 1:1-14.4.

The Board asserts that it is entitled to be reimbursed for tuition for the period of M.A.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right if an appeal to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board relative to its tuition claim. The Board's proofs are convincing and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition

reimbursement in the amount of $10,354.18, for the period from October 3, 2013, through May 19, 2014.

## ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $10,354.18.

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

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

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

June 8, 2016
DATE

**EDWARD J. DELANOY, JR.**, ALJ

Date Received at Agency: 6/8/16

Date Mailed to Parties: 6/9/16

## APPENDIX

## LIST OF WITNESSES:

**For petitioner:**

None

**For respondent:**

David Mikalauskas

## EXHIBITS:

**For petitioner:**

None

**For respondent:**

R-1 Residency Investigation Checklist

R-2 Letter to M.A. re: Residency Hearing

263-16

OAL DKT. NO. EDU 9554-16
AGENCY DKT. NO. 179-6/16

| | | |
|---|---|---|
| M.A., on behalf of minor child, J.A., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/16
Date of Mailing: 7/14/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 09554-16
AGENCY DKT. NO. 179-6/16

**M.A. ON BEHALF OF MINOR CHILD J.A.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,**

Respondent.

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**M.A.**, father of J.A., and **E.E.**, mother of J.A., pro se

**Michael J. Gross,** Esq., for respondent (Kenny Gross Kovats & Parton, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

M.A. ("petitioner") filed a petition with the Commissioner of Education seeking an order directing the Board of Education of the Township of Verona ("respondent") to allow his daughter, J.A., who recently completed her junior year in high school, to attend a summer recovery program to improve her low passing grades including a D in one subject and D- in three others during her sophomore year. In conjunction with the

petition, petitioner filed a request for emergent relief, because the registration for the summer recovery program is scheduled for July 8, 2016.

The matter was transmitted to the Office of Administrative Law on June 29, 2016, for determination as a contested case. An oral argument in regard to petitioner's motion for emergent relief was conducted on July 6, 2016, at the Office of Administrative Law in Newark, New Jersey.

In support of the motion for emergent relief, petitioner asserts that after her sophomore year, 2014-2015, J.A. was diagnosed with a medical condition that caused a dramatic decrease in her grades. According to M.A., J.A. received grades of F in most of her subjects, but the school raised to final grades to D or D- in order to pass her for the year. M.A. claims that the school district gave J.A. passing grades so that she could not attend a summer recovery program. M.A. further asserts that many counties provide summer recovery programs to make up low passing scores regardless of the reason. J.A. is very motivated to improve her grades from her sophomore year. In response to M.A.'s request for a summer recovery program for J.A., respondent's personnel advised him that they would only allow a summer recovery program if the final grade was F and that there would be no changes to J.A.'s grades for her sophomore year. M.A. maintains that this decision does not assist his daughter and that it denies her a fair and equal chance compared to students in other school districts in New Jersey that provide a summer recovery program for students with low passing grades in addition to failing courses. M.A. requests as an American citizen the equal rights without discrimination as the students in other school districts in New Jersey.

Respondent submitted the certification of Superintendent of Schools Rui M. Dionisia. According to the certification and attached exhibits, J.A. has completed three academic years at Verona High School and will be a senior for the 2016-2017 school year. The parents encouraged and endorsed J.A.'s participation in Honors and Advanced Placement ("AP") courses, when J.A. enrolled in Verona High School during the 2013-2014 school year for ninth grade. Respondent permits students to be enrolled in Honors and AP classes with the parents' consent even if District personnel do not

agree that the student is prepared for these advanced courses. J.A.'s grades were much better in her freshman and junior years, compared to when she was a sophomore.

Petitioners are seeking enrollment of J.A. in a summer recovery program in order to change the grades that she received as a sophomore during the 2014-2015 school year. Respondent does not offer a summer recovery program. Those students who seek enrollment in supplemental, remedial, advancement or enrichment courses must take these classes outside the Verona School District.

In accordance with the Verona High School Curriculum Handbook, credit recovery procedures are provided only for students who have a final grade of "F" in a course required for graduation. Petitioners are requesting credit recovery for courses that J.A. passed and for which she has already received credit.

Petitioners are seeking to change J.A.'s grades for the 2014-2015 school year to improve her grade point average (GPA) two years later. In accordance with the Curriculum Bulletin, summer school courses are not used in the determination of the student's GPA. Therefore, enrollment in a summer program would not affect J.A.'s GPA.

Additionally, if J.A. were allowed to take summer courses to improve her GPA, many other students would likely request the same relief. Alternatively, it would be unfair and inequitable to allow only J.A. to improve her GPA by taking summer courses.

Petitioner filed his motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

One factor for consideration is whether the petitioner has demonstrated a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. Where there are significant factual issues, the petitioner cannot demonstrate a likelihood of prevailing on the merits.

In this case, there is a factual issue as to whether other school districts offer summer programs designed to change a student's grades. Petitioner claims that there are such programs. During the oral argument, respondent maintained that it was not aware of any such programs. Under the circumstances, petitioner has not demonstrated a likelihood of prevailing on the merits of the underlying claim.

Another consideration is whether the legal right underlying the petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)2. Here, petitioner has not offered any legal theory to support his position. It follows that petitioner has not demonstrated that there is a settled legal right underlying his claim.

Another factor is whether a balancing of the equities and interests of the parties indicates that petitioner will suffer greater harm than the respondent if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)4. Here, petitioner's request is inherently inequitable in that he asks for an opportunity for his daughter to improve her grades from a previous school year, when other students do not have this opportunity. Alternatively, if all students are given this opportunity to improve their grades from prior years,jj it could create a chaotic situation for respondent. Under the circumstances, petitioner has not established that he or J.A. will suffer greater harm than respondent if the requested relief is not granted.

The final consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

Here, the harm to J.A.'s academic record occurred two years ago. The impact of J.A.'s GPA on her prospects for college admissions is speculative in that she may well be able to persuade colleges that her poor grades in her sophomore year were attributable to illness. It follows that petitioner has not demonstrated that he or J.A. will suffer irreparable harm if the requested relief is not granted.

In order to prevail on a motion for emergent relief, the movant must satisfy all four requirements under N.J.A.C. 6A:3-1.6(b). Here, petitioner does not meet any of the requirements for emergent relief. Under the circumstances, I **CONCLUDE** that petitioner's request does not satisfy the applicable standard for emergent relief. Accordingly, it is **ORDERED** that petitioner's request for emergent relief be denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 7, 2016

DATE

**RICHARD McGILL**, ALJ

ljb

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6066
Fax No. (973) 648-2358

DAVID C. HESPE
*Commissioner*

**Richard McGill**
*Administrative Law Judge*

July 7, 2016

David C. Hespe, Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500

Re: M.A. o/b/o minor child J.A. v. Board of Education
of the Township of Verona, Essex County
OAL Dkt. No. EDU 09554-16
Agency Dkt. No. 179-6/16

Dear Commissioner Hespe:

Enclosed please find a copy of an order entered regarding an application for emergent relief in the above-mentioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective in forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency heard.

Very truly yours,

Richard McGill
Administrative Law Judge

RM/ljb
Enclosure
C: M.A.
Kenneth J. Gross, Esq.
Robert Giordano, ALJ/MOD

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

262-16

OAL DKT. NO. EDU 08989-16
AGENCY DKT. NO. 164-6/16

| | | |
|---|---|---|
| MAYOR AND COUNCIL OF THE TOWNSHIP OF EVESHAM,<br><br>PETITIONER,<br><br>V.<br><br>BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,<br><br>RESPONDENT. | : | COMMISSIONER OF EDUCATION<br><br>DECISION ON<br><br>APPLICATION FOR EMERGENT RELIEF |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/16

Date of Mailing: 7/14/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

**EMERGENT RELIEF**

OAL DKT. NO. EDU 08989-16

AGENCY DKT. NO. 164-6/16

**MAYOR AND COUNCIL OF**
**THE TOWNSHIP OF EVESHAM,**
Petitioners,
v.
**BOARD OF EDUCATION**
**OF THE TOWNSHIP OF EVESHAM,**
**BURLINGTON COUNTY,**
Respondent.

---

**John C. Gillespie,** Esq., for petitioners (Parker McCay, P.A., attorneys)

**William S. Donio,** Esq., and **William J. Hughes, Jr.,** Esq., for respondent (Cooper Levenson, P.A., attorneys)

Record Closed: June 23, 2016 Decided: June 30, 2016

BEFORE **ELIA A. PELIOS**, ALJ:

## STATEMENT OF THE CASE

Mayor and Council of the Township of Evesham (petitioners) filed an emergent motion to prevent the respondent from taking any steps in furtherance of the proposed

closure of the Florence V. Evans School (Evans School), currently under review by the Commissioner of the Department of Education.

## PROCEDURAL HISTORY

On June 16, 2016, petitioners filed a petition for due process with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergent relief. On June 17, 2016, the emergent matter was filed, along with the due process request, with the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on June 23, 2016.

## FACTUAL DISCUSSION

In this emergent matter, petitioners, the Mayor and Council of the Township of Evesham, seek an order restraining the Evesham Township Board of Education (Board) from implementing its plan to close the Florence V. Evans Elementary School. On March 17, 2016, the Board passed a resolution to consolidate elementary schools within the Evesham Township School District, effective July 1, 2017. Motion for Emergent Relief, Ex. B. The Board resolved to close the Evans School and disperse its students and staff among the school district's other elementary schools as "an efficient and effective means of addressing declining enrollment, increased costs and achieving costs savings[.]" Ibid. The Board further resolved to comply with N.J.A.C. 6A:26-7.5, the State regulation governing school closings, and determined that "its action shall be contingent upon receipt of all necessary approvals from the Department of Education and the Executive County Superintendent [ECS] to close the Evans School[.]" Ibid. While the Board decided that the Evans School would not close until the end of the 2016-2017, the Board authorized the school district's administrators "to take such other action as is necessary and appropriate to effectuate the closing of the Evans School as provided herein and to implement an orderly and equitable transitional plan for education of the Board's students." Ibid.

In furtherance of the Board's resolution, the Superintendent of Schools for the Evesham Township School District, John Scavelli, on March 18, 2016, notified parents that "incoming Kindergarteners and any new students for the 2016-2017 school year from both

Evans Elementary School and Jaggard Elementary School . . . will begin in their new home school in September 2016." Id. at Ex. C. According to Superintendent Scavelli, he took this action in accordance with District Policy 5120 in order "to avoid confusion and/or anxiety in the fall of 2017." Scavelli Cert., ¶ 8. Under District Policy 5120:

> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance area when such an exception is justified by circumstances and/or is in the best interests of the pupil.
> [Board's Brief in Opposition to Motion, Ex. C.]

The Board has submitted its consolidation plan to the Department of Education's Division of Administration and Finance (Division), which is currently reviewing the plan. Scavelli Cert., ¶ 11. In seeking approval of its consolidation plan, the Board also submitted to the Division an amended long-range facilities plan (LRFP). Board's Brief, Ex. D.

On June 16, 2016, petitioners filed a motion for emergent relief with the Commissioner of Education, who subsequently transmitted the motion to the OAL for a hearing. In their motion, petitioners challenge the Board's decision to close the Evans School. Verified Petition for Emergent Relief, ¶ 1. According to petitioners:

> [the Board] has never amended the 2009 [LRFP], which calls for no discontinuation of use of any school facilities in Evesham Township. The [Board's] recent action would allow it to close the Evans School in violation of the approved LRFP. Without amending the Plan, the Board is not permitted to close or build new schools.
> [Ibid.]

The relief sought by petitioners includes an order "[r]estraining [the Board] from proceeding with the implementation of its School Closure Plan as reflected in its Closure Resolution of March 17, 2016" and "directing and finding [the Board] must submit a new [LRFP] to the Department of Education within ninety (90) days." Id. at p. 11. According to petitioners, without such relief, "the closure of the Evans School will be accomplished by

Respondent in violation of [the 2009 LRFP], its own Policy 7130, and applicable statutes and regulations."[1] Ibid.

In their brief in support of their application for emergent relief, petitioners contend that they "will suffer irreparable harm because the Evans School will effectively close if the matter is not heard immediately, and no quantum of damages can be calculated to redress the harm occasioned by this blatant disregard and violation of the approved LRFP, Policy 7130, and the statutes and regulations governing school closures;" "[t]he Board's violation of N.J.S.A. 18A:7G-4, N.J.A.C. 6A:26-7.5, and [District Policy] 7130 clearly provides [them] the right to contest [the Board's] wrongful actions" before the Commissioner; they "will be successful on the merits because the Board failed to meet all elements required to implement a school closure;" and, they will suffer greater harm if the requested relief is not granted because "the Board will have made a significant decision without the proper facts, and without necessary community input, endangering the 'thorough and efficient education' of the children in the District."[2] Petitioner's Brief, pp. 5-10.

In response, the Board argues that "[t]here is no emergency here" because "[t]he proposed closure does not take effect until the end of the 2016-2017 school year, and the Commissioner is still evaluating the [Board's] proposal." Board's Brief, p. 4.

## LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;

---

[1] Under District Policy 7130, in part, "[t]he Board must receive a letter of approval from the Department of Education before making a final determination to close a school" and "[t]he proposed closing must be consistent with the district's approved LRFP, demonstrating that sufficient school building capacity exists to house district pupils following such closing for the succeeding five years." Petition, Ex. E.

[2] Under N.J.S.A. 18A:7G-4(a), "each district shall prepare and submit to the commissioner a long-range facilities plan that details the district's school facilities needs and the district's plan to address those needs for the ensuing five years." Ibid.

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

Petitioners argue that they "will suffer irreparable harm if immediate relief is not granted because the School District has begun to implement its School Closure Plan" such that "[c]hildren are being directed from the Evans School to other elementary schools further away in the district." Petitioners' Brief, pp. 5-6. According to petitioners, "no quantum of damages can be calculated to redress the harm occasioned by this blatant disregard and violation of the approved LRFP, Policy 7130, and the statutes and regulations governing school closures." Id. at p. 6.

Petitioners have failed to identify any harm, let alone any irreparable harm, they will suffer if their motion for emergent relief is not granted. For instance, petitioners do not allege that any of their own children have been "directed from the Evans School" and they have not shown that the children who have been so directed, will be irreparably harmed if petitioners' motion is not granted. Additionally, petitioners' argument presupposes that providing educational service at a different location within the same school district constitutes harm without demonstrating such to be the case.

Petitioners have also failed to show how they have been or will be irreparably harmed by the Board's alleged violations of both its policy and the law governing school closings and long-range facilities plans. At the hearing on their motion, petitioners argued that such violations constitute irreparable harm per se. While it may be true that, for example, "[w]here injunctions are creatures of statute, all that need be proven is a statutory violation," Matawan Reg'l Teachers Ass'n v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328 (Ch. Div. 1986) (citation omitted), petitioners have not pointed to any statutory provision for injunctive relief with respect to school closings or long-range facilities plans. Compare, e.g., the Milk Control Act, N.J.S.A. 4:12A-44 (providing that "[a]ny habitual violation of the act or of any of the orders or rules or regulations made pursuant to the act may be restrained by the Superior Court in an action brought for such purpose by the Attorney-General on behalf of the director"). Moreover, petitioners presuppose that the Board has actually violated its own policy or the law governing school closings and long-range facilities plans which, as discussed below, is not necessarily so.

Finally, even if the Board's actions, as alleged, constituted irreparable harm, petitioners cannot show that they will suffer irreparable harm if the requested relief is not granted. Specifically, the Board has already sought approval from the Division to close the Evans School and there is a possibility that the Division will reject the Board's proposal in advance of the 2016-2017 school year. In that event, the Evans School would not close as planned and the children at the center of Superintendent Scavelli's transitional plan would presumably attend the Evans School during the 2016-2017 school year and thereafter. The possibility that the Division may render a decision on the Board's school closing application prior to the start of the 2016-2017 school year prevents petitioners from showing that they will suffer irreparable harm if the Board is not immediately restrained from implementing its transitional plan.

For the foregoing reasons, I **CONCLUDE** that petitioners have failed to demonstrate that they will suffer irreparable harm if emergent relief is not granted.

In order to grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, a judge "must not grant an injunction in cases

when the principal of law on which it depends is disputed, and has not been settled in this state." Stevens v. Paterson & N. R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869).

In the present matter, petitioners claim that the Board violated State law and its own procedures by failing to amend the 2009 LRFP and that the closing of the Evans School would be inconsistent with the approved 2009 LRFP, which "calls for no discontinuation of use of any school facilities in Evesham Township." I **CONCLUDE** that the legal right underlying petitioners' claim is settled in that N.J.A.C. 6A:26-7.5 conditions the Division's approval of a school closing on a showing that "[t]he proposed closing is consistent with the school district's approved LRFP," that the school board has received the appropriate ECS' recommendation that the school close, and that the school board receive a letter of approval from the Division prior to the school closing. Accordingly, I **CONCLUDE** that petitioners have met this requirement.

However, in order to obtain emergent relief, a petitioner must also demonstrate a likelihood that they will prevail on the merits of the underlying claim. N.J.A.C. 6A:26-7.5 requires school boards to prove to the Division that the proposed closing is consistent with the school district's approved LRFP. Even if the closing of the Evans School would be inconsistent with the 2009 LRFP, as alleged by petitioners, the Board has presented evidence that it provided the Division with an amended LRFP when it applied for approval of its school closing proposal. The simultaneous submission of an amended LRFP and school closing application accords with N.J.S.A. 18A:7G-4(c), which states that "[a]n amendment to a long-range facilities plan may be submitted at any time to the commissioner for review and determination on the approval or disapproval of the amendment." Whether or not the Division will approve the Board's proposal to close the Evans School at the end of the 2016-2017 school year is not yet known. As part of the approval process, the Division will determine whether the Board met all of the requirements of N.J.A.C. 6A:26-7.5. It is agreed by the parties that this proceeding is not to stand in front of or substitute for the Commissioner's review of the Board's application. If the Division approves the Board's plan, then petitioners may challenge that decision before the Commissioner. In that it may well be that petitioners' seeking a ruling that the board has violated State law or its own policies is premature or not appropriate for the underlying

petition, but rather more properly addressed in the context of the Commissioner's review of the application itself.

Additionally, while N.J.A.C. 6A:26-7.5 does not specifically authorize a school district to reassign students in advance of the Division's approval of a school closing, Superintendent Scavelli appears to have authority under District Policy 5120 to determine if it is in the best interests of certain students to attend a different school during the 2016-2017 school year in anticipation of receiving State approval to close the Evans School at the end of the 2016-2017 school year. It is not in dispute that the Board has not yet closed the Evans School and cannot do so unless and until the Division approves. Reversing Superintendent Scavelli's exercising of his educational judgment under District Policy 5120 would require a showing that his actions were arbitrary, capricious, or unreasonable, that has not been provided here. It may well be likely that determination of such would require further fact-finding provided at a plenary hearing which may include testimony and ability to cross-examine potential witnesses.

Considering these two reasons, I **CONCLUDE** that petitioners have not demonstrated a likelihood of succeeding on the underlying petition. It is stressed that this analysis does not represent a conclusion that either party is more or less likely to prevail at hearing, but only articulates that certain questions are not settled to a point that petitioners are deemed, for purposes of emergent relief, sufficiently likely to succeed at hearing, and that litigation of the underlying petition will be helpful in resolving these issues.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. When the equities and interests of the parties are balanced, petitioners will not suffer greater harm than the Board will suffer if the requested relief is not granted. In resolving to close the Evans School, the Board directed school officials to "implement an orderly and equitable transitional plan for education of the Board's students" and Superintendent Scavelli has done so in accordance with District Policy 5120 in order "to avoid confusion and/or anxiety in the fall of 2017." While it is yet unclear whether the Board's plan to close the Evans School will receive State approval, the Board will suffer greater harm than petitioners if the Board is restrained from implementing its transitional plan in anticipation of the eventual closing of the Evans School.

Petitioners would suffer no harm if the requested relief is not granted. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondents, and that petitioners have failed to satisfy this prong.

Consequently, the petitioners' request for emergency relief is **DENIED**.

## ORDER

Having **CONCLUDED** that petitioners are not entitled to the requested emergent relief, it is hereby **ORDERED** that the petitioners' request for emergency relief be **DENIED**. The matter will now be scheduled for plenary hearing on the underlying due process petition.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 21, 2016
DATE

**ELIA A. PELIOS,** ALJ

EAP/ nd

264-16

OAL DKT. NO. EDU 10067-14
AGENCY DKT. NO. 165-7/14

| | | |
|---|---|---|
| ARLENE CRUGNOLA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/16

Date of Mailing: 7/18/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 10067-14
AGENCY DKT. NO. 165-7/14

**ARLENE CRUGNOLA,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY,**

Respondent.

---

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

**Richard A. Brovarone**, Esq., for respondent

Record Closed: May 2, 2016 Decided: June 1, 2016

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

On August 11, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on several occasions but the dates were adjourned because the parties were discussing settlement. A signed copy of the Settlement Agreement/Consent Order indicating the terms of settlement was forwarded to the undersigned on May 2, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

June 1, 2016

DATE

**JEFFREY A. GERSON**, ALJ

Date Received at Agency:

6-7-16

Date Mailed to Parties: JUN 7 2016

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SPRINGSTEAD & MAURICE, ESQS. (251631971)
COURT PLAZA SOUTH, EAST WING
21 MAIN STREET, SUITE 304
HACKENSACK, NEW JERSEY 07601
TEL: (201) 343-0003
*ATTORNEYS FOR PETITIONER*

ARLENE CRUGNOLA

COMMISSIONER

Petitioner,

vs.

BOGOTA BOARD OF EDUCATION

Respondent.

BEFORE THE

OF EDUCATION OF NEW JERSEY

AGENCY DOCKET NO.: EDU-100674-14

SETTLEMENT AGREEMENT

This matter came before Administrative Law Judge, Jeffrey A. Gerson, for a hearing of Petitioner's claims respecting the Petition of Appeal under the above docket number. Counsel for the parties have conferred and have determined that it is in the mutual best interest of the parties to resolve the within controversy without the necessity of a formal hearing.

The parties stipulate and agree as follows:

1. Petitioner, Arlene Crugnola, was a tenured Business Education Teacher employed by Respondent, Bogota Board of Education. Crugnola holds teaching licenses and/or certifications in Business Finance, Economics and Law; Marketing; Business, Keyboarding and Data Entry for Nursery School through grade 12.
2. Petitioner was first employed by Respondent as a teaching staff member on or about September 2008 and has acquired tenure in office pursuant to NJSA 18A: 28-5.
3. Petitioner held a full-time position for the 2013-2014 school year.
4. On or about June 27, 2014, Petitioner received notice, by way of a Board resolution, that

she was the subject of a reduction in force and would not be employed for the 2014-2015 school year.

5. Crugnola filed a Petition of Appeal alleging that the Board violated her tenure and seniority rights when she was subject to a reduction in force (RIF) by continuing to engage non-tenured or less senior staff to teach subjects that she was eligible to teach by virtue of tenure or seniority.
6. The Petitioner now holds a full-time position of employment in another school district.
7. After discovery, it was determined that the available positions to which Petitioner is entitled, are insufficient to warrant a full time or significant part-time position.
8. As a result thereof, Petitioner has elected to remain in her fulltime position in another district, yet, remain on the Preferred Eligibility List for Reemployment in the Bogota School District and await the availability of a substantial part-time or full time position.
9. The Board acknowledges Petitioner's preferred eligibility right to reemployment and to the assignment of classes or subject matter within the scope of her certifications and endorsements. The Board further agreed to notify Petitioner when classes under these certificates and endorsements become available in the District.

10. On the basis of the foregoing, and the continuing obligation of the Respondent to honor her tenure and seniority rights, the Petitioner accepts the terms of this agreement in satisfaction of her claims in the Petition of Appeal.

Stipulated and agreed upon this 18 day of May 2016.

Alfred F. Maurice, Esq.
Attorney for Petitioner,

Richard A. Brovarone, Esq.
Attorney for Respondent

Arlene Crugnola

Bogota Board of Education

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

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Acting Commissioner*

June 6, 2014

Mrs. Arlene Crugnola
3-44 31 Street
Fair Lawn, NJ 07410

Dear Ms. Crugnola:

Our records indicate that you were issued the teacher certifications below. These certifications authorize you to seek and accept employment in a public school in New Jersey requiring teacher certification. They are as follows:

Standard Instructional Certificate
Business: Finance, Economics and Law
(Formerly Teacher of General Business)
Nursery through Grade 12
Issued September 1989; no expiration date

Standard Instructional Certificate
Teacher of Marketing
Nursery through Grade 12
Issued September 1989; no expiration date

Standard Instructional Certificate
Teacher of Business: Keyboarding/Data Entry
(Formerly Teacher of Typewriting)
Nursery through Grade 12
Issued September 2004; no expiration date

This letter also verifies that you have not had your certificates suspended, cancelled or revoked. As of this date, they remain in good standing.

You indicated in your correspondence that you are unsure of where to locate coursework to complete your remaining requirements for the 1304 and 1305 certificates for which you additionally applied. You may wish to contact the business chairperson at local accredited colleges/universities in your vicinity. I would give this person the titles of the coursework that need to be covered and ask if there is an equivalent at the particular institution in question. I would assume that such a person would have a broad

background on course content and would be able to assist you. Additionally, you could try contacting two online institutions which could possibly assist you. These are Thomas Edison College (www.teso.edu) and the University of Phoenix (www.phoenix.edu). Once you have such equivalent coursework, you should then contact your examiner in this office to make sure such coursework would be accepted toward the certification requirements remaining. Your examiner is Ms. Taya Womack and she can be reached at the address on this letterhead. You may also contact her through our online email system at Licensing.requests@doe.state.nj.us.

I hope the above information is of assistance to you. Best wishes on the completion of your certification requirements.

Sincerely,

(FOR ROBERT HIGGINS)

Robert R. Higgins, Ph.D., Director
Office of Certification and Induction

RRH/mmh/Crugnola 1320S,2560S,1340S
Enclosures

140-68-4043 521525

# The State of New Jersey

Department of Education
State Board of Examiners

Standard Certificate

*This is to certify that*

| Issued | Expires | | County | District |
|---|---|---|---|---|
| 09/04 | | ARLENE CRUGNOLA | 03 | 0000 |

Has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey as indicated below:

Teacher of Typewriting

*Commissioner of Education*

*Secretary, State Board of Examiners*

The State of New Jersey

# Department of Education

## State Board of Examiners

# CERTIFICATE

*This is to certify that*
ARLENE CRUGNOLA

*has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey as indicated below:*

| TYPE | ISSUED | EXPIRES | DESCRIPTION | CO. | DIST. |
|---|---|---|---|---|---|
| REG. | 09/89 | - - | TEACHER OF MARKETING EDUCATION | | |

**********

Commissioner of Education

Secretary, State Board of Examiners

The State of New Jersey

# Department of Education

## State Board of Examiners

# CERTIFICATE

*This is to certify that*

ARLENE CRUGNOLA

*has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey as indicated below:*

| TYPE | ISSUED | EXPIRES | DESCRIPTION | CO. | DIST. |
|---|---|---|---|---|---|
| REG. | 09/89 | - | TEACHER OF GENERAL BUSINESS STUDIES | | |

**********

Commissioner of Education

Secretary, State Board of Examiners

# TEACHER OF BUSINESS: FINANCE/ECONOMICS/LAW STANDARD CERTIFICATE
# (ENDORSEMENT CODE: 1302)

Please print this page before you apply.

**TO AVOID DELAYS:** After applying online, please submit **ALL** necessary documentation, including the oath of allegiance/verification of accuracy form, **together in a single packet to the address below.** If possible, please have transcripts sent to you first and then forward them in the sealed envelope(s) together with any other documents. Please include your Social Security number or tracking number in all correspondence with our office.

**NJ Department of Education**
**Office of Certification and Induction**
**PO Box 500**
**Trenton, NJ 08625-0500**

This endorsement entitles the holder to teach finance and investment, economics, law, banking and insurance, business mathematics, business communications, business management, business organization and exploration of related careers in all public schools.

**Degree Requirement**

- A minimum of a bachelor's degree is required from a regionally accredited college/university. (http://www.nj.gov/education/educators/license/usaccred.htm)

**Cumulative GPA Requirement**

- New Jersey requires that candidates for certification achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A grade for students graduating on or after September 1, 2004 (2.50 for those graduating before September 1, 2004) in a baccalaureate degree program, higher degree program or a State-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits. Please note that a high praxis test score may offset a GPA that is lower than 2.75 but higher than 2.50. Click on the following link for more details: http://www.nj.gov/education/educators/license/gpa.htm

**Subject Matter Preparation**

- For certification as a Finance/Economics/Law teacher, current regulations require that applicants complete a minimum of 30 credits in a coherent sequence in the subject field of Business Studies. A coherent sequence requires that at least 12 credits are completed at the advanced level of study (junior, senior or graduate level). Within the 30 credits, applicants must complete six credits in economics, three credits in finance, and three credits in business law. Related courses may be accepted depending on the course description/content. Please provide a course description if a course is not taken from the Business Department. Courses in pedagogy/education are not accepted towards the subject matter preparation. The final determination as to which courses will be counted towards the Finance/Economics/Law subject matter is based on professional and content standards found in the NJ Licensing Code. All credits must appear on a regionally accredited 2 or 4 year college/university transcript.

**Praxis II Test Requirement**

- **Test Requirement.** Please go to http://www.nj.gov/education/educators/license/1112.pdf for testing details. Official scores must be presented directly from Educational Testing Service to the NJ Department of Education. Only official scores are accepted. **The New Jersey Department of Education code (R7666) and your Social Security number must appear on your test score report in order to be accepted. Please submit a copy of your test score report if you have taken the appropriate exam.**

**Professional Teacher Preparation**

- Current regulations for certification require that applicants complete a coherent sequence of study in professional education which may be completed in a provisional teacher program or an approved teacher preparation program. This is to advise that courses presented by the applicant in professional education must be a coherent sequence of courses that culminates in supervised student teaching.

**State Teaching Certificate**

- Please submit a copy of an out-of-state teaching certificate that is equivalent to a NJ Standard Instructional Certificate. Holders of a NJ Standard Instructional Certificate do not need to send in a copy of their certificate.

NOTE: THIS DOCUMENT IS MADE IN ACCORDANCE WITH THE RULES CURRENTLY IN EFFECT. REQUIREMENTS, PASSING TEST SCORES, AND FEES ARE SUBJECT TO CHANGE WITHOUT NOTICE.

# TEACHER OF BUSINESS: KEYBOARDING/DATA ENTRY STANDARD CERTIFICATE
# (ENDORSEMENT CODE: 1303)

Please print this page before you apply.

**TO AVOID DELAYS:** After applying online, please submit ALL necessary documentation, including the oath of allegiance/verification of accuracy form, together in a single packet to the address below. If possible, please have transcripts sent to you first and then forward them in the sealed envelope(s) together with any other documents. Please include your Social Security number or tracking number in all correspondence with our office.

**NJ Department of Education**
**Office of Certification and Induction**
**PO Box 500**
**Trenton, NJ 08625-0500**

This endorsement entitles the holder to teach keyboarding, computer data entry, word processing and exploration of related careers in all public schools.

**Degree Requirement**

- A minimum of a bachelor's degree is required from a regionally accredited college/university. (http://www.nj.gov/education/educators/license/usaccred.htm)

**Cumulative GPA Requirement**

- New Jersey requires that candidates for certification achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A grade for students graduating on or after September 1, 2004 (2.50 for those graduating before September 1, 2004) in a baccalaureate degree program, higher degree program or a State-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits. Please note that a high praxis test score may offset a GPA that is lower than 2.75 but higher than 2.50. Click on the following link for more details: http://www.nj.gov/education/educators/license/gpa.htm

**Subject Matter Preparation**

- For certification as a **Keyboarding/Data Entry** teacher, current regulations require that applicants complete a minimum of 30 credits in a coherent sequence in the subject field of **Business Studies.** A coherent sequence requires that at least 12 credits are completed at the advanced level of study (junior, senior or graduate level). Within the 30 credits, applicants must complete six credits in economics, three credits in finance, and three credits in business law. Related courses may be accepted depending on the course description/content. Please provide a course description if a course is not taken from the **Business** Department. Courses in pedagogy/education are not accepted towards the subject matter preparation. The final determination as to which courses will be counted towards the **Keyboarding/Data Entry** subject matter is based on professional and content standards found in the NJ Licensing Code. **All credits must appear on a regionally accredited 2 or 4 year college/university transcript.**

**Praxis II Test Requirement**

- **Test Requirement.** Please go to http://www.nj.gov/education/educators/license/1112.pdf for testing details. Official scores must be presented directly from Educational Testing Service to the NJ Department of Education. Only official scores are accepted. **The New Jersey Department of Education code (R7666) and your Social Security number must appear on your test score report in order to be accepted. Please submit a copy of your test score report if you have taken the appropriate exam.**

**Professional Teacher Preparation**

- Current regulations for certification require that applicants complete a coherent sequence of study in professional education which may be completed in a provisional teacher program or an approved teacher preparation program. This is to advise that courses presented by the applicant in professional education must be a coherent sequence of courses that culminates in supervised student teaching.

**State Teaching Certificate**

- Please submit a copy of an out-of-state teaching certificate that is equivalent to a NJ Standard Instructional Certificate. Holders of a NJ Standard Instructional Certificate do not need to send in a copy of their certificate.

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# BUSINESS: MARKETING STANDARD CERTIFICATE
# (ENDORSEMENT CODE: 2560)

Please print this page before you apply.

This endorsement entitles the holder to teach **marketing occupations including sales, advertising and retailing, global marketing, entrepreneurship and exploration of related business occupations** in all public schools.

## In order to be eligible for the Standard Certificate, you will need to meet the following:

**Degree Requirement**

- A minimum of a bachelor's degree is required from a regionally accredited college/university. (http://www.nj.gov/education/educators/license/usaccred.htm)

**Cumulative GPA Requirement**

- New Jersey requires that candidates for certification achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A grade for students graduating on or after September 1, 2004 (2.50 for those graduating before September 1, 2004) in a baccalaureate degree program, higher degree program or a State-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits. Please note that a high praxis test score may offset a GPA that is lower than 2.75 but higher than 2.50. Click on the following link for more details: http://www.nj.gov/education/educators/license/gpa.htm

**Subject Matter Preparation**

- For certification as a **Marketing** teacher, current regulations require that applicants complete a minimum of 30 credits in a coherent sequence in the subject field of **business studies with a minimum of 12 credits in Marketing.** A coherent sequence requires that at least 12 credits are completed at the advanced level of study (junior, senior or graduate level). Examples of courses accepted for **Marketing** include **marketing distribution, retailing, sales promotion, entrepreneurship, advertising, and color and design textiles.** Related courses may be accepted depending on the course description/content. Please provide a course description if a course is not taken from the **Marketing** Department. Courses in pedagogy/education are not accepted towards the subject matter preparation. The final determination as to which courses will be counted towards the **Marketing** subject matter is based on professional and content standards found in the NJ Licensing Code. **All credits must appear on a regionally accredited 2 or 4-year college/university transcript.**

**Professional Teacher Preparation**

- Current regulations for certification require that applicants complete a coherent sequence of study in professional education which may be completed in a provisional teacher program or an approved teacher preparation program. This is to advise that courses presented by the applicant in professional education must be a coherent sequence of courses that culminates in supervised student teaching.

**State Teaching Certificate**

- Please submit a copy of an out-of-state teaching certificate that is equivalent to a NJ Standard Instructional Certificate. Holders of a NJ Standard Instructional Certificate do not need to send in a copy of their certificate.

**Letter of Teaching Experience**

- Please submit an original letter(s) from a school official(s), on school letterhead, documenting 1 year of fulltime teaching experience under a valid out-of-state license. The letter should include information about full or part-time status, specific teaching assignment and dates of employment. Holders of a NJ Standard Instructional Certificate do not need to send in a letter of teaching experience with the exception of those who hold a Standard Teacher of the Handicapped Certificate.

NOTE: THIS DOCUMENT IS MADE IN ACCORDANCE WITH THE RULES CURRENTLY IN EFFECT. REQUIREMENTS, PASSING TEST SCORES, AND FEES ARE SUBJECT TO CHANGE WITHOUT NOTICE.

267-16

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|---|---|---|
| BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY, | : | |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner, the Lodi Board of Education (Lodi), asserted that the Rochelle Park Board of Education (Rochelle Park) must share financial responsibility for two special education students whose divorced parents reside separately, each in one of the two school districts. Rochelle Park contended that under *N.J.A.C.* 6A:22-3.1 *et seq.*, shared financial responsibility would be appropriate only when it is not possible to determine where a child is domiciled, and that in the instant matter, a single domicile can be determined; accordingly, Lodi's appeal should be denied. Rochelle Park filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no material facts in dispute, and the matter is ripe for summary decision; at the time of their divorce in 2008, the parents herein were granted joint custody of the two children; when the children were registered in the Lodi school district in 2009, both parents were domiciled in Lodi, but at separate addresses; one parent moved to Rochelle Park in May 2015; in September 2015, Lodi proposed that the cost of programming for the two children at issue here – one of whom attends an out-of-district placement at the Valley Program in Westwood, New Jersey, while the other attends an in-district placement in Lodi – be shared by the two school districts, and forwarded contracts to that effect to Rochelle Park; in October 2015, Rochelle Park denied any financial responsibility for the children; pursuant to *N.J.S.A.* 18A:38-1, children attend school in the district in which they are domiciled; the domicile of children under shared custody arrangements after a divorce often makes it difficult to assign domicile under the traditional rules, but the regulatory scheme found at *N.J.A.C.* 6A:22-3.1 *et seq.* favors an interpretation that assigns a child only one domicile; further, the question of where the two students are domiciled can be answered by reference to *N.J.A.C.* 6A:22-3.1(a)(1)(ii), which instructs that a student's domicile is the domicile of the parent or guardian with whom the child resided on the last school day prior to the October 16th preceding the application date; thus the domicile of these children is the present domicile of the parent with whom they resided on October 15, 2014; as both parents were domiciled in Lodi on that date, Lodi is the district responsible for these children in accordance with *N.J.A.C.* 6A:22-3.1; and the facts in Cumberland Regional H.S. District v. Freehold Regional H.S. District are inapposite to the within matter, and emphasize the flaws in Lodi's argument. The ALJ concluded that Lodi's position is unsupported by either the facts in this matter or by the current law; accordingly, Rochelle Park's motion for summary decision was granted, and the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons well expressed therein.

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

267-16

OAL DKT. NO. EDU 20236-15
AGENCY DKT. NO. 362-12/15

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that requiring the two school districts to share the financial responsibility for the special education of the minor children is not supported by *N.J.A.C.* 6A:22-3.1; instead, only one district is responsible for the cost of their education. The Commissioner further agrees with the ALJ that the domicile of the minor children is determined by where they resided on October 15, 2014, pursuant to *N.J.A.C.* 6A:22-3.1(a)(1)(ii). Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/21/16
Date of Mailing: 7/21/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 20236-15
AGENCY DKT. NO. 362-12/15

**BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,**
Respondent.

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**Alisa Nunno Di Chiara**, Esq., for petitioner (Law Offices of William Nunno, attorneys)

**Stephen R. Fogarty**, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: May 16, 2016 Decided: June 10, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Lodi Board of Education (Lodi), asserts that the Rochelle Park Board of Education (Rochelle Park) must share financial responsibility for two special

education students whose divorced parents reside separately; each in one of the two school districts. Rochelle Park responds that under N.J.A.C. 6A:22-3.1 et seq., shared financial responsibility would be appropriate only when it is impossible to determine where a child is domiciled. Rochelle Park urges that under N.J.A.C. 6A:22-3.1(a)(1)(ii), a single domicile can be determined for these children, and that accordingly, the relief sought by Lodi should be denied.

A petition of appeal was filed by Lodi on November 20, 2015. Rochelle Park filed its answer on December 15, 2015, and the contested case was transmitted to the Office of Administrative Law on December 16, 2016. Rochelle Park filed a motion for summary decision on April 18, 2016. Lodi opposed that motion via letter brief and attachments dated May 2, 2016. Rochelle Park responded to the opposition on May 16, 2016, and the record closed.

## ISSUE PRESENTED

The petition of appeal raises a limited issue for determination; that is, whether, under the facts presented, the decision in Somerville Board of Education v. Manville Board of Education, 332 N.J. Super. 6 (App. Div. 2000), aff'd, 167 N.J. 55 (2001), requires that Lodi and Rochelle Park share special education costs for D.S. and Ry.S.[1]

## FINDINGS OF FACT

The general background facts are not in dispute and I **FIND**:

R.S. and S.R. divorced on or about October 9, 2008. They are the parents of two classified children, fifteen-year-old D.S., and thirteen-year-old Ry.S. The marital settlement agreement gave R.S. and S.R. joint custody, with S.R. as the primary custodial parent. In August 2009, S.R. registered the children in the Lodi school district; both parents resided in Lodi at the time, albeit in separate homes. Effective May 1,

[1] Lodi exclusively alleges that Somerville requires cost sharing because a single domicile for these children cannot be established under the facts presented. Lodi does not ask this forum, in the alternative, to determine the actual domicile of the children, in the event its Somerville argument is rejected.

2015, S.R. signed a lease for an apartment in Rochelle Park, and in July 2015 she advised the Rochelle Park Supervisor of Special Services that she would be moving there. A July 10, 2015, notarized statement signed by both parents indicated that the children "divided their time equally" between their parents' homes.

A later notarized statement dated April 21, 2016, describes the shared time arrangement in a bit more detail as follows:

> [D.S. and Ry.S.] reside immediately following pick up from school on Tuesdays, Thursdays, and alternating Fridays [in] Rochelle Park, NJ with their mother, S.R. On Tuesdays, Thursdays, and alternating Fridays, they sleep [in Rochelle Park]. [D.S. and Ry.S.] reside immediately following pick up from school on Mondays, Wednesdays, and alternating Fridays [in Lodi with their father]. On Mondays, Wednesdays, and alternating Fridays, they sleep [in Lodi].

D.S. attends an out-of-district day placement at the Valley Program in Westwood, New Jersey, under the auspices of the Lodi Child Study Team (CST) and at the expense of the Lodi district. Ry.S. attends an in-district placement at Thomas Jefferson Middle School in Lodi. On or about September 24, 2015, Lodi proposed that the cost of programming for D.S. and Ry.S. be shared by the two districts, and forwarded contracts to that effect to Rochelle Park. On October 8, 2015, Rochelle Park, through its Business Administrator, denied any financial responsibility for D.S. and Ry.S. This petition of appeal followed.

## ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that Rochelle Park is entitled to judgment as a matter of law.

Children attend school in the district in which they are domiciled. N.J.S.A. 18A:38-1. Domicile has been defined as the place where a person "has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). Since children cannot formulate the requisite intent to establish domicile, their domicile follows that of their parents. P.B.K. v Tenafly Bd. of Educ., 343 N.J. Super. 419, 427 (App. Div. 2001); Somerville Bd. of Educ., supra, 332 N.J. Super. at 12. After a divorce, the domicile of the child is that of the parent with whom the child lives. A person may have only one domicile, although he may have many residences. Ibid.

It might seem that domicile thus is a fairly straightforward thing to define. But the shared custody arrangements for today's children of divorce are as varied as the human imagination, making it difficult, at times, to assign domicile under the traditional rules. Our courts have recognized that, as a result, where divorced parents share equal parenting time, the traditional single-domicile rule may require reexamination. Id. at 13. In Somerville, divorced parents lived in different school districts; shared custody; and the child lived with each parent on alternating weeks. The child was placed in an out-of-district program by Somerville where the father resided. The mother resided in Manville. Upon the child's enrollment out-of-district, the Somerville and Manville Directors of Special Services orally agreed to share the child's tuition costs on an alternating year basis. They did so for several years, until a new Manville Director disavowed the agreement, on the grounds that the child was not a Manville domiciliary. Somerville filed suit, seeking a declaration that the child had a dual domicile.

The Appellate Division determined that it was "satisfied in the circumstances before [it that] the statute requiring a free public education to be provided by the district where a child is 'domiciled' does not require that only one of the parents' home, and therefore one district, be designated as the child's domicile." Id. at 15. The Court rejected arguments by the Department of Education that the concept of dual domicile is unworkable in an educational setting, especially for special education students, whose education is scripted according to a well thought out plan that requires consistency and continuity of approach. The Supreme Court affirmed.

But Somerville predates the regulations that now define domicile. And as Supreme Court Justice Coleman aptly noted in his concurring opinion, Somerville was a response to the unique facts presented, and filled a void created by an absence of regulatory guidance. Justice Coleman wrote,

> Nothing in the opinions of the Appellate Division or this Court should be viewed as precluding the Department of Education from promulgating regulations that are consistent with the theory that a school-aged child can have only one domicile . . . . The polestar of the Court's opinion and the proposed regulations is educational continuity for [the child].

[Somerville Bd. of Educ., supra, 167 N.J. at 59.]

Likewise, the majority Supreme Court opinion acknowledged that "the issue posed by this appeal is one that appropriately may be addressed by regulation," and that "any regulation adopted in the future by the Department of Education addressing the issue [of domicile] would supersede our disposition of this appeal." Ibid.

Somerville has indeed been superseded by comprehensive regulations. N.J.A.C. 6A:22-3.1(a) provides in pertinent part:

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.
>
> (1) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian

> previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.
>
> (2) When the domicile of a student with disabilities as defined in N.J.A.C. 6A:14, Special Education, cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of shared responsibility for the cost of the student's out-of-district placement.

An administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959).

N.J.A.C. 6A:22-3.1(a) begins by confirming the general proposition that a child's domicile follows that of his parents; it goes on to countenance a variety of factual complications, and resolves each with a formula for determining a single domicile. Where a special education student is placed out-of-district; his parents reside in different districts; and the regulatory formulas offer no clarity; then, and only then, is a dual domicile assigned for the child. Rochelle Park urges that the regulation reflects the Department of Education's preference for a single domicile, except in the most limited of circumstances. I agree and **CONCLUDE** that the regulatory scheme disfavors the cost sharing approach Lodi advocates for here. My conclusion is consistent with the policy considerations that the Department of Education raised before the Somerville Court.

Moreover, I **CONCLUDE** that the question of where these two children are domiciled can be answered by reference to N.J.A.C. 6A:22-3.1(a)(1)(ii), thus making the cost sharing sought by Lodi inconsistent with the regulations. All agree that D.S. and Ry.S. equally share their time between their parents' homes, and the regulation provides that under that scenario, "the student's domicile is the present domicile of the

parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date." S.R. moved to Rochelle Park on or about May 2015, and alerted school officials there to her relocation in or about July 2015. I thus **CONCLUDE** that the domicile of these children is the present domicile of the parent or guardian with whom they "resided" on October 15, 2014.[2]

Lodi argues that where the children "resided" on October 15, 2014, eludes determination, because they alternate homes day-by-day, waking up in one home on any given day, and going to bed that same day in another. But I agree with Rochelle Park that while D.S. and Ry.S. may sleep in two different homes on any given day, they only "reside[d] in one." I **CONCLUDE** that they "resided" in the home in which they actually conducted the activities of daily life. On October 15, 2014, D.S. and Ry.S. "resided" in the home they returned to after school, because it is there that they did their homework; ate supper; perhaps watched some television or played video games; otherwise relaxed and unwound from their day; and went to sleep. See Citizens Bank and Tr. Co. v. Glaser, 70 N.J. 72, 81 (1976), where the Court held that "[h]ome is the place where a person dwells and which is the center of his domestic, social and civil life." Granted, that morning the children had eaten breakfast in another home, but fewer activities of life take place in the home in which the children awake on any given day. I **CONCLUDE** that it is reasonable to deem the home a child returns to on any given day the home in which he "resides." The regulatory scheme presses for an interpretation that assigns a child only one domicile, and this interpretation of the word "resides" supports the regulatory intent.

Relative to the sort of scenario contemplated by N.J.A.C. 6A:22-3.1(a)(1)(ii)(2), the decision in Cumberland Regional H.S. District Board of Education v Freehold Regional H.S. District Board of Education, 293 Fed. Appx. 900 (3d Cir. 2008) is instructive. There, the special needs child of divorced parents was placed in a residential facility out-of-state. Freehold Regional, the district where the father lived,

[2] The date of enrollment in Rochelle Park has to be the operative "application date" contemplated by the regulation. N.J.A.C. 6A:22-1.2 defines "applicant" to mean "a parent, guardian, or a resident supporting an affidavit student who seeks to enroll a student in a school district . . . ." When the children were initially enrolled in the Lodi schools both parents lived there, making their domicile obvious. October 15, 2014, was a school day; and I take judicial notice by reference to a calendar that it was a Wednesday.

contended that the home district of the child's mother should share in the cost of the placement. The court agreed, relying on the Somerville decision to direct that the districts share the cost of the placement. Cumberland predates the regulations that now guide thorny domicile determinations but offers a scenario that would result in a dual domicile determination even today. The special education student in Cumberland "resided" out-of-state and thus in neither parents' home; as a result, her domicile could not "be determined pursuant to [the regulation]." N.J.A.C. 6A:22-3.1(a)(1)(ii)(2).

Clearly, not so here, and Cumberland's facts emphasize the flaws in Lodi's argument. Accordingly, I **CONCLUDE** that Lodi's contention that Rochelle Park must share the cost of educating D.S. and Ry.S. is unsupported by either the facts presented or by the current law. One district or the other is responsible for these children, in accordance with N.J.A.C. 6A:22-3.1.

## ORDER

Based on the foregoing, Rochelle Park's Motion for Summary Decision is **GRANTED** and the petition of appeal is **DISMISSED**.

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

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

June 10, 2016

DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: June 10, 2016

Date Mailed to Parties: JUN 13 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

268-16

| | | |
|---|---|---|
| C.S., ON BEHALF OF MINOR CHILD, A.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* appeal challenging the integrity and accuracy of A.S.'s disciplinary record. The respondent Board filed a motion to dismiss based upon petitioner's failure to follow the procedural requirements for a parent to challenge their child's school record, as set forth at *N.J.A.C.* 6A:32-7.7(b) and (c).

The ALJ found, *inter alia*, that: *N.J.A.C.* 6A:32-7.7(b) and (c) lays out the procedures that a parent must follow to request a change in a student record, including disciplinary records; the parent must first notify the chief school administrator in writing of specific issues relating to their child's student record; within 10 school days, the chief school administrator or a designee must notify the parent of the school district's decision; if the chief school administrator disagrees with a parent request, the chief school administrator or designee will meet with the parent to resolve the issues set forth in the appeal; if the matter is not resolved, the parent may appeal to the district board of education, which then has 20 school days to render a decision; the decision of the district board of education may then be appealed to the Commissioner pursuant to *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6A:3; in the instant matter, petitioner wanted the disciplinary record of his son changed, but did not meet with the chief school administrator or his designee, despite having been offered the opportunity to do so; instead, petitioner sought to bypass this portion of the regulation and wanted the matter to go directly to the Board. The ALJ concluded that petitioner did not comply with *N.J.A.C.* 6A:32-7.7(b) and (c), and further concluded that the matter should be dismissed and returned to the agency.

Upon review, the Commissioner concurred with the ALJ that the within petition was premature, as petitioner did not comply with *N.J.A.C.* 6A:32-7.7(b) and (c). Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

Issued 7/21/16

OAL DKT. NO. EDU 03315-16
AGENCY DKT. NO. 32-2/16

| | | |
|---|---|---|
| C.S., ON BEHALF OF MINOR CHILD, A.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4, and there is no indication that they were served on the Board or the Administrative Law Judge (ALJ); accordingly, the petitioner's exceptions were not considered by the Commissioner. The Board did not file a reply.

Upon review, the Commissioner agrees with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petition of appeal was premature, as petitioner did not comply with *N.J.A.C.* 6A:32-7.7(b) and (c). Petitioner was informed that in order to challenge the accuracy of his son's disciplinary record, he was required by *N.J.A.C.* 6A:32-7.7(b) and (c) to meet with the Superintendant or other member of the District's administration prior to filing an appeal before the Board. Instead, petitioner did not meet with the Superintendant and filed his appeal with the Commissioner without first filing an appeal with the Board. As petitioner did not comply with the established procedure – and the instant appeal was filed prior to a Board-level hearing – this matter is premature and must be dismissed.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/21/16

Date of Mailing: 7/21/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSAL**
OAL DKT.NO. EDU 03315-16
AGENCY DKT. NO. 32-2/16

**C.S. ON BEHALF MINOR CHILD A.S,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY**

Respondent.

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**C.S.,** pro se

**David Disler,** Esq., for Respondent, North Arlington Board of Education (Fogarty & Hara)

Record Closed: June 8, 2016 Decided: June 8, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

This motion to dismiss was brought by David Disler, Esq., (respondent) in the above-mentioned matter, and papers in opposition to the motion having been filed by

C.S. By way of background, the matter was filed at the Office of Administrative Law as a contested matter on March 3, 2016. On or about March 1, 2016, respondent filed a motion to dismiss this matter with the Department of Education. The motion was sent to OAL along with the file. A telephone conference was held on April 16, 2016. Petitioner sent a letter response on May 9, 2016.

## FACTUAL DISCUSSION

C.S. is the father of A.S. a student in North Arlington. On September 11, 2015, C.S. filed a complaint with the New Jersey Department of Education, Office of Special Education Programs, (OSEP) alleging that North Arlington failed to provide him with A.S.'s disciplinary records; altered A.S.'s disciplinary records and only provided him with a summary of A.S.'s records. He requested A.S.'s record be changed. An investigation was conducted by OSEP which resulted in a complaint investigation report. The OSEP report concluded:

1. North Arlington did not violate the special education regulation by not providing paper incident reports.

2. The records were no impermissibly altered when the principal corrected the students name on the log.

3. North Arlington did not supply the student's records within ten days of the parents' request.

No corrective action is required. Petitioner and Dr. Oliver Stringham, Superintendent of schools, understanding of the complaint investigation report differed.

Petitioner challenged the lack of supporting documents supplied by respondent to OSEP and questioned the integrity of A.S.'s entire disciplinary record. Dr. Stringham requested petitioner provides specific information regarding his allegations against

North Arlington. Dr. Stringham also outlined the procedural requirements for a parent to challenge their child's school record. Petitioner provided information regarding his allegations to Dr. Stingham. Dr. Stingham agreed to modify a portion of A.S.'s disciplinary record, but not other items in petitioner's letter. Dr. Stringham informed petitioner if he disagreed with Stringham's decision to inform him if petitioner wanted to meet to discuss petitioner's challenge to the disciplinary log of A.S. If that did not resolve the matter petitioner could appeal the decision within ten days to the North Arlington Board of Education (Board). Petitioner did not meet with Stringham, he wanted the matter to go to the Board.

Petitioner was again given the opportunity to meet with a designee of Stringham, Stephen Yurchak to discuss the matter. Petitioner has not contacted Yurchak.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:32-7.7 (b) and (c) provides:

To request a change in the record or to request a stay of disclosure pending final determination of the challenged procedure, a parent or adult student shall notify in writing the chief school administrator of the specific issues relating to the student record within 10 school days of notification, the chief school administrator or his or her designee shall notify the parent or adult student of the school district's decision. If the school district disagrees with the request, the chief school administrator or his or her designee shall meet with the parent or adult student to resolve the issues set forth in the appeal. If the matter is not satisfactorily resolved, the parent or adult student has 10 school days to appeal this decision the district board of education. If appeal is made to the district board of education, a decision shall be rendered within 20 school days. The decision of the district board of education may be appealed to the Commissioner pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6A:3, Controversies and Disputes. At all stages of the appeal process, the parent or adult student shall be afforded a full and fair opportunity to present evidence relevant to the issue. A record of the appeal

proceedings and outcome shall be made a part of the student record with copies made available to the parent or adult student.

(c) Appeals relating to student records of students with disabilities shall be processed in accordance with the requirements of (b) above.

In this matter it is clear that petitioner wanted the disciplinary record of his son changed. The regulation is clear on the procedure required when a parent requests a change in a student's record. When the district disagrees with the requested changes as is the case here, the parent must meet with the chief school administer or his designee to resolve the issue. Petitioner did not meet with Dr Stringham or his designee. He wanted to bypass this portion of the regulation and have the matter be heard by the board.

I **CONCLUDE** that petitioner did not comply with N.J.A.C. 6A: 32-7.7 (b) and (c) because he failed to meet with the chief school administer or his designee. I further **CONCLUDE** that this matter should be dismissed and returned to the agency.

## ORDER

Based on the foregoing, it is hereby **ORDERED** that the request for the petition to be dismissed is **GRANTED**.

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

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

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

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

6-8-16

DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency: 6-8-2016

Date Mailed to Parties: JUN 10 2016

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DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

275-16

**STATE OF NEW JERSEY**
**COMMISSIONER OF EDUCATION**

| | | |
|---|---|---|
| **IN THE MATTER OF THE TENURE CHARGES OF** | ) | |
| | ) | **Arbitrator's** |
| **DARNAY DODSON** | ) | **Decision and Award** |
| **-AND-** | ) | |
| | ) | **Agency Docket No. 278-9/15** |
| **STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK** | ) | |

**Peter Adomeit, Esq.**
**Arbitrator**

**For The State Operated School District of the City of Newark**

Sandro Polledri, Esq.
Adams Gutierrez & Lattiboudere, LLC
Raymond Boulevard, Suite 900
Newark, New Jersey 07102

**For Darnay Dodson**

Stuart Ball, Esq.
661 Franklin Avenue
Nutley, New Jersey 07110

**Date of Arbitrator's Decision, Award and Order: July 22, 2016**

**Summary of Award**

Mr. Dodson received two back to back evaluations in 2013-2014 ("Partially Effective" and 2014-2015 ("Ineffective") which under the TEACHNJ Act, required the District to initiate tenure charges. There were three evidentiary arbitration hearings where both sides called witnesses and presented exhibits in the many hundreds of pages. The briefs and reply briefs totaled 143 pages. [1]

The arbitrator has studied and analyzed all of this incredibly detailed and highly technical material of extraordinary complexity and the statues and authorities cited by the parties, and the requirements and limitation the law places on an arbitrator in an effective case, and applying the legal standards to the facts of this case, issues this opinion and award.

The arbitrator finds there were no mistakes of fact; that the evaluations were not motived by any of the illegal motive specified in TEACHNJ; that the districts actions were not arbitrary or capricious. The arbitrator finds that the calculations used to compute student progress is both 2014 and 2015 in the language of TEACHNJ "failed to adhere substantially to the evaluation process."

Having so found, I am by the statute required to *determine if that fact materially affected the outcome of the evaluation.* I find that it did not. If student performance were

[1] The arbitrator acknowledges the superb advocacy by both sides and their ability to make clear their view of the facts and contentions. Attorney Sarah Wieselthier assisted on the briefs for the District. Andrea L. Madden, J.D. assisted on the briefs for Mr. Dodson.

entirely removed from his evaluations, his other failures would by themselves require the evaluations given him. Even if his student performance were calculated properly and were acceptable, his other deficiencies in the 2013-2014 evaluations would not have increased his 2013-2014 evaluations from "partially effective " to "effective"; and that his 2014-2015 evaluations would not have increased from "ineffective" all the way past "partially effective" to "effective." Achieving those scores was a practical impossibility in 2013-2014 and a mathematical impossibility in 2014-2015, even if his student's showed sufficient progress, because his other competency scores were too low. Even if his students were measured as having sufficient progress, which they were not because they could not be so measured by the tools then in existence, the outcome would have been the same.

Because they would not have made a difference in his overall evaluation rating, they are not "material" under TEACHNJ. It is not enough for the teacher to show the standards were not substantially followed. The teacher must also show that any deviation was "material." A "material" deviation is one that would more likely than not make a difference in the evaluations. I conclude they would not.

In different case with a teacher whose other evaluations compared with Mr. Dodson's were better, contained components that were better, the defect in measuring student progress may well be "material." It will turn of the facts of each case.

I find Mr. Dodson's other contentions either unsupported by credible evidence or not persuasive.

Having so found, TEACHNJ Act requires that I render a decision in favor of the board. I so find.

Limitations on Arbitrator

Under The TEACHNJ ACT 18A:6-17.2. , the arbitrator must follow these "*Considerations for arbitrator in rendering decision.*"

*23. a.* [In an inefficiency case] *in rendering a decision the arbitrator shall only consider whether or not:*

*(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;*

*(2) there is a mistake of fact in the evaluation;*

*(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or*

*(4) the district's actions were arbitrary and capricious.*

*b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.*

*c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.*

*d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.*

**Notice of Inefficiency Tenure Charges**

The Charges, dated August 25 and filed September 19, 2015, state as follows:

1. During the period from September 2013 to the present~ Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in an effective manner.
2. During the 2013-2014 school year, Respondent was assigned as a math teacher at Maple Avenue School.
3. Respondent's annual summative evaluation rating for the 2013-2014 school year was "partially effective."
4. As a result of Respondent's annual summative evaluation rating of "partially "effective" Respondent was placed on a corrective action plan ("CAP") for the 2014-2015 school year.
5. During the 2014-2015 school year, Respondent was assigned as a math teacher at the Dr. William H. Horton Elementary School.
6. Despite feedback, suggestions, and assistance, Respondent continued to demonstrate inefficiencies as a teacher.
7. Respondent's annual summative evaluation rating for the 2014-2015 school year was "ineffective."
8. Respondent was rated ""partially effective" and "ineffective" in two consecutive summative annual evaluations.
9. Respondent has failed to prove his effectiveness as a teacher during the 2013-2014 and 2014-2015 school years.
10. Respondent has failed to demonstrate a knowledge of lesson design and focus.
11. Respondent has failed to demonstrate a knowledge of lesson sequence.
12. Respondent has failed to organize lesson components and deliver lessons to move students towards mastery.
13. Respondent has failed to demonstrate a knowledge of pacing and momentum.
14. Respondent has failed to demonstrate an ability to communicate content and instructions in a clear way.
15. Respondent has failed to demonstrate a knowledge of coherent planning.
16. Respondent has failed to demonstrate a knowledge of progression of instruction.
17. Respondent has failed to demonstrate lessons incorporating rigor and inclusiveness.

18. Respondent has failed to demonstrate tailored instruction.
19. Respondent has failed to demonstrate effective practices of asking questions and assigning tasks.
20. Respondent has failed to demonstrate responsiveness to student misunderstanding

classroom (sic).
21. Respondent has failed to demonstrate that he demands precision and well-structured arguments from his students.
22. Respondent has failed to demonstrate that his students revised work based upon teacher and student feedback.
23. Respondent has failed to demonstrate a depth of knowledge.
24. Respondent has failed to achieve a culture of achievement where his students demonstrate an enthusiasm for learning.
25. Respondent has failed to achieve a culture of achievement where his students persist in confronting demanding concepts.
26. Respondent hs failed to persist in seeking approaches for students who have difficulty learning.
27. Respondent has failed to achieve a culture of learning where students use positive productive language and promote classroom values and norms.
28. Respondent has failed to ensure that his students were paying attention and focused on lessons.
29. Respondent has failed to set high learning expectations for his students.
30. Respondent has failed to achieve a culture of learning where there is peer accountability.
31. Respondent has failed to set high learning expectations for his students.
32. Respondent has failed to demonstrate that students understand the lesson and instruction.
33. Respondent has failed to provide students with appropriate feedback.
34. Respondent has failed to demonstrate that his students mastered lesson objectives.
35. Respondent has failed to demonstrate that he effectively used data.
36. Respondent failed to demonstrate that he had an effective understanding of student growth.
37. Respondent failed to demonstrate that his students progressed towards goals.
38. Respondent failed to demonstrate commitment to continuous improvement.
39. Respondent failed to effectively collaborate or contribute during meetings with colleagues.
40. Respondent failed to effectively communicate students~ progress to students, parents, and school leaders.
41. Respondent failed to demonstrate effective attendance and promptness.
42. Despite feedback, suggestions, and assistance. Respondent continued to demonstrate inefficiencies as a teacher.

Decision

Mr. Dodson was employed as a teacher with the district for approximately 15 years,[2] serving first at Avon School teaching elementary classes and with a change in certification, middle school math. Structural changes in the school building would have interfered his continued coaching, so he transferred Maple Avenue in 2010-11, teaching in successive years math, science (which was new to him) and returning to math in 2013-2014, the first year on which the tenure charges are based. Maple Avenue administrators identified him as needing a correction plan in 2012-2013, so at the start of 2013-2014, he met with Hillary Dow, his new supervisor, to develop a Corrective Action Plan ("CAP"). He finished the 2013-2014 school year with a summative evaluation of "partially effective" and because Maple Avenue closed down, the district assigned him to teach eight-grade math at William H. Horton Elementary School for 2014-2015, a struggling school, with many students below proficiency.

There is no credible evidence that the administrators in these three schools, all of whom found him deficient as a teacher, were motivation by any consideration other than trying to improve his ability to teach. There is no credible evidence that the charge of inefficiency was brought against him for any of the improper motives in the statute: "political affiliation, nepotism, union activity, discrimination as prohibited by State or

[2] Before starting his career as a certified teacher, he worked in the District for approximately 5 years, for a total service of 20 years.

federal law, or other conduct prohibited by State or federal law."

His claim that his relationship with Ms. Mignone, his supervisor at the third school, was strained by her not collaborating with the development of a CAP, by his calling his Union representative when she failed to respond to his questioning of his evaluation, or when she sent him a change in his evaluation impersonally by using Bloomboard, and other frictions, and other actions which he considers slights, does not rise to an illegal motive, nor is there any evidence of any improper motive by any of the other evaluators and observers. If he had succeeded in following the advice of his evaluators, his evaluations would not have required a referral for termination proceedings. His CAP was not in retaliation for his calling his Union because he could not get his supervisor's attention. His CAP arose out his performance at the school from which he came prior to 2014-2015. The evaluation process can be frustrating and it is not infrequent that the relationship between the teacher and the administration can be strained, but that does mean that the evaluation was in retaliation for the friction. Mr. Dodson was observed by a number of administrators besides Ms. Mignone, and he makes no credible claim that they all were improperly motivated.

Although he testified he began the 2013-2014 year without a textbook or teacher's edition, he was provided with written teaching materials, and the assistance of the school's math coach. So while the materials were not in textbook form, he went on the internet, developed lesson plans, which he says quickly became satisfactory, and taught his classes. In his first observation, he received an evaluation of "effective." In view of

this evaluation and his own testimony that he went on the internet and developed lesson plans that he said quickly became satisfactory, his assertion that he was disadvantaged by the lack of physical textbooks and teacher's edition harmed his evaluations is not persuasive.

TEACHNJ requires the District to establish a School Improvement Panel ("SIP") N.J.S.A. 18A:6-120. The purpose of an SIP is to ensure the effectiveness of teachers by overseeing the mentoring of teachers and "identify[ing] professional development opportunities tailored to meet the unique needs of the staff". N.J.S.A. 18A:6-120(b); N.J.S.A.18A:6-128. However, at Maple Avenue School in 2013 - 2014, the named panel never met. Mr. Dodson contends that this is a gross violation of the applicable law clearly and deprived Mr. Dodson of an opportunity to improve and grow as a teacher.

The argument is not persuasive. I have examined the statutory provisions[3] on the School Improvement Panel and conclude, in agreement with the District, that they are an administrative device to advise on the process of evaluating teacher performing smoothly and adhering to the rules and timelines. Contrary to Dodson's unsubstantiated assertions, the SIP was not required to meet with individual teachers, nor would it be appropriate for the SIP to do so. There is nothing in the Framework for either the 2013-2014 or 2014-2015 school year that provides for the SIP to meet directly with certain teachers or provide professional development directly, as a panel, to individual teachers. Rather, the

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[3] TEACHNJ 6A:10-3.1 School Improvement Panel membership 6A:10-3.2 School Improvement Panel responsibilities

SIP meets as a panel to oversee the mentoring and evaluations of teachers and provides advice as to school-based implementation of teacher evaluation and development.

There is no credible evidence of any causation between the lack of an advisory panel and Mr. Dodson's 2013-2014 evaluation of "partially ineffective." Nor is there any evidence of any supports the SIP could find which the administrators could not. In the absence of any established causal link between the absence of the SIP, even if they were determined to be part of the "evaluation process" rather than the administrative unit monitoring the process, I find that their absence in 2013-2014 did not "materially affect the outcome of the evaluation, including but not limited to providing a corrective action plan."

Mr. Dodson contends that for the second year, 2014-2015, his assigned school had a School Improvement Panel, but they never met with him, and therefore failed to adhere to the evaluation process. The argument is not persuasive. As just discussed, the District presented credible evidence that the School Improvement Panels meet amongst themselves to discuss teachers, and exchange information, but they do not meet with the individual CAP teachers.

Mr. Dodson's 2013-2014 CAP was required by TEACHNJ and AchieveNJ (N.J.S.A.18A:6-117 et seq.) and N.J.A.C. 6A-10) to contain a measurement of student achievement and to make it part of the teacher's evaluation. In other words, how much have the student advanced during the time in question. That requires a measurement of their skills before they entered Mr. Dodson's class and a second measurement at the end.

Mr. Dodson's 2013-2014 CAP listed four end points.[4]

None of them were usable. The District so acknowledged in their brief. "The District does not dispute that it did not provide a specific student achievement score separate from a teacher practice score as part of Dodson's annual evaluations for either the 2013-2014 and 2014-2015 school years. However, the District was not required to do so because the New Jersey Department of Education ("Department of Education") approved its alternative method of incorporating student achievement into the annual evaluation."[5] The parties disagree over whether the written documents showing the Department of Education approved the District's method of computation were admissible. This issue of whether the final evaluations complied with the statute is discussed later in this decision.

The 2013-2014 observations reveal serious deficiencies in Mr. Dodson's teaching. Ms. Dow's Long observation in October, 2013 showed as follows: 1) For competency 1 [lesson design and focus], he needed a) to design lesson components which move students towards mastery; b) to design questions that lead students to the application and analysis in the strategy in the absence of the scaffold; c) to redirect off-task behavior to preserve lesson time; d) provide unique feedback for each student to allow for independent corrections. For competency 2 ["rigor and inclusiveness"] he used questions that allowed students to show they understood the SOLVE strategy, but needed to ask

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[4] Mathematics tasks that will conclude at the end of Units of Grade 7 curricula; Mathematics assessments developed by ANET; Mathematics NJASK; and Mathematics Post Unit Assessment.

[5] Page 3, District Brief.

questions leading to the application of the strategy and an understanding as to why the strategy was used rather than the SOLVE scaffold. For competency 3 [culture of achievement], he allowed a few off-task students to be talking and not focusing on the problem; he provided feedback to the entire class as a group where he should have given feedback tailored to the individual student so they could correct their mistakes.

Ms. Dow entered the scores as competency 1 [lesson design and focus]: "effective" ; competency 2 ["rigor and inclusiveness"]: "partially effective"; competency 3 ["culture of achievement"]: "effective" ; and competency 4 ["student progress toward mastery"]: "partially effective." The total is 10, falling in the "partially effective" range. "Partially effective" is 6-10 points. "Effective" is 11-14 points. When she first filled out the numbers, she added the numbers wrong and selected the overall rating was "effective" whereas in fact the numbers only added up to 10, which is "partially effective." Havier Nazario, a Special Assistant for Teach Quality noticed the error, asked Ms. Dow to correct it. Ms. Dow had a meeting with Mr. Dodson and told him that the overall score was added wrong and changed, but the individual scores were not changed. He re-signed the summary observation form and initialed the correct number.

Mr. Dodson's position that he was only told it was a "glitch in the system" and that the change constituted an error in the evaluation under the statutory list of reasons to set aside an evaluation is not persuasive, in light of the evidence showing the error was in adding the numbers, not changing the individual scores within the overall assessments of two effectives and two ineffectives. Mr. Dodson's position that he was somehow

disadvantaged by not being first told of the discrepancy, but learning of it on Bloomboard, is not a statutory violation of some process. The Bloomboard is a standard communication device.

Ms. Dow conducted a short, unannounced observation on November 20, 2013. Evaluating him on competency 3 and found his students confronted a demanding concept and helped peers. She rated him as "effective."

Ms. Dow and Mr. Dodson's mid-year conference took place on February 14, 2014. For competency 1, She told him that he must submit lesson plans on time and improve the quality of his lesson plans. For competency 2, she told him that lesson questions and tasks must move students toward analysis and synthesis of the focus skill and standard and questions and tasks must lead students toward extension of their thinking. For competency 3, she told him he must continue to foster an environment that allows students to confront demanding concepts, provide rationales for their solutions, and challenge and support peers. For competency 4, she told him he must be able to articulate, with evidence, each student's progress, standards mastered, and continuing needs. For competency 5, she told him he must submit lesson plans on time.

Ms. Dow reviewed with Mr. Dodson the ANET assessment data. The District used ANET, an interim assessment, during 2013-2014. His students on the ANET assessment performed as follows: Assessments 1 and 2, his students were 12% below other 7th graders in the network. Despite weekly in-class assistance with the math coach,

weekly math content meetings, and monthly progress reports from Ms. Dow, Ms. Dow believed he was not on course to meet the goals he set for himself in his CAP. Ms. Dow told him he must submit lesson plans for review and feedback and analyze data to modify his lessons to address student deficiencies. The District acknowledged in their brief that the ANET scores are not a sufficient basis by themselves for judging student progress, because it doesn't measure how much Mr. Dodson's students progressed.

On the teaching rubric, Ms. Dow rated Mr. Dodson as follows: "partially effective" competencies 1, 2 and 3; "effective" for competency 4; and "slightly below expectations" for competency 5.[6] Competencies 1, 2, and 3 represent, respectively, "lesson design and focus"; "rigor and inclusiveness"; and "culture of achievement." Competency 4 is "student progress towards mastery" and is the one affected by the measurement tools for showing student progress; and competency 5 is "commitment to personal and collective excellence."

Mr. Dodson's overall rating for the mid-year evaluation: "partially effective."

Mr. Nazario conducted a short, unannounced observation on March 24, 2014. Mr. Nazario reported that Mr. Dodson spent the first 20 minutes on a "Do Now," a short introductory exercise to begin a class that is supposed to take five to seven minutes. 'Do Nows' introduce what the lesson will be about It is not intended for it to be the lesson."

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[6] The scale for competency 5 is different from 1 through 4. Grading the teacher in relationship to expectations, the descending scale is: exceeds expectations; meets; slightly above; and significantly below.

Mr. Nazario wrote in the observation that the "Do Now was not connected with the lesson, unit objective(s) or long term goal(s). " He wrote that there was minimal evidence that careful planning and consideration went toward organizing the tools for learning" and that "[m]ore than half the period was consumed without any whole group or instruction on the written objective."

The post-observation conference, held April 2, 2014. Mr. Dodson's rating for competency was "ineffective" and the rating for the entire observation was "ineffective."

The arbitrator finds it inexplicable why in the presence of an evaluator Mr. Dodson did not move onto the lesson for the day. As a veteran teacher, he obviously knew that the "Do Nows" should last for 5 to 7 minutes. When did not advance to the lesson is odd. And he did the same thing a second time, during an evaluation, having been previously told not to do it.

In Ms. Dow's fourth observation on March 31, 2014, was an unannounced long observation. Her evaluation states that Mr. Dodson (l) must be consistent in planning lessons that build on previous learning and are reflective of the major standards; (2) continue to implement lessons where students are required to provide well structured arguments for their solutions; (3) continue to foster an environment that affords students the opportunity to volunteer and actively participate; and (4) continue to provide feedback that will afford students the opportunity to self correct. On the teaching rubric, Ms. Dow rated Mr. Dodson as "effective" for competency 1, "effective" for competency

2, "effective" for competency 3, and "effective "for competency 4. Ms. Dow gave Mr. Dodson an overall rating for the long observation of "effective."

David Scaturi, a Special Assistant for Instruction, held a short, unannounced observation of Mr. Dodson on May 15, 2014, rating him on competency 1, "lesson design and focus", as "partially effective" on all four indicators. Mr. Scaturi found that Mr. Dodson did not connect the lesson to unit objectives or long-term goals; Mr. Dodson did not organize the components nor deliver them to move students towards mastery of the objective; Mr. Dodson's pace was too slow and his content and instructions were sometimes unclear or inaccurate. Mr. Dodson solved a problem on the board incorrectly. Mr. Scaturi recommended that Mr. Dodson use proper math vocabulary; design and implement alternative strategies to allow students to review material more effectively; ensure that he presents solutions that are complete and accurate; and ensure he is clear on the board.

The post-observation conference occurred on May 21, 2014. Mr. Scaturi rated Mr. Dodson on competency 1 as "partially effective" and his rating for the evaluation was "partially effective."

Before holding the annual evaluation, Ms. Dow supplied Mr. Dodson with an annual evaluation evidence sheet for him to complete by April 22, 2015. He failed to return it before the deadline. His annual evaluation had to be rescheduled for May 19, 2014 due to his absence on the prior scheduled date. Mr. Dodson was on an attendance

policy due to poor attendance and tardiness.

Ms. Dow's evaluation shows that Mr. Dodson did not implement any of the feedback he had received. For competency 1, Ms. Dow noted that he had to consistently provide lesson plans on time and that he had only provided lesson plans for review 50% of the time.

Ms. Dow noted his lesson plans must identify, through lesson sequence and lesson components, how lessons fit into the larger unit objectives and lead students toward identified achievement goals. For competency 2, Ms. Dow noted that he must plan and implement lessons tasks and activities that will afford students the opportunity to extend their thinking. For competency 3, Ms. Dow noted he must continue to foster an environment that affords students the opportunity to confront demanding concepts, provide rationales for their solutions, and challenge and support their peers. For competency 4, the Ms. Dow noted that Mr. Dodson must be able to articulate, with evidence, each student's progress , standards, mastered, and continuing needs.

Regarding whether he met his goals or SGOs set forth on his CAP, the evaluation shows he did not. His students performed well below their peers, according to the ANET assessment data. 15% of his students were below all other seventh grade students on interim 1, 11% were below all other seventh students on interim 2, and 17% were below all other seventh grade students on interim.

Mr. Dodson contends the ANET scores are not a valid measure of how students progressed through the school. I agree. There was no dispute. The District's brief acknowledges that their measure of student progress did not comply with the statutes but defended on the ground that the Department of Education had approved their approach. Whether the documentary evidence on this point was admissible is discussed elsewhere in this opinion.

The SGO data is incorporated into the evaluation of Mr. Dodson's performance with regards to indicators d,e, and f under competency 4. Regarding competency 5, Ms. Dow informed Mr. Dodson that he must consistently adhere to attendance policies. Mr. Dodson replied the meeting, (contrary to the facts showing that he failed to submit lessons approximately 50% of the time) that he only failed to submit lesson plans "once or twice" and that he always completed them. Mr. Dodson's assertion that he only failed to provide them once or twice is not credible. At the hearing, Mr. Dodson's assertion that a substitute failed to return his lesson plans for the day was possible; but when he continued to explain missing lesson plans by blaming the substitute, I concluded his mental agility outran his accuracy.

During 2013-2014, Mr. Dodson was absent 9 times and tardy 9 times, and was placed on an Attendance Improvement Plan during 2013-24. The District points to Ms. Dow's testimony that if a teacher is absent, the students are not receiving the curriculum instruction. An abundance of absences [such as Mr. Dodson's] means students are missing out on valuable instruction time.

Mr. Dodson's 2013-2014 ratings were for competency 1 -"partially effective"; competency 2 -"partially effective"; competency 3 - "effective;" competency 4 - "effective;" competency 5 - slightly below expectations. His overall rating for 2013-2014 was "partially effective". It does not incorporate a SGP score because New Jersey did not calculate a SFP score for Mr. Dodson because his class size was under threshold of 20.

Because competency 1 and 2 did not contain student assessment, they would have remained as "partially effective" and is the basis for my conclusion that the failure to follow the statutory scheme for measuring students was not "material" because it not have affected competency 1 and 2 at all. Additionally, his rating for competency 4, where the defective measuring tool for student achievement, was "effective, "which was the highest rating he achieved on any competency during any evaluations in the two period covered by his CAP. For Mr. Dodson to credibly show that the defective measuring tools for student achievement would have been "material" would mean he would have to establish that he would have, had they been measured properly, reached "highly effective" for competency 4, a score he had never achieved on any evaluation. So the "effective" score for competency 4 was the highest he could reasonably expected. With that "effective" his overall score would still have been "partially effectine."

Black's Law Dictionary (2nd Ed.)[7] defines "material" in this way

[7] The Law Dictionary, featuring Black's Law Dictionary (2nd Ed.)
http://thelawdictionary.org/material/

*Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. An allegation is said to be material when it forms a substantive part of the case presented by the pleading. Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.*

Each dispute has unique facts and so a deviation from procedures may have a different impact, depending on the facts of the case. The arbitrator must examine both the deviation and the impact it may have had on the process. If the impact would not change the overall evaluation, it is not material. If it would have changed the evaluation or had a substantial impact on the integrity of the process of evaluation, it is material, and would nullify the termination.

For 2014-2015, Mr. Dodson continued on a CAP. Mr. Dodson's annual evaluation was completed On May 28, 2015, Ms. Mignone and Mr. Dodson met for his evaluation conference. His testimony that he had no such conference is not credible; the final report was witnessed and states he did not sign the evaluation. Ms. Dow credibly testified that the conference took place.

The evaluation document reviewed Mr. Dodson's performance on observations and coaching observations throughout the school year, including the 4 formal observations, 3 coaching observations, and 16 classroom visits from the math coach.

For competency 1, Ms. Mignone indicated that: "Lesson plan submission does not demonstrate a connection between lesson, units and long term goals. There is also a lack of structured lesson components such as modeling, shared practice, guided practice and

independent practice." Mr. Dodson's rating for competency 1 was" partially effective".

For competency 2, Ms. Mignone found that Mr. Dodson failed to implement structured, standards based learning centers despite the math coach focusing on this in several meetings. Mr. Dodson's rating for competency 2 was "partially effective."

For competency 3, Ms. Mignone that "Mr. Dodson's class improved in the realm of management but it is still evident that procedures and routines are absent." His rating for competency 3 was "partially effective."

Mr. Dodson's rating for competency 4 was "partially effective." Ms. Mignone noted that Mr. Dodson did not submit a portfolio to demonstrate his student's progress, despite being asked to do so. The ANET assessment data indicated that Mr. Dodson's goals were not met with regard to any of the four focus standards he identified. The percentage passing was 30% for 8EEl, 31% for 8EE2, 24% for 8EE3, and 56% for 8EE4.8 As such, the District contends that Mr. Dodson did not meet his goals.

Mr. Dodson contends that competency 4 contained invalid measures of student achievement. I agree. Elsewhere in the decision I discuss the issue of whether approval by the Department of Education of the District's assessment plan was admissible. The District acknowledged it did not comply with the strict standards of the statute and I have ruled that the Department of Education approval was inadmissible.

Mr. Dodson contends that even if it were admissible, the District did not follow it. There is no need to discuss this alternative argument, in light of the finding that it is not

8 8EE1, 8EE2, 8EE3, and 8EE4 reference common core standards that relate to the eighth grade math curriculum. These are the standards that Mr. Dodson identified in his CAP with regard to SGOs.

admissible.

I conclude there that the District failed to substantially follow to this portion of the evaluation process. However, even if his students improved sufficiently, and were so measured, and thus increased competency 4 from "partially effective" to "effective", his scores in competencies 1, 2 and 3 were still all "partially effective." Given his set of skills t would have been impossible for him to have overcome three "partially effective" ratings and achieved an overall "effective" score. Consequently, the fact the District's failure to measure student achievement by the statute did not materially affect the outcome of the evaluation.

For competency 5, Mr. Dodson was rated slightly below expectations. Ms. Mignone noted that:

> *Mr. Dodson has not shown a commitment to improvement. Although he has had several meetings with the math coach and feedback sessions with the administration there has been little improvement in target areas. Mr. Mr. Dodson did not submit a portfolio to communicate student progress through data. Attendance is in need of improvement with 17 days absent and 18 days late (7 of which were 5 minutes or more).*

Mr. Dodson's overall annual evaluation score was 6, or "ineffective." It is a score so low that he could not mathematically move it to the "effective" range even if he were "effective" on student achievement.

The District contends that Mr. Dodson falsely testified that he never received an annual review conference. In fact, Mr. Dodson was present and refused to sign the form at the meeting. Mr. Hutchins served as a witness for the meeting and signed the document to indicate her presence as a witness that the meeting took place. I conclude

the meeting occurred, and Mr. Dodson is mistaken when he claims it didn't.

During the 2014-2015 school year, the School Improvement Panel ("SIP") met monthly to discuss all of the teachers that needed assistance. The SIP included Ms. Mignone, the math coach, and the literacy coach. The Panel discussed at the meetings held during the November 2014-April 2015 time period. The agendas from the meetings make clear that Mr. Dodson continued to struggle in the same areas and did not implement the feedback and support he was provided.

For example, in February 2015, it the Panel noted that there was "[n]o evidence of implementation" of feedback Mr. Dodson received about lesson structure. Mr. Dodson continued to require assistance with small group learning centers. In March 2015, the Panel discussed how Mr. Dodson was still having difficulty implementing small group instruction. In April 2015, the Panel discussed how Mr. Dodson needed to work on data analysis and use additional assessments throughout the unit between the pre-tests and post-tests to drive instruction.

The District contends that they provided Mr. Dodson with a significant amount of professional development throughout the 2014-2015 school year in the form of coaching observations, written materials, access to videos and other resources on Bloomboard, weekly meetings with the math coach, and unlimited assistance from the math coach. Despite the significant assistance provided to him, Mr. Dodson failed to make improvements to his teacher practice or demonstrate student progress on the identified goals. Consequently, the District had no choice but to give Mr. Dodson an overall rating of ineffective for the 2014-2015 school year and proceed with tenure charges. I found this evidence persuasive.

Mr. Dodson contends that TEACHNJ required that he receive at last one pre-conference for an announced evaluation during 2014-2015. He did not. It appears to have been an oversight. Mr. Dodson contends that this failure to adhere substantially to the evaluation process. I agree. I must then decide whether this failure materially affected the outcome of the evaluation. Mr. Dodson contends it did. The Board disagrees. I conclude that it did not. Obviously having a pre-conference might make for a better performance and a better evaluation. And possibly a higher score on one evaluation. However, his deficiencies were well known to his evaluators and to him; he knew what he had to work on. He had been told repeatedly. He appeared over a two-year period to be unable to put into effect what he had been told to do. Inserting one conference into this mix would not have moved the scoring needle in an upward direction by very much, if at all. That is not to say that failure to have a pre-observation may not been in a different case, but not on these facts.

I now turn to the question of admissibility of the Department of Education's approval. I conclude it was not admissible; but I also have also conclude that the District's failure in complying with the process on measuring student achievement was not a material failure to comply with the evaluation process. So the issue of admissibility is moot.

Mr. Dodson contends the Department of Education's approval is not admissible because it was not among the evidence provided by the Board to Mr. Dodson before the hearings and is therefore expressly inadmissible under TEACHNJ; and because one of

their interrogatories was broad enough to cover this document and was not provided, which also renders it inadmissible under the Act. I agree. Here is what the statute provides:

> *(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative.* ***The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.*** *At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative.* ***The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.***
>
> *Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.*
>
> *c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures*

*established pursuant to this section, the procedures established pursuant to this section shall govern.*

At the hearing, I reviewed the language and structure of the statute, and concluded it means what it says and the exception based on "impeachment of witnesses" did not apply. "Impeachment" refers to evidence that attacks the credibility of a witness. At the time the District offered the evidence, Attorney Ball had not yet called a witness. There was nothing to impeach. Had a witness denied that the document existed, it could be used to impeach that witness. That is not what happened. I suggested that the parties brief the issue so I could reconsider my initial ruling. I had the documents marked for identification, but not admitted.

On reconsideration, having again reviewed the statute, its language and purpose, and the transcript of the hearing, and analyzed the issue in depth, I again conclude that the evidence is not admissible. However, this ruling does not affect the outcome of the case, because as I discuss elsewhere, although the District failure to substantially follow the procedures for measuring student achievement in competency 4, this failure did not materially affect the outcome of the evaluation.

Here is what transpired when I asked Attorney Ball to describe the documents, which I had then not yet seen. Attorney Ball:

"*There are two documents. One is a set of documents that purports to say Mr. Dodson did not have an SGP for that particular year, the 2013, 2014 year. The*

*second set of documents he is going to try to produce is a set of documents that purport to show that he also didn't get SGOs, that part of the requirement for SGOs was waived and another part was rendered unnecessary because the way they scored competency 4 was equivalent to doing an SGO.*

*Now, this the first time we are getting this. We have gone through the entire process with the initial disclosure of documents, inches thick. Then we also did discovery, and in my interrogatories, in number three I wrote as follows. As per NJAC 6A 10-4.2,* ***describe in detail the measures of student achievement and/or Student Growth Objectives that were utilized to evaluate respondent's performances in 2013, 2014 and 2014, 2015.*** *Describe how the SGOs were specific and measurable based on available student learning data aligned to the core curriculum standards and based on growth and/or achievement. Include detailed descriptions of how respondent met or failed to meet the SGOs in his CAP, Corrective Action Plan.* [Emphasis added.]

*They provide an answer to that question that is at least half of a page long.* ***Nowhere in that answer do they make any reference to any of these documents or even to any of the theories that the documents are submitted to support. There's nothing in the case here that I prepared for trial that gave me any clue about any of this stuff. I developed my case, I tried my case, I prepared Mr. Dodson based on the record that I had.*** *The record now goes 180 degree the other way. I'll ask for a mistrial. If that is not granted, I'll ask to the law division.*

*I will not present Mr. Dodson because we are not prepared to meet any of this.*[9]

[Emphasis added.]

This statute really means business. The TEACHNJ Act contains an affirmative disclosure provision, which by its terms requires each side to exchange all of their documents in advance. There are no depositions, and interrogatories are limited to 25 questions including subparts. "***The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."*** (Emphasis added.) The same goes for the teacher. No disclosure, no admit, except for impeachment. Rebuttal is not impeachment. The whole discovery process relies on voluntary disclosure. It would not work as the legislature intended if new evidence could be introduced to fill holes in either of the parties' cases. The one exception is "impeachment of witnesses." There is no general exception for rebuttal that is not impeachment, although clearly new documents can be introduced for impeachment purposes.

The clear language of the statute states the evidence here in question is inadmissible. The legislature mandates that the arbitrators are required to enforce the statute as written. The procedural structures could unravel if arbitrator opened the door to evidence not allowed by the NEACHNJ. Rejecting the offered document is the enforcement mechanism that makes the pre-trial process work. Weaken that enforcement mechanism, and the pre-trial discovery process could unravel. In other words, making

[9] Tr. Hearing Day 3, March 10, 2016, p. 6.

this evidence inadmissible is a means to an end and not an end in itself. The end is making the discovery work. The means is rejecting evidence that does not comply with the discovery rules.

The District's contends that because TEACHNJ tells the arbitrators to use the American Arbitration Association Labor Arbitration Rules, the AAA rules would allow the arbitrator to admit this evidence, [10] and so the evidence is admissible. But TEACHNJ also says in the event of a conflict with the AAA rules, a conflict which clearly exists here, the TEACHNJ rule procedures rules shall govern:

> *The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section,* ***the procedures established pursuant to this section shall govern.*** (Emphasis added.)

The District argues they had no notice that Mr. Dodson would raise the question of non-compliance with the measurement of student. However, Attorney Ball asked in his interrogatories quoted above about the measurement instrument, and the District did not mention that the Commissioner of Education had essentially waived the statute and

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[10] Under AAA Rule, Rule 14, AAA Rules, could admit the document. *"The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."*

approved a substitute method. The District, by not including it in their list of exhibits and by not providing it in the answer to his interrogatories, are compelled by the statute from relying on that evidence.

The District argues that it would violate due process not to allow the evidence in. Courts have the power to declare statutes unconstitutional; NJ statutory arbitrators under TEACHNJ do not. Besides, courts of law frequently exclude otherwise admissible evidence for failure to follow the discovery rules. I am unaware of any decision that finds that enforcing the discovery rules by excluding evidence violates due process. Excluding evidence to enforce discovery rules is an common event in the trial courts across America. This is no different. Except here, the venue is a statutory arbitration tribunal, not a court.

The District argues "this document amounts to a legal ruling by an administrative agency that the Arbitrator must consider as part of the legal analysis of this case". It cites Smith v. Director. Div. of Taxation, 108 N.J, 19, 25 (1987), for the proposition that substantial deference should be given to the interpretation an agency gives to a statute that the agency is charged with enforcing. But the "equivalency" document does not "interpret a statute". At most it gives a limited waiver to compliance with specific portions of N.J.A.C. 6A:10 et seq. (P87C- "Waiver").

But before we get to the issue of whether it excuses compliance with the statute, it must first be in evidence, and I conclude that it cannot be admitted. A court may conclude that "waiver" is the same as "interpretation" and that deference must be shown.

I can't get to that issue unless the evidence is admissible, and it is not. The legislature created this evidentiary mechanism to enforce their strict rules on pre-hearing disclosure of documents and interrogatories . The legislature coupled it with a stern admonition to the arbitrators to follow their procedural rules.

Mr. Dodson was observed by six different supervisors and administrators (i.e., Ms. Dow, Mr. Nazario, Mr. Scutari, Ms. Ms. Mignone, Ms. Mr. Hutchins, Ms. Evans-Humes) for a total of nine formal observations over a two-year period, in addition to a peer validation observation by a non-District employee. The observers included administrators in two different school buildings and Network administrators, in addition to a tenth observation conducted by an individual who is unaffiliated with the District. Additionally, Mr. Dodson received informal coaching observations. All seven individuals consistently identified the same fundamental problems with Mr. Dodson's performance as a teacher during both the 2013-2014 and 2014-2015 school years.

Specifically, the pace of instruction was too slow, he lacked lesson planning, did not use scaffolding; he did not use tailored instruction and did not divide the class into groups; he failed to press students to analyze problems for themselves or with other students and would simply provide them with the answers; he did not individualize instructions; he failed despite many warnings to provide lesson plans; his attendance and timeliness was not satisfactory and he was placed on an attendance plan. Mr. Dodson failed to implement instructional strategies that would instill higher level thinking in his students, and there was a lack of student progress. These deficiencies are reflected in the

observation summary forms and accompanying rubrics as well as Mr. Dodson's mid-year and annual evaluations for both school years in question, resulting in a "partially effective" rating for the 2013-2014 school year and an "ineffective rating" for the 2014-2015 school year.

Mr. Dodson received help and assistance and encouragement over two years. The observers gave him specific advice as to how to improve, including how to scaffold, how to divide the class into groups, how to press students to analyze problems rather than simply providing answers, how to individualize instruction rather than teaching the entire class.

Mr. Dodson claim that he did not receive adequate assistance and should have been given more in the form of modeled teaching is not persuasive. He was given substantial supports over a two-year period.

Because Mr. Dodson received a "partially effective" rating for the 2013-2014 school year and an ineffective rating for the 2014-2015 school year, the District was required by law to file inefficiency tenure charges against him. N.J.S.A. 18A:6-17.3(a)(1). The District's decision to file the instant tenure charges was neither arbitrary nor capricious.

Mr. Dodson contends he did not develop his CAP in collaboration with an administrator. A CAP is defined as "a written plan developed by a teaching staff member serving in a supervisory capacity in collaboration with the teaching staff member to

address deficiencies as outlined in an evaluation." N.J.S.A. 18A:6-119. See also N.J.A.C. 6A: 10-2.5 ("a corrective action plan shall be developed by the teaching staff member and the ... teaching staff member's designated supervisor"). Mr. Dodson drafted his CAP for the 2013-2014 school year and then met with Ms. Dow to review it. Similarly, Dodson drafted his CAP for the 2014-2015 school year and then met with Vice Principal LaContee Hill to review it. Dodson's testimony to the contrary is not credible and is contradicted by the documentary and testimonial evidence in the record.

Mr. Dodson contends that a peer observation was excluded, arguing it was excluded because it rated Mr. Dodson "effective." The argument is not persuasive. The District states it was excluded because Mr. McVerry was from outside the district and conducted a Peer Validation Observation. Theirs is a correct application of the clear language of TEACHNJ regulating which evaluation must be included in the annual summative evaluation rating. The person must be "employed in the district" and have the necessary credentials. By law, the McVerry observation, which was not a statutory evaluation, had to be excluded from the annual summative evaluation.

> *Observation" means a method of collecting data on the performance of a teaching staff member's assigned duties and responsibilities. An observation for the purpose of evaluation will be included in the determination of the annual summative evaluation rating and* ***shall be conducted by an individual employed in the school district*** *in a supervisory role and capacity and possessing a school administrator, principal, or supervisor endorsement as defined in N.J.A.C. 6A:9-1.1.*[11]

The content of the McVerry peer validation observation of Mr. Dodson may be helpful advice on how to improve his teaching, but does him no credit. For competency 1,

[11] 6A:10-1.2 Definitions

Mr. Dodson had issues with pacing, taking 40 minutes to go over the first three problems. Mr. McVerry noted that the group activity did not begin until there was five minutes left in the class. As for competency 2, Mr. McVerry observed that Dodson "did not adjust his instruction to meet their [the students'] needs" and instead would refer to the common misconceptions he noted rather than individual struggles by the students. Mr. McVerry noted that Mr. Dodson did not create a learning environment in which students could demand evidence of each other. With regard to competency 3, Mr. McVerry noted that the environment was "too teacher directed" and that one student was sleeping in the classroom. Similar deficiencies were found in the numerous observation during the 2014-2015 school year.

Mr. Dodson contends that because the rebuttals he wrote to each of the observations and evaluations were not considered by Mignone, the District violated the evaluation rues. However, while Dodson maintained the right to submit a rebuttal to challenge the observations and evaluations he received, Mignone had no obligation to do anything but attach the rebuttals to the observations and evaluations in his file. The statute gives him no right, beyond the evaluation meeting, to have more meetings to reconsider what has already been discussed.

While Dodson had the right to submit a written rebuttal and create a written record, Mignone did not have any obligation to have a meeting with Dodson to discuss its contents. In fact, Dodson never requested the opportunity to meet with Mignone to discuss his rebuttal submissions at any time during the 2014-2015 school year. Moreover, consideration of Dodson's rebuttals has no bearing on whether the District substantially adhered to the evaluation process.

The process related to rebuttals is outlined in the Framework. The Framework provides:

> ***What is the process for a teacher who disagrees with their observation, Mid-Year, or Annual rating?***
>
> If a teacher disagrees with his or her score, he or she still has to sign the form to indicate receipt, but not agreement. In the event that a teacher refuses to sign the form, a witness signature must be obtained indicating the refusal to sign. Teachers have the opportunity to object to the observation in writing within 10 days of the post-observation conference. The Assistant Superintendent (or his/her designee) **may review** the rebuttal letter, mid-year evaluation or annual rating, and supporting documents and **if the rating is inconsistent with the documentation, then the Assistant superintendent may, in his/her sole discretion, change the overall evaluation rating after reviewing the documentation with the principal.**

The words "may review" shows that review is not mandatory, but within the discretion of the administrator. Because there is no obligation to read the rebuttals, Mr. Dodson had no right to have them read.

Ms. Mignone had no obligation to respond to Mr. Dodson's rebuttals, either through an in-person meeting or in writing. Ms. Mignone used her discretion to determine that Mr. Dodson's ratings would not be changed as a result of the rebuttals that he orally made to her at their meetings and confirmed through her testimony that Mr. Dodson's rebuttals did not provide any information that demonstrated why the rating did not reflect his practice. Ms. Mignone's actions with regard to the rebuttals were consistent with the Framework and compliant with the District's evaluation process.

I have found nothing in Mr. Dodson's factual or legal arguments that fall within the statutory grounds for setting aside a decision to recommend termination.

Mr. Dodson was only marginally credible. He truthfully acknowledged he used sick time when he used up his three personal days to take his daughter to visits high

schools. But he was not credible, when confronted with the fact that this could be seen as fraudulent, fumbled a bit and stated that he was sick on the days he visited schools with his daughter. That portion of the cross-examination was a textbook illustration of the truism that a lawyer can make up questions faster than an untruthful witness an make up answers. Once a witness starts to stray from the truth, his credibility is undermined. That happened here to Mr. Dodson.

At other times, Mr. Dodson testified with diminished accuracy, with a tendency to diminish his shortcomings, such as not filing timely lesson plans 50% of the time, or finding excuses for shortcomings external to him. His memory was at times faulty, unable to remember meetings, which the evidence establishes through witnesses and documents bearing a signature by a witness and a notation that Mr. Dodson refused to sign or did not sign. The credible evidence establishes that these meetings took place.

When asked at the hearing about an instance of failure to leave lesson plans in his room, he said a substitute took them, and then when asked about other missing lessons, said the same thing. It is unlikely that all of these missing plans were taken by substitutes. He showed a tendency at times to be simultaneously inventive but unconvincing. Ultimately I found his testimony on critical contested issues of fact not credible.

I have carefully considered all of his factual and legal arguments and find them unpersuasive.

Based on the forgoing, I find that the District has proven its case and Mr. Dodson has failed to show that any of the variations from the evaluation process had a material effect on the outcome of the evaluations.

# AWARD

The District established that it had statutory grounds to terminate Mr. Dodson for two consecutive evaluations of "partially effective" and "ineffective." Mr. Dodson established in several respects that the District failed to adhere substantially to the evaluation process. However, the evidence and reasonable inferences drawn from the evidence shows that these failures to adhere did not materially affect the outcome of the evaluations. There were no mistakes of fact in the evaluations that could materially affect the outcome of the evaluations. There is no credible evidence that the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or Federal law, or other conduct prohibited by state or federal law. The District's actions were not arbitrary or capricious.

The arbitrator renders a decision in favor of the Board and in accordance with the law, the employee shall be dismissed.

Dated: July 22, 2016 _____

Peter Adomeit, Esq.
Arbitrator

State of Connecticut )
) SS: West Hartford
County of Hartford )

On this 22 day of July, 2016, before me personally came Peter Adomeit, Esq., to be known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same.

_____

Notary Public

CYNTHIA A. ARTHUR
NOTARY PUBLIC
STATE OF CONNECTICUT
MY COMM. EXP. 09-30-2018

My Commission expires on _____

Z-76-16

| | | |
|---|---|---|
| MICHELE A. MOODY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

In 2014, petitioner filed a *pro se* petition seeking emergent relief in which she alleged that the respondent Board inappropriately transferred her children between schools, harassed her and failed to maintain accurate educational records. The Office of Administrative Law (OAL) was subsequently notified by an attorney that he would be representing the petitioner, and that she was withdrawing her request for emergent relief. The matter remained open until 2016 without further filings. A telephone conference was scheduled for April 7, 2016, but neither petitioner nor any attorney representing her appeared, despite having received appropriate notice of the conference. Notifications sent to the parties on June 23, 2016 provided an opportunity to submit an explanation for the nonappearance. When no explanation was filed by the petitioner, the OAL returned the file to the Commissioner.

Upon review, this matter was no longer deemed to be a contested case before the Commissioner. Accordingly, the petition was dismissed with prejudice.

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

July 25, 2016

OAL DKT. NO. EDU 05634-14
AGENCY DKT. NO. 90-4/14

| | | |
|---|---|---|
| MICHELE A. MOODY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and advisement of petitioner's failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on June 23, 2016, providing an opportunity to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/25/16
Date of Mailing: 7/25/16

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

277-16

| | | |
|---|---|---|
| L.P. and H.P., on behalf of minor child, L.P., | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

The petitioners challenged the determination of the respondent Board that L.P. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). L.P. – a member of the high school fencing team – alleged that she had been a victim of HIB by B.S. – another student member of the fencing team – during the 2014-2015 school year, and asserted that the alleged bullying stemmed from L.P.'s status as a new and younger member of the team who possessed superior skills in comparison to B.S. The Board contended that the incident in question constituted student conflict and did not meet the definition of HIB pursuant to the Act. The Board filed a motion to dismiss the appeal.

The ALJ found, *inter alia*, that: the granting of a motion to dismiss a petition is warranted where there is no relief upon which the Office of Administrative Law (OAL) or the Department can act, or no relief to which petitioners are entitled as a matter of law, even when viewing the pleadings in the most favorable light; the main issue for resolution in this case is whether the Board's finding that there was no HIB was arbitrary, capricious or unreasonable, in light of the information the Board possessed when it made its determination; the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication – whether it be a single incident or a series of incidents – that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; petitioners allege various incidents of HIB by B.S. during the 2014-2015 school year, beginning with a November 2014 incident during fencing practice in which L.P. accidentally injured a teammate – who sustained a concussion; L.P. argued, *inter alia*, that this accident was held over her head all season by B.S., who repeatedly reminded L.P. that she was lucky she didn't get kicked off the team after she caused her teammate's concussion; the Board herein contends that the HIB investigation into the fencing team incidents was inconclusive as to their occurrence or intent; and there were no allegations that a distinguishing characteristic of L.P. – either actual or perceived – motivated any of the conduct complained of herein. The ALJ concluded that it was reasonable for the Board to conclude that the circumstances in this case – which showed personal conflict between L.P. and other girls on the fencing team, but not conduct based on any distinguishing characteristic of the victim – did not rise to the level of HIB. Accordingly, the Board's motion to dismiss was granted.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ in this matter. Accordingly, the Initial Decision was adopted as the final decision, and the petition was dismissed

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

July 25, 2016

OAL DKT. NO. EDU 4462-16
AGENCY DKT. NO. 80-3/16

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|---|---|---|
| L.P. and H.P., on behalf of minor child, L.P., | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the West Morris Regional Board of Education's (Board) reply thereto. This case involves a challenge by the petitioners to the Board's determination that certain conduct directed at L.P. by another student, B.S., did not constitute Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Administrative Law Judge (ALJ) found that the Board's determination that the conduct did not meet the definition of HIB was not arbitrary, capricious or unreasonable, and granted the Board's motion to dismiss.

In their exceptions, the petitioners maintain that the ALJ erroneously granted the Board's motion to dismiss because the Board's HIB determination was arbitrary, capricious and unreasonable. The petitioners initially allege that the Board's anti-bullying specialist lied under oath and falsified evidence throughout the entire HIB investigation; and the tainted investigation was ultimately the basis of the Board's decision. Additionally, the petitioners assert that they have demonstrated every element necessary under the Act to prove that an act of HIB was

committed by B.S. Specifically, the petitioners contend that the ALJ's finding that B.S.'s conduct was not motivated by a distinguishing characteristic is incorrect. The petitioners argue that L.P's feeling of persecution based on being young and vulnerable and a more skilled fencer than B.S. was a distinguishing characteristic. Therefore, the petitioners contend that B.S. used the team pecking order and the power conferred by her status as a caption to harass, intimidate and bully L.P.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's conclusion – for the reason stated in the Initial Decision – that the Board's HIB determination was not arbitrary, capricious, or unreasonable. Although the ALJ determined that there may have been a conflict among the members of the fencing team, the Commissioner agrees that B.S.'s alleged conduct toward L.P. was not based on a distinguishing characteristic of L.P., actual or perceived.

It is well established that conduct that is motivated by a personal dispute such as specific roles on a sports team, albeit potentially harmful, does not fall within the definition of bullying under the Act. *See, K.L. v. Evesham Township Board of Education*, 423 *N.J. Super* 337, 350-351 (App. Div. 2011); *R.A., on behalf of minor child, B.A. v. Board of Education of the Township of Hamilton, Mercer County*, EDU 10485-15 (May 12, 2016) *adopted* Comm'r June 22, 2016; L.B.T., on behalf of minor child, *K.T. v. Board of Education of the Freehold Regional School District, Monmouth County*, EDU 7894-12 (January 24, 2013) *adopted*, Comm'r (March 7, 2013). Based on the circumstances in this case, it was reasonable for the Board to determine that the conduct of B.S. was motivated by the relationship between the two team members and the dynamics of the fencing team, not a distinguishing characteristic protected by the Act. Additionally, despite the petitioners' assertions to the contrary, there is no

evidence in the record to suggest that the Board's decision was induced by improper motives or based on doctored evidence.

Accordingly, the recommended decision of the ALJ is adopted for the reasons stated therein, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/25/16

Date of Mailing: 7/25/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON MOTION**
**TO DISMISS PETITION OF APPEAL**
OAL DKT. NO. EDU 04462-16
AGENCY DKT. NO. 80-3/16

**L.P. AND H.P. o/b/o L.P.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,**
Respondent.

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**L.P.** and **L.P.**, parents on behalf of L.P., pro se

**Jodi S. Howlett**, Esq., for respondent Board of Education of the West Morris Regional High School District (Cleary Giacobbe Alfieiri Jacobs, attorneys)

Record Closed: May 17, 2016 Decided: June 10, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about March 11, 2016, L.P. and H.P. (petitioners) filed a Petition of Appeal to the decision of the Board of Education of the West Morris Regional High School District (Board) in which they asserted that the District erred in failing to find that their

daughter L.P. (L.P.) had been the victim of Harassment, Intimidation or Bullying (HIB) in violation of the Anti-Bullying Act of 2010, N.J.S.A. 18A:37-13 et seq. On or about March 18, 2016, petitioners filed with the Department of Education a motion for emergent relief on its petition seeking specific relief during a forthcoming spring break school trip of the concert band to Orlando, Florida.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on March 24, 2016, for plenary hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and for oral argument on the emergent relief, which was scheduled for March 29, 2016. The matter was assigned to the undersigned on March 24, 2016, on which date I also received a motion to dismiss the application for emergent relief and for an adjournment of the oral argument on said motion from the Board. Accordingly, I convened a telephonic case management conference with the parties on March 24, 2016, to discuss the potential issues in the case, the emergent relief application, and other case management concerns.

During that first case management conference, I granted orally the Board's motion to adjourn the oral argument date on the motion for emergent relief because the high school was closed for spring break and staff would not be available for the hearing. Instead, we discussed some consensual terms and conditions of the upcoming band trip that might alleviate petitioners' concerns about their daughter's well-being during it. The emergent relief was deferred in order to allow petitioners time to evaluate whether it was necessary to continue to pursue it even after the trip was concluded. Petitioners ultimately decided to withdraw the emergent aspect of their appeal.

Respondent filed a Motion to Dismiss the Petition of Appeal on or about April 19, 2016. During a previously scheduled case management conference call on April 26, 2016, it was agreed that petitioners would have until May 10, 2016, to submit opposition to the motion and thereafter, respondent would file a reply by May 17, 2016. Accordingly, the scheduling of a plenary hearing date was deferred. Those motion submissions having been received, the matter is now ripe for decision.

## ISSUE PRESENTED ON THE MOTION

Respondent argues that the Board's determination that the conduct petitioners complained of did not constitute harassment, intimidation, or bullying under N.J.S.A. 18A:37-14 was not arbitrary, capricious or unreasonable and can be decided at this preliminary stage on the basis that the petition fails to set forth a claim upon which relief may be granted. Petitioners oppose the motion to dismiss on the basis that the conclusions of the Board were arrived at in a cursory and faulty manner procedurally; and that substantively, their daughter should have been believed even if others lied or chose conveniently not to recall what they view as obvious incidents. To the extent that the proceedings were not arbitrary, petitioners claim that the HIB complaint must have been denied as retaliation against their daughter for daring to file such a complaint.

This case is presented at this time on motions to dismiss the complaint for failure to state a claim upon which relief can be granted by each of the three respondents. Such a motion must be based on the pleadings themselves. Roa v. Roa, 200 N.J. 555, 562 (2010). This forum must accept as true the facts alleged in the complaint and all reasonable inferences of fact flowing from those allegations, to ascertain whether there is or could be a claim upon which relief can be granted. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). "[M]otions to dismiss should be granted in 'only the rarest [of] instances.'" Banco Popular N. America v. Gandi, 184 N.J. 161, 165 (2005) (quoting Lieberman v. Port Auth. of N.Y. and N.J., 132 N.J. 76, 79 (1993)).

In evaluating a motion to dismiss a petition at the very earliest stage in the litigation, "courts are cautioned to search the complaint 'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement[.]'" Ibid. (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 166 N.J. 739, 772 (1989)). "The test is whether a cause of action is suggested by the facts alleged in the complaint." Russo v. Nagel, 358 N.J. Super. 254, 262 (App. Div. 2003). Phrased another way, if there is no relief upon which this forum or the Department can act or no relief to which petitioners are entitled as a matter of law, even

viewing the pled allegations in a light most favorable to them, then dismissal of the petition is warranted.

## UNDISPUTED MATERIAL FACTS

1. L.P. was a freshman in high school during the 2014-2015 school year. During the 2015-2016 school year, she is in her sophomore year.

2. As a freshman, L.P. joined the school's fencing team. While she was a freshman, she had already had several years of experience as a fencer and undertook private lessons in the sport.

3. On November 23, 2015, petitioners submitted to respondent an HIB complaint on behalf of L.P. See Exhibit A attached to Affidavit of Cathleen Cartier (hereinafter referred to as Cartier Aff.).

4. This formal complaint had been preceded by some emails and meetings between petitioners and the coach and staff of the school about their concerns that their daughter was being purposely tormented and bullied by another member of the fencing team. See Affidavit of H.P. (hereinafter referred to as H.P Aff.), ¶¶ 6-8.

5. The alleged perpetrator was identified by petitioners as student B.S., a female senior and also a member of the girls' fencing team. See Cartier Aff., ¶ 3; H.P. Aff. ¶ 12.

6. In the petitioner's narrative attached to the HIB Reporting Form, Petitioners allege that L.P. was a victim of HIB by B.S. during the prior school year (2014-2015) starting in from approximately November 2014. See Cartier Aff., Exhibit A. Petitioners asserted that B.S.'s motivation was L.P.'s "status as a new and younger member of the EMC fencing team with better fencing skills in comparison to [B.S.]." Id.

7. Petitioners' first allegation against B.S. involves an incident that occurred in approximately November 2014 during a fencing practice in which L.P. accidentally injured a teammate. See Cartier Aff., Exhibit A. According to petitioners, during a

"human obstacle course," L.P.'s knee grazed the side of K.M. when L.P. jumped over her head causing her injury, later identified as a concussion. See Cartier Aff., Exhibit A. Although the girls' fencing coach, Gladys Berardi, "did not assign blame," she "also did not say that it was merely an accident." Id. Petitioners contend that, "[u]nder [B.S.]'s guidance, L.P. would come to believe that she would be kicked off the team or subject to lawsuit if the coach ever found out what [L.P.] had done." Id.

8. Other allegations contained in the HIB complaint included:

a. In December 2014, at a freshman-sophomore tournament, Coach Berardi praised L.P. for winning all of her bouts. See Cartier Aff., Exhibit A. B.S. allegedly pointed out that L.P. had, in fact, lost one bout. Id.

b. On January 17, 2015, at the Morris County Tournament, B.S. made a comment to L.P. that she as "lucky [L.P.] didn't get kicked off the team" after causing K.M.'s concussion. Id.

c. On January 24, 2015, at the District Championship, B.S. "pointed out [K.M.] and reminded L.P. what she had done." Id. Petitioners allege that B.S.'s comments caused L.P. to sit out the next two (2) meets with "illness" and resulted in the team's suspicion of why L.P. was "able to attend school during the day but sick for the evening meets." See Cartier Aff., Exhibit A.

d. On February 23, 2015, at the Squad Championships, L.P. revealed to Petitioners that she believed she would be "kicked off the team" for giving K.M. a concussion and was afraid K.M would sue her, even though B.S. "did not suggest this to her." Id. L.P. further reported that she was "sick of listening to [B.S.] blaming and shaming other fencers who happened to be her friends." Id. L.P. also reported to Petitioners that she "didn't want to hear [B.S.]'s constant bragging about what she did with her current and former boyfriends" and B.S.'s "bragging about forging teacher signatures to cut classes." Id.

e. In May 2015, at a private fencing meet, B.S. allegedly said that L.P. should have "stayed away [from the tournament] so that the Mendham fencer

could earn an E rating." See Cartier Aff., Exhibit A. This statement was allegedly witnessed by C.W., a male fencer at West Morris Central High School, who defended L.P. to B.S. Id. L.P. reported to petitioners that B.S. was "determined to destroy her in front of the other fencers at [West Morris Central High School]." Id.

f. At the annual Fencing Parents Association annual banquet B.S. allegedly filled two (2) "vacant Captaincies on the sabre and épée squads with her friends" over L.P., who "lost only a single bout the entire season." Id.

9. Petitioners also allege that: (1) B.S. held a team meeting without the authorization of Coach Berardi; (2) B.S. "continues to speak of 'my A strip'" even though L.P. "has consistently out-performed [B.S.]" and that "[n]o strip has been assigned," (3) L.P. "has indicated that she will not feel safe on the team if [B.S.] retains both A strip and a Captain's authority." See Cartier Aff., Exhibit A

10. Petitioners state that "[B.S.] finds reason to speak to and interact with [L.P.] or direct [L.P.]'s activities at every practice and needlessly chooses to sit next to [L.P.] when they do not speak." Id. Petitioners claim that "[t]his is highly aggressive behavior for someone who knows that her presence is unwanted and offensive to [L.P.]." Id.

11. On November 30, 2015, West Morris Central High School's Anti-Bullying Specialist, Cathleen Cartier met with L.P. and arranged for regular counseling in which L.P. could discuss her stress and anxiety. See Cartier Aff., ¶ 5. L.P., however, failed to attend any of the counseling sessions offered by Cartier. Id. at ¶ 5.

12. L.P. has alleged that Cartier missed several appointments to interview her about the HIB complaint, and then cut her short in trying to tell her side of the story. L.P. felt at a loss to know what to say when Cartier insisted that L.P. not repeat the details set forth in the complaint. See Affidavit of L.P.

13. Cartier with the assistance of Anne Meagher, Assistant Principal, investigated the HIB complaint between November 23 and December 8, 2015. They

interviewed a total of fourteen (14) persons who were identified as potentially having information relative to the allegations in the complaint.

14. In addition, written statements were procured from the parents of the two girls, members of the boys and girls fencing teams, and Coach Berardi.

15. L.P. also felt that Cartier was "demanding" and "forbidding" to her during the pendency of the investigation. The email referenced by L.P. actually stated: "Also, please let me know if any of your team mates have been approaching you regarding the issue. In order to keep the confusion and stress to a minimum it is important that you not engage in any conversations about the investigation while it is in progress." See L.P. Aff., ¶ 18, Exhibit B.

16. Following completion of her investigation, Cartier concluded that:

a. Following K.M.'s injury, B.S. allegedly returned to practice and "announced that [L.P.] gave the hurt teammate a concussion" and that B.S. told L.P. "she would be kicked off the team for causing a teammate injury." – Unsubstantiated. After meeting with many witnesses, not one teammate could recall that anything was said; they either did not remember or they shared that no one knew the extent of the injury until the following week.

b. At two (2) fencing tournaments, B.S. allegedly pointed at the injured teammate "to blame [L.P.] for hurting her peer and also to remind her how lucky she was that she was not kicked off the team." – Unfounded. The dates of the two (2) tournaments took place before the teammate was injured so it would not have been possible for B.S. to reference something that had not yet happened.

c. An incident where B.S. allegedly accused L.P. of "stealing someone's rating." – Unsubstantiated. The witness to the conversation who was identified by L.P. and her parents did not support this allegation and shared a different account of the interaction.

[See Cartier Aff., ¶ 12; see also Exhibit B.]

17. On December 8, 2015, Cartier and the school principal advised petitioners in writing that its investigation did not find any evidence that L.P. had been the victim of HIB. [See Cartier Aff., Exhibit C.]

18. L.P. asserted that her friends have abandoned her since the HIB complaint was investigated since Cartier "punished" her oldest friend for being my friend. See L.P. Aff. ¶ 18.

19. L.P. feels that she was labeled as a "liar" by Cartier, and that her friends have abandoned her and deem her unfit company. L.P. ended up in a hospital with suicidal thoughts due to the stress of being unheard and made defenseless in the face of the actions or inactions of the coach and captain of the fencing team. See L.P. Aff. ¶¶ 16-17.

20. On December 14, 2015, the Board of Education voted unanimously to affirm the school's finding that there was no evidence of HIB against L.P. [See Affidavit of Dr. David Leigh, Director of Special Services and District Anti-Bullying Coordinator (Leigh Aff.), Exhibit A.

21. On December 16, 2015, Superintendent of Schools, Michael Ben-David, J.D., M.Ed., issued a letter to petitioners advising them that the Board of Education had reviewed and accepted Cartier's findings in the HIB report. [See Leigh Aff., Exihibt C.]

22. On December 14, 2015, petitioners sent a letter to respondent containing extensive objections to the HIB investigation and requesting a hearing before the Board of Education to appeal Cartier's HIB determination. [See Leigh Aff., Exhibit B.] On December 21, 2015, respondent advised petitioners in an e-mail that there would be a Board hearing on their appeal on January 4, 2016. [See Leigh Aff., Exhibit D.]

23. On January 4, 2016, an executive closed-door hearing was held at the Board at which petitioners presented testimony. The hearing lasted approximately ninety minutes. Upon conclusion of the testimony, the Board voted unanimously to

affirm the Superintendent's decision finding that no evidence of HIB existed against L.P. [See Leigh Aff., Exhibit E.]

24. On January 8, 2016, respondent issued a letter to petitioners advising them that the Board affirmed the HIB finding of "unfounded" and notifying them of their right to appeal the decision to the Commissioner of Education. [See Leigh Aff., Exhibit F.]

25. On March 9, 2016, Petitioners filed the Petition of Appeal that is the subject of the within matter.

Based on these facts presented on the pending motion, and even giving petitioners the benefit of any reasonable inferences that could be drawn from their papers or initial petition, I **FIND** that L.P. cannot prove that the alleged incidents reported as HIB to the school can be sustained. L.P. has interpreted and is now complaining that the HIB investigation has caused her stress, caused her friends to be "punished," for her to be labeled a "liar," and for her to be locked up at CCIS. None of this is probative of the question as to whether B.S. bullied L.P. about the accidental concussion incident or a fencing rating prior to the HIB investigation.

## LEGAL DISCUSSION

The issue for resolution is whether the Board's finding of no HIB was arbitrary, capricious or unreasonable, in light of the information that the Board possessed when it made its determination. The Anti-Bullying Act, N.J.S.A. 18A:37-14, sets forth:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122

> (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The Anti-Bullying Act mandates that school personnel report in writing to the school principal "all acts of harassment, intimidation or bullying" within two days of witnessing or receiving reliable information regarding any such incident. N.J.S.A. 18A:37-15(b)(5). The principal or the principal's designee must initiate a prompt investigation of the incident, which must be completed within ten school days of the report to the principal. N.J.S.A. 18A:37-15(b)(6)(a). The results of the investigation must be reported to the superintendent and the board of education. N.J.S.A. 18A:37-15(b)(6)(b) and (c). Within five school days of reporting the results to the board of education, school officials must inform the parents or guardians of students involved about the results of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). The statute does not expressly require disclosure of a written investigative report, notes, or any other designated school records. Rather, the statute provides that the school district must inform parents in writing of "the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying." Ibid. See K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 358 (App. Div. 2011).

After receiving the results of an HIB investigation, a parent or guardian may request a hearing before the board of education. N.J.S.A. 18A:37-15(b)(6)(d). At the next meeting following receipt of the HIB report, the board shall issue a decision to

affirm, reject, or modify the superintendent's HIB decision. N.J.S.A. 18A:37-15(b)(6)(e). Parents of students who are aggrieved by the board of education's determination are then entitled to appeal the board's decision to the Commissioner of Education no later than ninety (90) days after the board issued the decision. Id.

The Board argues in the present motion that the investigation into the 2015 fencing team incidents was inconclusive as to their occurrence or intent. The other team members interviewed during the investigation said they had no knowledge of the comments alleged by L.P. to have been made by B.S. Further, there were no allegations that a distinguishing characteristic of L.P., actual or perceived, motivated any of the conduct, with the possible exception that L.P. should have been perceived as a better fencer but was not accorded that acknowledgement. Cartier, who has no stake in whether there is a finding of HIB, conducted the investigation, but concluded that there was no bullying substantiated. The superintendent recommended this finding to the Board. Thus, the Board argues that it correctly determined that the conduct described and investigated by the Board did not rise to the level of HIB. For the foregoing reasons, I **CONCLUDE** that the issue of can be decided as a matter of law and that respondent is entitled to dismissal of the Petition of Appeal.

In Evesham, the Appellate Division noted that the offending conduct for purposes of HIB must be motivated by a distinguishing characteristic. It noted that the statutory definition of HIB "does not include all violent or aggressive conduct against a student," but it has consistently required that the perceived motivation be a distinguishing characteristic. Id. at 350-51. The court also provided a summation of what does not constitute HIB:

> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.
>
> [Id. at 351.]

The Legislature in the Anti-Bullying Act intentionally included a very open-ended phrase, "any other distinguishing characteristic," to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student. For example, in J.M.C. ex rel A.C. v. Board of Education of East Brunswick, EDU 04144-12, Initial Decision (November 27, 2012), adopted, Comm'r (January 9, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner found that a single incident in which a male student was demeaned by a statement that he "danced like a Girl" was a violation of the Act because it was an act of bullying based on the distinguishing characteristic of the perception of the targeted student's dancing. Furthermore, in C.C. ex rel S.C. v. Board of Education of Jefferson, EDU 10872-14 (April 6, 2015), adopted, Comm'r (May 12, 2015), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner ruled that a perception that the targeted student was not a good athlete was sufficient to trigger the protection of the Act. The Commissioner noted that "the HIB statute is intended to drive home the principle that cruel words will not be tolerated in a school environment." Similarly, in W.C.L. and A.L. ex rel L.L. v. Board of Education of Tenafly, EDU 03223-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner held that even a single and true comment by a student that the targeted student had dyed her hair because she had head lice violated the statute.

However, courts have addressed situations where an act is not considered to be bullying motivated by a "distinguishing characteristic." In L.B.T. ex rel K.T. v. Board of Education of the Freehold Regional School District, EDU 7894-12 (January 24, 2013), adopted, Comm'r (March 7, 2013), <http://njlaw.rutgers.edu/collections/oal/>, there was a mutual dispute between two students about their respective roles on the swim team. The judge held that if a victim was targeted because of a dispute between the two people involved--such as a relationship falling apart between former friends, a fight over a piece of property, or some form of personal vendetta of one against another--such conduct would not be based on a "distinguishing characteristic" of the victim and would not be a violation of the statute.

The events between L.P. and the other female fencing team members as set forth are not even alleged to have been "motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14. It was reasonable for the Board to conclude that the circumstances, which certainly showed a conflict between L.P. and the girls, did not rise to the level of bullying under the Act, even to the extent that any of the incidents had been corroborated, which they were not. As noted above, a dispute between students such as a relationship falling apart between former friends, a fight over a piece of property, or some form of personal vendetta of one against another is not conduct based on a "distinguishing characteristic" of the victim and, thus, does not constitute a violation of the Act. I understand and appreciate that petitioners might be viewing the matters as constituting "bullying" under a more common place or lay meaning of that term, and there might have even been a clear demonstration of poor sportsmanship, but the Act sets forth a specific legislative definition and regulatory response.

The Board has demonstrated that there are no facts in dispute and that it is entitled to dismissal as a matter of law. Petitioner has not demonstrated entitlement to the relief sought as a matter of law. The Board applied the standard in the law and did so after a thorough and timely investigation, which the Act intends to be undertaken quickly, including interviews of the alleged victim, alleged perpetrator, alleged witnesses, and supervising adults. Therefore, I **CONCLUDE** that the action of the Board in determining that the conduct does not constitute harassment, intimidation, or bullying within the meaning of the Anti-Bullying Act was not arbitrary, capricious or against the weight of the evidence.

## ORDER

It is **ORDERED** that the motion of respondent Board of Educaiton of the West Morris Regional High School District for an Order Dismissing the Petition of Appeal by

petitioners L.P. and H.P. on behalf of L.P. is hereby **GRANTED**. It is further **ORDERED** that the Appeal shall be and the same is hereby dismissed.

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

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

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

June 10, 2016
DATE

**GAIL M. COOKSON**, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 13 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

278-16

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-Operated School District of the City of Newark

In the Matter of

PATRICK ALGIERI,

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

**SETTLEMENT AGREEMENT**

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement Agreement") that fully disposes of all issues in controversy between teacher PATRICK ALGIERI ("Algieri") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK (the "School District"):

**WHEREAS** Algieri is a tenured teaching staff member employed by the School District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges of unbecoming conduct and other just cause to the Commissioner of Education of New Jersey, captioned *In the Matter of Patrick Algieri, State-operated School District of the City of Newark, Essex County* ("Tenure Charges"); and the Tenure Charges were assigned Docket No. 142-5/16; and Employee filed an answer opposing the Tenure Charges, and the Commissioner of Education, having reviewed the Tenure Charges and Employee's answer, determined that the Tenure Charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Howard Edelman ("Arbitrator") for a hearing; and

**WHEREAS**, because of the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and

responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public; and

**WHEREAS** Algieri has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate, and he has been advised of the School District's duty to report the resignation of any teaching staff member accused of unbecoming conduct.

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1 This Agreement shall be and is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and shall be effective only upon the School District's receipt of a copy of this Agreement, executed by the Arbitrator to indicate his approval and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

2 The effective date of this Settlement Agreement ("Effective Date") shall be the date of the School District's receipt of this Settlement Agreement, approved by the Arbitrator, or the eighth day after the School District's receipt of this Settlement Agreement, executed by Employee, whichever is later, provided that Employee has not exercised his right to rescind this Settlement Agreement in accordance with paragraph 14 below. In the event of disapproval by the Arbitrator or any failure to act on such approval, this Settlement Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Tenure Charge.

3. Algieri hereby agrees to resign from his tenured position of employment with the School District, effective June 20, 2016 (the "Resignation Date"). Attached is a copy of

Algieri 's signed Letter of Resignation (Exhibit A). Algieri's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the School District will only confirm Algieri's employment, position, title, salary and dates of employment

4 Algieri also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the School District that remain pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Algieri. Should Algieri fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims or suits, this Settlement Agreement will serve as Algieri's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

5. In exchange, the School District shall pay Algieri salary and benefits, at his current rate of pay and in accordance with the terms and conditions of its benefit plans and policies, retroactive to May 11, 2016 through the Resignation Date. Such payment shall include the full amount of salary withheld by the School District and held for Algieri's benefit pursuant to N.J.S.A. 18A:29-3 as of the Resignation Date. Other than the retroactive salary, withheld salary, and benefits that he receives pursuant to this paragraph, Algieri will not receive any further monies from the School District in exchange for this Settlement Agreement.

6 Algieri understands and acknowledges that the School District intends to report his resignation to the State Board of Examiners in accordance with the requirements of N.J.A.C. 6A:9B-4.4. Aside from such report, the School District agrees that it will not take any action to seek suspension or revocation of Algieri's teaching certification or license and it will not take any position with respect to action by the State Board of Examiners with respect to such suspension or revocation.

7 The School District agrees not to pursue any disciplinary action, including tenure charges of unbecoming conduct and/or other just cause or any action seeking termination of Algieri's employment, so long as this Settlement Agreement remains in effect and is

not voided by any court or administrative agency of competent jurisdiction. However, if this Settlement Agreement is voided, the School District retains the right to pursue disciplinary action or any other action against Algieri, including termination of his employment.

8 As of the Resignation Date, all of Algieri's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

9 Algieri agrees that he will not apply for reemployment with the School District at any time. Specifically, Algieri will be considered to have permanently resigned from his tenured position as a result of this Settlement Agreement. If Algieri does apply for reemployment with the School District and is approved for employment, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Algieri's employment.

10 This Settlement shall not constitute a precedent in any matters involving other employees.

11 Except as noted above, Algieri waives all claims of any nature against the School District with regard to his employment with and/or his separation from the School District including fees, or other monetary relief, with the exception of workers' compensation claims.

12. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraph 4 and 5 above, the sufficiency of which is hereby acknowledged by the parties, Algieri releases and discharges the School District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the School District regarding her employment with the School District. This includes without limitation any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Algieri's employment with the School District and separation from the School District. It

specifically includes, without limitation, all claims which Algieri may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act, the Employee Polygraph Protection Act; the Immigration Reform Control Act, the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law, the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of his employment with the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Algieri agrees to save, hold harmless and indemnify the School District for any legal costs and attorneys fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

13. Notwithstanding Paragraph 12 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims in Paragraph 12, Algieri agrees not to seek or accept any resulting relief whatsoever.

14. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Algieri of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Algieri acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Algieri understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

15. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

16. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

17. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

18. This Settlement Agreement is subject to final approval by the State District Superintendant of the State-operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: 6/29/2016

PATRICK ALGIERI

Dated: 6-29-16

JOSEPH FUSELLA, ESQ.
Attorney for Patrick Algieri

Dated: 7 11 16

CHRISTOPHER CERF
State District Superintendent

Dated: 6/30/16

BRENDA C. LISS, ESQ.
Attorney for State-Operated School District of the city of Newark

**EXHIBIT A**

Bernard Mercado, Esq.
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

**RE: PATRICK ALGIERI**
**NOTICE OF RESIGNATION – JUNE 20, 2016**

Dear Mr. Mercado

I wish to inform you that I resign from employment with the Newark Public Schools, effective June 20, 2016

Dated: 6/29/2016

PATRICK ALGIERI

## CERTIFICATION

PATRICK ALGIERI, of full age, hereby certifies as follows:

I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully ~~false~~, I am subject to punishment.

DATED: 6/29/2016

PATRICK ALGIERI

## APPENDIX

## ARBITRATOR'S STATEMENT OF THE CASE

**Whereas**, I, Howard Edelman, Arbitrator, have been designated to hear and decide the dispute having read the Petition filed by the District, and after reviewing evidence provided by both parties including but not limited to initial statements of witnesses, reports of investigation and Respondent's record of service, I conclude that suspension or revocation of Mr. Algieri's teaching certificate(s) or license, as well as his receipt of pension benefits, should not be made part of any future charges before any state administrative agency.

DATED: July 26, 2016

Howard C. Edelman, Esq.
Arbitrator

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

**IN THE MATTER OF THE TENURE HEARING OF GINA RIGGS**

| | | |
|---|---|---|
| **WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT MERCER COUNTY,** | : | **Agency Dkt No. 111-4/16** |
| **Petitioner** | : | |
| **and** | : | **July 27, 2016** |
| **GINA RIGGS,** | : | **ORDER DISMISSING CHARGES AS MOOT PURSUANT TO N.J.A.C. 6A:3-5.6** |
| **Respondent** | : | |

Before:Joseph Licata, Esq., Arbitrator

APPEARANCES:

For the Petitioner
Jeffrey R. Caccese, Esq.
Comegno Law Group P.C.

For the Respondent
Michael J. Barrett, Esq.
Berman & Barrett

**WHEREAS**, the West Windsor-Plainsboro Regional School District ("District") or ("Petitioner") opened the above-captioned matter by certifying Tenure Charges (the "Tenure Charges") against Gina Riggs ("Respondent") with the Commissioner of Education (the "Commissioner") for conduct unbecoming an employee, incapacity, and other just cause (excessive absenteeism) in accordance with the statutory and regulatory provisions of the "TEACHNJ ACT"; and

**WHEREAS**, the Commissioner referred the Tenure Charges to the undersigned arbitrator pursuant to N.J.S.A. 18A:6-16, as amended by P.L. 2012, c. 26; and

**WHEREAS**, the hearing on the Tenure Charges was stayed pending the outcome of a motion for Summary Decision initiated by Petitioner's Counsel; and

**WHEREAS**, on July 22, 2016, the Respondent notified the District in writing that she was resigning from her employment with the District, effective immediately (a copy of which is attached hereto as Exhibit A); and

**WHEREAS**, on July 26, 2016, at a formal meeting of the District's Board of Education, the Board voted in favor of accepting Respondent's letter of resignation (a copy of an email from Counsel for Petitioner to the undersigned confirming same is attached hereto as Exhibit B); and

**WHEREAS**, the Tenure Charges against Respondent are now moot as a result of Respondent's unilateral resignation;

**NOW THEREFORE**, it is on this 27th day of July, 2016, hereby **ORDERED** that the Tenure Charges against Respondent are DISMISSED AS MOOT.

DATED: July 27, 2016

JOSEPH LICATA, ESQ., ARBITRATOR

STATE OF NEW JERSEY:

COUNTY OF BERGEN:

I CERTIFY that on July 27, 2016
JOSEPH LICATA, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

DATED: July 27, 2016

JACQUELINE M. LICATA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/9/2020

**Bergman & Barrett**
**Attorneys at Law**
103 Carnegie Center
Suite 210
Princeton, New Jersey 08540

**Edward J. Bergman**
**ejb@gear3.net**

**Michael T. Barrett**
**mbar97@aol.com**

**Telephone: (609) 921-1502**
**Fax: (609) 683-0288**

July 22, 2016

Joseph Licata, Esq.
570 Piermont Road, Suite 123
Closter, NJ 07624
**(Via telefax @ 201-374-1512 & reg mail)**

**Re: I/M/O Tenure Hearing of Gina Riggs**

Dear Mr. Licata:

This letter follows my voice mail of July 21, 2016 in which I indicated that Respondent has agreed to submit a letter of resignation and the Board has agreed to accept that letter of resignation in disposition of the tenure case. I enclose a copy of the executed letter of resignation.

Please advise if you require additional information.

Very truly yours,
**BERGMAN & BARRETT**

Michael T. Barrett

MTB/sd
Enclosure
cc: Jeffrey Caccese, Esq.

Exhibit A

I, GINA RIGGS, hereby tender my resignation from the West Windsor-Plainsboro Board of Education effective immediately.

**GINA RIGGS**

Dated: July 22, 2016

2-82-16

OAL DKT. NO. EDU 06333-16
(EDU 14406-15 ON REMAND)
AGENCY DKT. NO. 267-9/15

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE CERTIFICATE OF TRUDI DAWES, | : | COMMISSIONER OF EDUCATION |
| HOPE COMMUNITY CHARTER SCHOOL, | : | DECISION ON REMAND |
| CAMDEN COUNTY. | : | |

The record, proposed settlement agreement and general release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-19.1, have been reviewed – mindful of the Commissioner's April 22, 2016 determination that the prior settlement agreement did not comply with N.J.A.C. 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Executive Director to sign the settlement agreement on its behalf. Since the settlement agreement now contains the signature of the Board attorney, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/28/16

Date of Mailing: 7/29/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**

OAL DKT. NO. EDU 6333-16
(ON REMAND OAL DKT. NO. EDU 14406-15)
AGENCY DKT. NO. 267-9/15

**IN THE MATTER THE SUSPENSION OF THE CERTIFICATE OF TRUDI DAWES, HOPE COMMUNITY CHARTER SCHOOL, CAMDEN COUNTY.**

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**Lauren E. Tedesco**, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

**Zachary R. Wall**, Esq., for respondent (Wall & London, LLC, attorneys)

Record Closed: June 13, 2016 Decided: June 16, 2016

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 27, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

June 16, 2016
DATE

Susan Scarola
**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: June 16, 2016

Date Mailed to Parties: June 16, 2016

/cb

**SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is between the Hope Community Charter School, County of Camden ("Hope"), and Trudi Dawes ("Dawes"); Hope and Dawes are collectively referred to herein as the parties or individually as the party.

**WHEREAS**, Dawes was previously employed as a teacher with Hope; and

**WHEREAS**, Dawes resigned from her position with Hope on April 15, 2015; and

**WHEREAS**, Hope filed a Motion for an Order to Show Cause with the Commissioner of Education to suspend Dawes teaching certificate, captioned In the Matter of the Suspension of the Certificate of Trudi Dawes, Hope Community Charter School, Camden County, OAL Docket No.: EDU 14406-2015 S, Agency Dkt. No. 267-9/15; and

**WHEREAS**, the parties wish to reach a full and final resolution of all matters related to the employment relationship between them and the separation of such employment.

**NOW THEREFORE**, in consideration of the mutual promises of the parties to this Agreement, the receipt and sufficiency is hereby acknowledged, the parties agree as follows:

1. Hope will dismiss the matter captioned In the Matter of the Suspension of the Certificate of Trudi Dawes, Hope Community Charter School, Camden County, OAL Docket No.: EDU 14406-2015 S, Agency Dkt. No. 267-9/15, with prejudice.
2. Dawes, her heirs, assigns and agents, does hereby **RELEASE** and forever **DISCHARGE** HOPE and its officers, members, employees and agents, and its successors and assigns, of and from any and all actions and causes of actions, suits, claims and demands whatsoever in law or in equity, which she ever had or now has, or which her heirs, executors or administrators hereafter may have, by reason of any matter, cause or thing

whatsoever, from the beginning of time to the effective date of this Agreement, and particularly, but without limitation of the foregoing general terms, any claims arising from or relating in any way to her employment relationship with Hope and/or the termination of her employment relationship and/or affiliation with Hope, including but not limited to, any claims which have been asserted or could have been asserted under any and all constitutional, federal, state or local laws and any common law claims now or hereafter recognized.

3. Without limiting the foregoing, Dawes hereby releases Hope from any and all claims or causes of action under any federal or state constitution, federal, state or local law, including but not limited to any alleged violations of the following statutes, including any amendments:

- National Labor Relations Act;
- Title VII of the Civil Rights Act;
- Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- Employee Retirement Income Security Act;
- Fair Credit Reporting Act;
- Immigration Reform Control Act;
- Americans with Disabilities Act;
- Section 504 of the Rehabilitation Act;
- Age Discrimination in Employment Act;
- Fair Labor Standards Act;
- Occupational Safety and Health Act;
- Family Medical Leave Act;
- Equal Pay Act;
- Uniformed Services Employment and Reemployment Rights Act;
- Worker Adjustment and Retraining Notification Act;
- Employee Polygraph Protection Act;
- New Jersey Law Against Discrimination Act;
- New Jersey Family Leave Act;
- New Jersey Civil Rights Act;
- New Jersey State Wage and Hour Law;
- New Jersey Conscientious Employee Protection Act;

- New Jersey Equal Pay Law;
- New Jersey Occupational Safety and Health Laws;
- New Jersey Smokers' Rights Law;
- New Jersey Genetic Privacy Act;
- New Jersey laws regarding political activities of employees, lie detector tests, jury duty, employment protection, and consumer reports;
- Any other federal state or local civil rights law or any other local, state or federal law, regulation or ordinance;
- Any public policy, contract (express, written or implied), tort, or common law;
- Any claims for vacation, sick or personal leave pay or payment pursuant to any practice, policy, handbook or manual of the Board; or
- Any allegation for costs, fees, or other expenses including attorneys' fees.

4. This Release specifically includes, but not by way of limitation, all monetary and equitable claims which could have been asserted by or on behalf of Dawes against Hope including attorney fees or costs.

5. Dawes waives any right to future employment and/or consideration of future employment with Hope.

6. Dawes agrees to keep confidential and make no voluntary disclosure of the terms of this Agreement and/or the existence thereof, to any person or entity of any kind or identity whatsoever. Dawes shall not disclose, either directly or indirectly, any information whatsoever regarding the existence, substance and/or alleged factual basis for any and all potential grievances, claims, demands, suits, judgments, or causes of action against Hope which are the subject of this Release, to any person or entity, including, but not limited to, members of the media, present or former employees of Hope, their affiliates, subsidiaries or divisions, and other members of the public.

7. Dawes shall not voluntarily render assistance of any sort to present and/or former employee(s) of Hope in any suits, claims, complaints and/or causes of action brought against Hope. However, nothing contained in this paragraph shall prohibit Dawes from

complying with duly served subpoena(s) issued by the Court and/or cooperating in any and all investigations by state and/or federal administrative agencies.

8. Dawes agrees not only to Release and Discharge Hope from any and all claims against it that she could make on her behalf, but also those which have been or may be made against Hope by any other person, organization or entity on her individual behalf. Dawes specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against Hope, involving any event that has occurred as of the date of this Agreement.

9. Dawes and Hope agree to refrain from taking any actions or making any statements, oral or written, in any way relating to or concerning Dawes' employment with Hope or the conclusion thereof, which have the purpose of or effect of injuring or in any way detracting from Dawes' or Hope's reputations or causing any person or entity to refrain from or cease any employment or business relationship with either Dawes or Hope. Either Dawes or Hope shall be entitled to seek injunctive relief and an award of damages for any such breach.

10. In the event that Hope is contacted for an employment reference regarding Dawes, Hope agrees to give a neutral reference for Dawes (i.e. to/from dates of employment and position held only with no reference to performance or how Dawes' employment ended).

11. The provisions of this Agreement are severable and, if any part is found to be unenforceable, the other portion shall remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein.

12. This Agreement contains and constitutes the entire understanding and agreement between the parties hereto respecting the subject matter hereof and supersedes and

cancels all previous negotiations, agreements, commitments and writings in connection herewith. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner orally or otherwise, except by an instrument in writing of concurrent or subsequent date signed by a duly authorized officer or representative of each of the parties hereto. The parties agree that they waive the rule of construction against the drafter of this Agreement.

13. Dawes represents and agrees that she has had the opportunity to discuss all aspects of this Agreement with counsel or other personal advisor of her choice (if she so chooses) prior to executing this Agreement, that she has carefully read and fully understands all of the provisions of this Agreement, that she understands the final and binding effect of the Agreement, and that she freely and voluntarily enters into this Agreement, without duress or coercion. Dawes further represents that she has been given twenty-one (21) days from the receipt of this document to accept or reject this Agreement, and that she has waived this twenty one (21) day period by signing the Agreement today, and further Dawes acknowledges that she has seven (7) days to revoke this Agreement after signing the Agreement. If Dawes determines to revoke this Agreement, notification in writing must be provided to Lauren E. Tedesco, Esq., Capehart & Scatchard, 8000 Midlantic Drive, P.O. Box 5016, Mt. Laurel, New Jersey, 08054-5016. If the Agreement is not revoked within the seven (7) day period, Hope will dismiss the matter as described in Paragraph 1 above.

15. This Agreement shall be governed and construed under the laws of the State of New Jersey.

**THE UNDERSIGNED STATE THAT SHE HAS CAREFULLY READ THE FOREGOING AGREEMENT, KNOWS THE CONTENTS THEREOF, HAS HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF HER CHOOSING, FREELY AND VOLUNTARILY CONSENTS TO ALL TERMS AND CONDITIONS THEREOF AND SIGNS THE SAME AS HER OWN FREE ACT.**

Dated: 6·6·16

Trudi Dawes

Trudi Dawes

**Hope Community Charter School**

Dated: 5/5/16

By:

Dated: 5/23/16

Lauren E. Tedesco, Esq.

CAPEHART & SCATCHARD, P.A.

# HOPE COMMUNITY CHARTER SCHOOL • CAMDEN, NJ

**Hope Community Charter School**
**836 S. 4th Street**
**Camden, NJ 08103**
**Board Meeting Minutes**
**May 4, 2016**

2016 JUN 16 A 3:43

**Resolution 11 -** Resolved that the Hope Community Charter School Board of Trustees approves the settlement agreement between Trudi Dawes v. Hope Community Charter School and designates Robin Ruiz in her capacity as Executive Director to sign the agreement on the Board's behalf.

Motion by: Robert Delengowski Seconded by: Yolette Ross

| | | |
|---|---|---|
| Yolette Ross | Board Chair | Yes |
| Robert Delengowski | Board Vice Chair | Yes |
| Christian Galietta | Trustee | Yes |
| David Brady | Trustee | Absent |

Certified by:

Stephen J. Gilmartin
Board Secretary

280-16

| | | |
|---|---|---|
| CHRISTOPHER GARUCCIO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner asserted that this matter arose from harassment and inappropriate discipline he allegedly experienced over the last two years of his employment with the respondent school district. Petitioner was employed by the Board from 1992 until November 2013, when he received notice that the Board intended to file tenure charges against him; petitioner subsequently resigned his teaching position with the district. In June 2014, the petitioner filed a complaint against the school district with the U.S. Equal Employment Opportunity Commission (EEOC), after which he reviewed his personnel file and discovered that the tenure charges had not been filed. The EEOC closed its file on petitioner's case in April 2015, after having been unable to conclude that a violation had occurred. Petitioner subsequently filed the within petition on December 17, 2015, seeking "closure" through monetary relief, apologies and an acknowledgment that he had been treated unfairly. The Board filed a motion to dismiss, asserting that the petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: *N.J.A.C.* 6A:3-1.3(i) provides that a petitioner must file an appeal no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the board of education, which is the subject of the requested contested case hearing; in the within case, petitioner received notice that tenure charges were being filed against him on or about November 15, 2013; consequently, petitioner resigned his employment; in July 2014, petitioner discovered that the tenure charges had never been filed; if the petitioner had been challenging the employment action that was taken against him or wished to rescind his resignation, the ninety-day time limit would have lapsed – at the very latest – in October 2014; petitioner did not file his appeal until December 17, 2015. The ALJ concluded that the petition was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i); accordingly, the ALJ granted the Board's motion to dismiss, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's determination that the petition was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

July 28, 2016

OAL DKT. NO. EDU 457-16
AGENCY DKT. NO. 368-12/15

| | | |
|---|---|---|
| CHRISTOPHER GARUCCIO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/28/16
Date of Mailing: 7/29/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 457-2016
AGENCY DKT. NO. 368-12/15

**CHRISTOPHER A. GARUCCIO,**
Petitioner,
v.
**CUMBERLAND REGIONAL**
**SCHOOL DISTRICT**
**BOARD OF EDUCATION,**
Respondent.

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**Christopher A. Garuccio**, petitioner, pro se

**Syrion A. Jack,** Esq., for respondent (Schwartz, Simon, Edelstein & Celso, LLC attorneys)

Record Closed: June 7, 2016 Decided: June 20, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, Cumberland Regional School District Board of Education (District) has filed a Motion to Dismiss in Lieu of Answer asserting that the petition was not timely filed pursuant to N.J.A.C. 6A:3-1.3(i)

The original Petition of Appeal was filed with the Department of Education on December 17, 2015. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on January 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties filed several briefs and the record closed on June 7, 2016.

## FACTUAL DISCUSSION

This matter arises from what petitioner describes as harassment and inappropriate discipline he experienced over the last two years of his employment with the District. On or about November 15, 2013 petitioner, a teacher employed by the District since 1992, received tenure charges that the District intended to file against him. As a result of these charges, petitioner resigned his position. In June 2014, petitioner filed a complaint against the District with the U.S. Equal Employment Opportunity Commission (EEOC). In July 2014, petitioner reviewed his personnel file and discovered that the tenure charges had not been filed. On April 6, 2015 the EEOC closed its file having been unable to conclude that a violation had occurred. In his petition, petitioner does not seek reinstatement of his teaching position, rather he seeks monetary relief, apologies and acknowledgment that he was treated unfairly. Petitioner claims the petition in about "closure".

## LEGAL ANALYSIS AND CONCLUSION

In support of the motion, respondent contends that petitioner was aware of possible claims against the District when he filed the EEOC complaint. N.J.A.C. 6A:3-1.3(i) provides that a petition against a school District must be filed within ninety days

from the date of the last allegation in the petition. Moreover, there is no reason for relaxation of the ninety-day time limit.

Petitioner maintains that he is not a lawyer but he is certain that the ninety-day time limit only applies in Civil Court and not Administrative Court. He feels that since the tenure charges were never filed, that they must have been falsified.

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

There is no genuine issue as to any material fact in this matter in relation to the time limit in N.J.A.C. 6A:3-1.3(i). The material facts are as follows:

1. Petitioner was employed by respondent from 1992 until he resigned in November, 2013.
2. On or about November 15, 2013 petitioner received notice that the District intended to file tenure charges against him.
3. Petitioner filed a complaint with the EEOC on June 24, 2014.
4. Petitioner reviewed his personnel records maintained by the District in July 2014 and discovered that the tenure charges were never filed.
5. On April 6, 2015 the EEOC closed its file having been unable to conclude that a violation had occurred.
6. Petitioner filed his petition with the Commissioner of Education on December 17, 2015.

The applicable regulation is N.J.A.C. 6A:3-1.3(i), which provides in pertinent part as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the District board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The ninety-day limitation period has been upheld by the Supreme Court of New Jersey as "a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572, 582 (1993). The Court further stated as follows:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the

> position with back pay. The limitation period gives school Districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid.

In this case, the petitioner received notice that tenure charges were being filed against him on or about November 15, 2016. As a result of receiving notice that tenure charges were being filed, petitioner resigned his employment. He later discovered in July, 2014 that the tenure charges were never filed. Even if petitioner were challenging the employment action that was taken against him or wished to rescind his resignation, the ninety-day time limit would have lapsed, at the very latest, sometime in October, 2014. As petitioner did not file his petition until December 17, 2015, I **CONCLUDE** that the petition in this matter was not filed within the ninety-day time limit set forth in N.J.A.C. 6A:3-1.3(i).

Rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. N.J.A.C. 6A:3-1.16. An example would be where there is a compelling public interest. DeMaio v. New Providence Board of Education, 96 N.J.A.R.2d (EDU) 449, 453. N.J.A.C. 12:20-3 provides, in pertinent part, that a late appeal shall nevertheless be considered if the filing was delayed for good cause. Good Cause is defined as where the delay was due to circumstances that were not reasonably foreseeable or were beyond the petitioner's control. N.J.A.C. 12:20-3(i). Here, petitioner knew or had reason to know that his employment was being effected in November 2013. He discovered in July 2014 that tenure charges were never filed against him. Petitioner has not advanced a compelling public interest or good cause sufficient to relax the ninety-day time limit in N.J.A.C. 6A:3-1.3(i), and there does not appear to be any reason to do so.

Based upon the above, I **CONCLUDE** that petitioner failed to file his petition within the ninety-day time limit in N.J.A.C. 6A:3-1.3(i) and that therefore the petition in this matter should be dismissed. Since the petition has not been filed in a timely manner, there is no reason to consider the merits of respondent's argument that petitioner has failed to implicate a dispute arising under the school laws.

Accordingly, it is **ORDERED** that Respondent's motion is **GRANTED** and the petition filed in this matter is **DISMISSED.**

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

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

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

June 20, 2016
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency: 6/20/16

Date Mailed to Parties: 6/20/16

2-51-16

| | | |
|---|---|---|
| SERGIO CALAFIORE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner appealed the decision of the respondent, the Union County Educational Services Commission (Commission), to remove him from his position as a Food Services Teacher as the result of a reduction in force (RIF). Petitioner filed his appeal on September 19, 2014, alleging that his RIF was arbitrary, capricious and unreasonable. On April 15, 2015, petitioner filed a motion to amend the petition to include a seniority claim stemming from the same set of circumstances, which alleged that respondent violated his seniority rights under *N.J.S.A.* 18A:28-10 when it assigned a Commission employee to teach a food services class that petitioner was entitled to teach by virtue of his seniority. The Commission thereafter filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:28-9, a local board of education has the authority to reduce its teaching force for reasons of economy; in this case, the Commission abolished petitioner's position in good faith, in order to save money; because petitioner did not possess the credentials to necessary to teach special education students, there were too few students and a lack of full-time duties to justify petitioner's continued employment; however, the Commission's argument that one of the reasons it terminated petitioner's position was because he did not have the necessary credentials for teaching special education students is somewhat specious as the record shows that petitioner was still teaching special education students after the Commission had notice of his lack of credentials; nevertheless, the petitioner did not hold the proper credentials to teach special education students, and the respondent therefore had the right to remove him from that assignment. The ALJ concluded that the Commission reasonably determined that abolishing petitioner's position would achieve financial savings without any detrimental impact to the students or the school's programs; accordingly, the Commission's decision to abolish petitioner's position was not arbitrary, capricious, or unreasonable under *N.J.S.A.* 18A:28-9. Further, the ALJ found that petitioner's motion to dismiss was filed almost a year after the matter was transmitted to the OAL and, if allowed, would cause undue prejudice to the respondent; accordingly, the ALJ denied petitioner's motion to amend his petition under *N.J.A.C.* 6A:3-1.7.

The Commissioner concurred with the ALJ's conclusion that the Commission's decision to abolish petitioner's position as the result of a RIF was made in good faith, and was not arbitrary, capricious or unreasonable. However, the Commissioner found that – with respect to petitioner's motion to amend the petition – the ALJ abused her discretion under *N.J.A.C.* 1:1-6.2 when she denied petitioner's request to amend his petition. The Commissioner found that the motion to amend was filed seven months after the matter was transmitted to the OAL – not a year after, as the ALJ asserted. Further, the record does not support the ALJ's assertion that the granting of the motion to amend would result in undue prejudice. Accordingly, the Commissioner granted petitioner's motion to amend, and remanded the matter to the OAL for a determination on whether the petitioner is entitled to a position with the Commission by virtue of his seniority rights.

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

Issued 7/28/16

OAL DKT. NO. EDU 12005-14
AGENCY DKT. NO. 223-8/14

| | | |
|---|---|---|
| SERGIO CALAFIORE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Sergio Calafiore, and the Union County Educational Services Commission's (Commission) reply thereto. In this matter, the petitioner alleges that the Commission's decision to abolish his position as a result of a reduction in force was arbitrary, capricious and unreasonable.

The petitioner's exceptions substantially reiterated the substance of his submissions at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously granted summary decision in favor of the Commission. Specifically, the petitioner maintains that the ALJ wrongfully found that the Commission's decision to abolish his food-services instructor position was not arbitrary, capricious or unreasonable under *N.J.S.A.* 18A:28-9. The petitioner also takes exception to the ALJ's order denying his motion to amend the petition to include a claim that the Commission also violated his seniority rights when it employed another less senior teacher to instruct a food

services class. Therefore, the petitioner asserts that the ALJ erroneously dismissed the petition. In reply, the Commission also reiterated the positions advanced in its submissions at the OAL, stressing that the ALJ properly granted its motion for summary decision and denied the petitioner's motion to amend his position.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that the Commission's decision to abolish the petitioner's position as a result of a reduction in force was not arbitrary, capricious or unreasonable. The Commissioner finds the petitioner's exceptions unpersuasive, largely reflecting arguments previously raised before the ALJ and taken into account by her in determining that the Commission acted in good faith, and abolished the petitioner's position for valid economic reasons.

With respect to the petitioner's motion to amend the petition, the Commissioner finds that the ALJ abused her discretion under *N.J.A.C.* 1:1-6.2 when she denied the petitioner's request to amend his petition. Pursuant to *N.J.A.C.* 1:1-6.2, once a case is transmitted to the OAL, "pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." In the Initial Decision, the ALJ found that allowing the petition to be amended would cause undue prejudice to the respondent because discovery was complete; the respondent filed a motion for summary decision on the original petition; and "it would be highly prejudicial to respondent to have to address a new claim for relief when it did not have any notice of it for over a year." (Initial Decision at 11). Although there may be cases where a petitioner's request to amend a petition seven months after the matter

is transmitted would result in undue prejudice, the rational for the undue prejudice to the Commission stated in the Initial Decision is completely inconsistent with the record.

This matter was transmitted to the OAL on September 19, 2014, and on April 15, 2015, the petitioner filed a motion to amend the petition to include a seniority claim stemming from the same set of circumstances that were detailed in the original petition, *i.e.,* the abolishment of his position as a result of a reduction in force.[1] Importantly, when the petitioner filed the motion to amend the petition in April 2015, there was no outstanding motion for summary decision as the Commission did not file its motion for summary decision until June 30, 2015.[2] Additionally, the Commission concedes in its reply exceptions that it was on notice as early as November 2014 that the petitioner claimed another Commission employee was teaching a food services class that the petitioner was entitled to teach by virtue of his seniority.[3] Therefore, the ALJ wrongfully denied the petitioner's motion to amend the petition to include his seniority claim.[4] In the interest of "efficiency" and "the avoidance of over-technical pleading requirements" the two claims that stem from the same set of circumstances should have been simultaneously adjudicated at the OAL. *N.J.A.C.* 6A:3-1.3(i). Contrary to the Commission's arguments, the 90-day rule contained in *N.J.A.C.* 6A:3-1.3(i) does not limit the ability to amend a petition outside of 90 days, as pleadings may be freely amended at the Judge's discretion as long

[1] Despite the undisputed procedural history, the ALJ states that the motion to amend the petition was filed nearly a year after the matter was transmitted to the OAL, when in fact it was actually filed seven months after the matter was transmitted.

[2] It also appears from the record that discovery was still ongoing in April 2014.

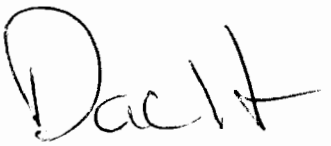
[3] According to the Commission, petitioner's counsel contacted the Commission's counsel on November 18, 2014 and raised the seniority issue, and the parties exchanged a series of correspondence regarding the matter.

[4] Under *N.J.A.C.* 1:1-12.2, with the exception of specific motions not at issue here, "all motions shall be decided within 30 days of service of the last permitted response". Yet in the instant matter, the ALJ did not decide the petitioner's motion to amend the petition – which was filed in April 2015 – until she issued the Initial Decision on June 16, 2016.

as the amendment does not create undue prejudice. *See, T.F.S., on behalf of minor child, C.M.S. v. Board of Education of the Township of South Brunswick, Middlesex County, et al.*, Commissioner Decision No. 400-05, decided November 2, 2005; *Roberts v. Keansburg Board of Education*, 5 *N.J.A.R.* 208 (1983).

Accordingly, the petitioner's motion to amend the petition is hereby granted and this matter is remanded to the OAL for a determination as to whether the petitioner is entitled to a position with the Commission by virtue of his seniority rights.

IT IS SO ORDERED.[5]



COMMISSIONER OF EDUCATION

Date of Decision: 7/28/16

Date of Mailing: 7/29/16

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**GRANTING MOTION FOR**
**SUMMARY JUDGMENT**
OAL DKT. NO. EDU 12005-14
AGENCY DKT. NO. 223-8/14

**SERGIO CALAFIORE,**

Petitioner,

v.

**UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,**

Respondent.

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**Steven J. Kaflowitz**, Esq., for petitioner (Caruso, Smith & Picini, attorneys)

**Robin T. McMahon**, Esq, for respondent, (Cleary, Giacobbe, Alfiere, Jacobs, attorneys)

Record Closed: July 22, 2015 Decided: June 16, 2016

BEFORE **IRENE JONES**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Sergio Calafiore, (petitioner or Calafiore) appeals the decision of respondent, Union County Educational Services Commission, Union County

(respondent or Commission) that removed him from his position due to a reduction in force (RIF). Petitioner alleges that his RIF was arbitrary, unreasonable and capricious.

After the filing of the appeal with Department of Education, the matter was transmitted to the Office of Administrative Law (OAL) on September 19, 2014, for hearing as a contested case on September 19, 2014. Pursuant to N.J.A.C. 6A:3-17, petitioner moved to amend his petition to include a claim that respondent violated his seniority rights under N.J.S.A. 18A:28-10 and N.J.S.A. 6A:32-5.1. On July 2, 2015, respondent moved for summary decision and petitioner filed a brief in opposition to said motion on July 22, 2015.

## FACTS

Based on the record, I **FIND** the following **FACTS**:

Petitioner was employed by the Commission as a Food Services Teacher. The Commission provides educational programs and services for twenty-one member school districts. It operates two alternative high schools and three schools for students with disabilities. Additionally, it directs an educational program at the Juvenile Detention Center, and at the time of petitioner's employment, it also directed a Special Needs Career Academy within the Union County Vo-Tech School. The Commission provides State-mandated services to over 4000 students enrolled in seventy non-public schools. These programs include: Compensatory Education, Supplemental Instruction, Speech-Language Therapy, English as a Second Language (ESL) Instruction, Child Study Team services, Home Instruction, and School Nursing Services. (RB.)[1]

Petitioner was hired by the Commission in September 1993, and achieved tenure in September 1997. He also served as a Food Services Manager for the Commission prior to November 2013. As Food Services Manager, petitioner oversaw

[1] "RB" refers to respondent's brief in support of its motion.

the procurement, preparation, and delivery of meals for schools operated by the Commission. In addition to his salary, petitioner was also paid a "cleaning stipend."

Petitioner's instructional duties involved teaching students from several different schools [Hillcrest Academy North, Hillcrest Academy South, and Lamberts Mill Academy] in the mornings. The students from Hillcrest Academy North and South are general education students, while the students from Lamberts Mill Academy are special education students. Prior to November 2013, only students from Hillcrest Academy North and South attended petitioner's program. However the Superintendent asserts that petitioner's program did not have a formalized program and did not follow a particular curriculum. The students who attended only received "community service" hours rather than course credit.

Prior to November 2013, petitioner also taught special education students at Westlake school. Westlake students had access to the original kitchen space in the cafeteria in the morning and afternoon, and the same students would attend these classes and receive course credits.

Early in November 2013, the Commission's principals and the superintendent began researching petitioner's qualifications, specifically whether he had the required certifications to allow him to continue in his teaching position. It was learned that petitioner only possessed a Certification in "Teacher of Productions, Personal, or Service Occupations: Food Services" without any other certifications required to teach handicapped special education students. The Superintendent was advised by the State Department of Education that petitioner's teaching program/curriculum did not have any specific goals or objectives for Hillcrest Academy North and Hillcrest Academy South students, contrary to the mandate of the IDEA.

On about October 28, 2013, petitioner was involved in an incident with a student where he had words with the student which led to him grabbing and lifting up the chair that the student was sitting on, causing the student to fall to the floor. Tenure charges

were filed and petitioner was removed from his teaching and Food Service Manager duties.

On December 11, 2013, the Board approved the filing of "conduct unbecoming" and "corporal punishment" charges against petitioner. Thereafter, on December 16, 2013, he was suspended without pay pending resolution of the tenure charges. The Commission contracted with, Maschio's, an outside company for food services. Maschio's utilized the cafeteria space that was previously occupied by petitioner. Maschio's proved to be more cost-efficient than paying petitioner's annual teaching salary and additional compensation.

During petitioner's suspension, the Commission explored expanding its programs to start a formal culinary program, but found that it lacked sufficient space. The school Business Administrator, the Superintendent and a Principal toured other buildings within Hillcrest Academy to search for an appropriate space to house a culinary program but ultimately decided not to lease additional space.

In February 2014, the parties settled the tenure charges against petitioner and an arbitrator approved the settlement on February 24, 2014. The settlement terms included, inter alia, that petitioner accepted a forty-five-day suspension without pay, and the following:

> It is further understood and agreed that Mr. Calafiore's employment with the Commission will be in the position of Teacher. He will no longer be the Food Services Manager and will not receive a food service stipend or cleaning stipend during the regular school year or in the summer.

On February 24, 2014, State Department of Education notified the Commission that the holder of a food service endorsement could not teach special education students without also possessing a teacher of the handicapped or teacher of students with disabilities endorsement. (Exhibit A.) Consequently, petitioner would need to be supervised by someone who held a teacher who had the required credentials.

On February 25, 2014, petitioner returned from his suspension. On that date, a "re-entry meeting" was held between petitioner, the superintendent, and the principal to discuss his duties going forward. In accord with the settlement agreement, petitioner was not returned to food service duties. The Commission decided to continue to use Maschio's to prepare student breakfasts and lunches.

As Maschio's was utilizing the Commission's cafeteria, petitioner was no longer able to utilize the cafeteria for food services instruction in the morning. Petitioner was assigned to an "activities of daily living" (ADL) room for his morning students. This location was later determined to be an unsuitable setting for food services instruction. Further, the ADL room was inadequate due to the space and lack of ventilation, and the classroom was not conducive to teaching/learning culinary arts, but instead was designed to help prepare students learn activities of daily living skills, such as, sweeping, vacuuming, table setting, bed making, and other household chores.

Petitioner's utilization of the ADL room also precluded staff from Westlake and Lamberts Mill Academy for utilizing the room, for ADL, counseling and health and Spanish classes. The Commission determined that it would not conduct additional Food Services Instruction classes in the ADL room following the 2014 spring semester.

Thereafter, the Commission attempted to formalize the program for students who attended petitioner's morning class. Westlake students were no longer attending petitioner's morning class upon his reinstatement. Students from the Commission's three other schools who attended the morning class "resisted" a formalized schedule and were not attending regularly. Although, petitioner continued to conduct a class in the ADL room from 9:00 a.m. to 12:15 p.m., there was not a consistent number of students attending his morning session. Moreover, those students who did attend, no longer received "community service" credits or academic credits for their attendance.

Yet another obstacle was the number of students in petitioner's class. During the suspension, a Westlake student who was in the petitioner's afternoon class dropped out of the class. Her withdrawal from the course resulted in petitioner only

having four Westlake students in the afternoon class. It was determined that another teacher was teaching eight Westlake students in her spring 2014 class. That class focused on life skills, such as meal preparation, financial literacy, socialization, laundry, and other household chores. The teacher of that class possessed home economics and special education endorsements. Since there was a room for a total of twelve students in that class, the Commission determined that it could place four additional Westlake students in the class.

Students from Hillcrest Academy North, Hillcrest Academy South, and Lamberts Mill Academy also had the option to enroll in alternate educational facilities, including a "culinary arts" program at Union County Vocational Technical High School. At least one Lamberts Mill Academy student enrolled in the Union County Vocational Technical program. Hillcrest North and South pupils are from the City of Elizabeth and as such have the option of attending a similar culinary program at Elizabeth High School.

In light of petitioner's lack of the requisite teacher of handicapped certification to teach classified students, declining enrollment in the number of pupils attending his classes, and the lack of adequate kitchen space to conduct his morning class, the Commission decided to abolish his position. Thus, on May 7, 2014, the Commission voted to abolish the Food Services Instruction at the Vocational Exchange Program and to eliminate the position of Food Services Teacher, effective July 1, 2014. (Exhibit C.) On June 4, 2014, the Commission voted to formally terminate petitioner's employment with the Commission. Petitioner filed a retirement application with the Division of Pensions and Benefits, effective November 1, 2014.

## DUSCUSSION, FINDINGS AND CONCLUSIONS

At issue is whether Commission decision to abolish petitioner's position as a Food Services teacher was arbitrary, capricious or unreasonable under N.J.S.A. 18A:28-9.

It is well established that a Board of Education may reduce the number of its teaching staff members whenever in the judgment of the Board, it is advisable to abolish such position for reasons of economy, or due to a reduction in the number of pupils or due to a change in the administrative organization of the district or upon other good cause. N.J.S.A. 18A:28-9. The Court so recognized this fact in Maywood Board of Education v. Maywood Education Association, 168 N.J. Super. 45, 55 (App. Div.), cert. denied, 81 N.J. 292 (1979), where it held, "reduction in force, whether tenured or non-tenured teachers, if done for reasons of economy, is entirely within the authority of the board. The relevant statutory provisions so ordains."

On point on this issue is the case of Impey v. Board of Education of Borough of Shrewsbury, 142 N.J. 388 (1995) where the board of education, for economic reasons, entered into a contract with a county Educational Service Commission (ESC) to provide speech-correction services for students. The board abolished the permanent part-time position and terminated the employment of a tenured part-time speech correctionist. The part-time speech correctionist's annual salary was slightly more than $20,000, and the board agreed to pay the ESC $8,000 to provide the equivalent speech correction services. As a result of the subcontracting arrangement with the ESC, the board saved approximately $12,000.

The speech correctionist filed an appeal claiming that the board's action violated her tenure, seniority, and re-employment rights. The New Jersey Supreme Court noted that courts have recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely "for reasons of economy." Id. at 398. The court concluded that the board's decision to abolish the speech correctionist's position resulted in a more economical delivery of those services in the district. It determined that the board's sole motive in contracting with the Monmouth County ESC, and in abolishing petitioner's position, had been to save money and therefore, was in compliance with N.J.S.A. 18A:28-9.

Nevertheless, any RIF is subject to the procedural safeguards set forth in State's Tenure Law, that provides district school teachers with some measure of security in the

ranks they hold. See Viemeister v. Prospect Park, Passaic Cty. Bd. of Educ., 5 N.J. Super. 215, 218 (Ap. Div. 1949). Thus, this matter is guided by the Commission's right to engage in RIF for reasons of economy and the right of the teacher to be free from pretextual decisions of the Board.

Here, petitioner alleges that the respondent's decision to abolish the Food Services Instruction program and to eliminate the Teacher of Food Services position was arbitrary, capricious or unreasonable under N.J.S.A. 18A:28-9 for the following reasons: 1) that the programs at issue, the new Food Service Program, was highly successful; 2) that the lack of enrollment in the old food service program was caused by limiting enrollment in the program strictly to Westlake students; 3) that by combining the Pre-Employment Training Services program, (P.E.T.S., a component of the old food service program) with the SAVE (Social Academic Vocational Education) program, students were forbidden from enrolling in the old Food Service Program; and 4) because he had no difficulty in working in the ADL classroom, and that additional space was available to sufficiently run the new Food Service Program both within the existing building and off premises, but were not adequately explored or considered by the Commission. (PB at 4, 5.)[2]

Respondent counters even if petitioner was in fact able to substantiate them, the aforementioned factors would be permissible reasons, thus not "arbitrary, capricious, or unreasonable" for abolishing his position pursuant to N.J.S.A. 18A:28-9.

I **FIND** that the Commission abolished the petitioner's position in good faith because it determined that Maschio's was more cost effective in providing the students' with breakfast and lunch than continuing to employ the petitioner. See, Impey, supra, 142 N.J. 388. I further **FIND** that because petitioner did not have credentials to teach special education students, there existed a lack of students and a lack of full-time duties for the petitioner. Moreover as Maschio's was utilizing the kitchen space to prepare food, there was a lack of sufficient space petitioner to conduct food services instruction. All of these factors lead to the RIF.

[2] PB refers to petitioner's brief.

I **FIND** that the reduced number of pupils in petitioner's class may have been the result of the new program. However, even if the lack of enrollment was a result of enrollment restrictions implemented by the Commission, it does not follow that its decision to abolish petitioner's position was arbitrary. Indeed, I am persuaded that the respondent acted in good faith when it restricted students from enlisting in two similar programs.

I further **FIND** that there was a lack of enrollment in petitioner's classes because he could no longer teach special education students. However, it is noted that the record supports that petitioner taught special education students from Lamberts Mill Academy as part of the new food service program and also taught special education students from Westlake in his afternoon session as part of the old food service program. Therefore, the Commission's argument that one of the reasons it terminated petitioner's position was because he did not have credentials to teach special education students is somewhat specious since petitioner was still teaching such students after the Commission had notice of his lack of credentials. Nevertheless, the fact remains that petitioner did not hold the proper credentials to teach the special education students, thus the respondent had the right to remove him from teaching special education students.

I **FIND** and **CONCLUDE** that the Commission reasonably determined that abolishing the position would achieve financial savings without any detrimental impact to the students or to the school's programs. It is significant to note here that many students were not receiving any credit for attending petitioner's class. Therefore, I **CONCLUDE** that respondent's decision to abolish petitioner's position was not arbitrary, capricious or unreasonable under N.J.S.A. 18A:28-9.

The remaining issue is whether petitioner's motion to amend the petition pursuant to N.J.A.C. 6A:3-1.7, to include a claim that Commission violated his seniority rights under N.J.S.A. 18A:28-10 and N.J.S.A. 6A:32-5.1 should be granted. The relevant regulation, N.J.A.C. 6A:3-1.7 provides:

> (a) Prior to the transmittal of any matter to the OAL, the Commissioner may order the amendment of any petition or answer, or any petitioner may amend the petition, and any respondent may amend the answer; provided, however, that once an answer or other responsive pleading is filed, an amendment to a petition may be made only with the consent of each adverse party or by leave of the Commissioner upon written application.
>
> (b) Following transmittal to the OAL, motions to amend a petition or answer shall be filed with and determined by the OAL in accordance with applicable rules of the OAL.
>
> N.J.A.C. 1:1-6.2 states that:
>
> (a) Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.
>
> (b) A judge in granting pleading amendments may permit a brief continuance to allow an opposing party additional preparation time.

Petitioner filed the motion to amend on April 15, 2015. The underlying petition was transmitted to the OAL on September 19, 2014, and the respondent filed a Motion for Summary Decision on July 2, 2015. As noted above, N.J.A.C. 6A:3-1.7, states that parties are free to amend their pleading prior to transmittal of the matter to OAL. Once the matter is transmitted to the OAL, motions to amend a petition or answer shall be filed with and determined by the OAL in accordance with applicable rules of the OAL.

I **FIND** that since the motion to amend was filed almost a year after the matter was transmitted to the OAL, the petition cannot be amended under N.J.A.C. 6A:3-1.7.

N.J.A.C. 1:1-6.2 confers a judge with discretion to allow an amendment when it in the interest of efficiency, expediency, and where it would not create undue prejudice. Petitioner has not presented any argument as to how it would be efficient or non-prejudicial if the claim of relief pursuant to N.J.S.A. 18A:28-10 and N.J.S.A. 6A:32-5.1 is

added to the Petition. Indeed, I **FIND** and **CONCLUDE** that the amendment, if allowed, would cause undue prejudice to the respondent as both sides have completed discovery. Additionally, the respondent has filed a Motion for Summary Decision on the merits of the original petition. It would be highly prejudicial to respondent to have to address a new claim for relief when it did not have any notice of it for over a year.

Therefore, petitioner's Motion to Amend his petition is denied.

## ORDER

I **ORDER** respondent's decision to abolish petitioner's position as a Teacher of Food Services is hereby **AFFIRMED**.

I further **ORDER** petitioner's Motion to Amend the petition pursuant to N.J.A.C. 6A:3-1.7 is hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

June 16, 2016

DATE

**IRENE JONES**, ALJ

Date Received at Agency: 6/16/16

Date Mailed to Parties: JUN 21 2016

sej

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

284-16

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|---|---|---|
| BRENDA MILLER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION ON REMAND |
| RESPONDENT. | : | |

SYNOPSIS

In this case on remand, petitioner challenged the District's decision to terminate her employment in August 2014, contending that she had earned tenure in her secretarial or clerical position in accordance with *N.J.S.A.* 18A:17-2. Petitioner also alleged that the individual who terminated her employment – the "Chief Talent Officer" – had not been appropriately delegated the authority to make personnel determinations on behalf of the State District Superintendant. In an Initial Decision issued by the OAL on December 9, 2015, the ALJ found that the petitioner had earned tenure under *N.J.S.A.* 18A:17-2, and ordered the District to reinstate her to a full-time position; petitioner's allegation regarding the individual who terminated her employment was not addressed in the December 9, 2015 Initial Decision. The Commissioner rejected this Initial Decision, finding, *inter alia*, that petitioner could not have earned tenure under *N.J.S.A.* 18A:17-2 because she did not satisfy the conditions of the statute, as she was employed in her unclassified title for less than the three years required to accrue tenure under Title 18A. The Commissioner remanded the matter to the OAL for a determination regarding whether petitioner's termination was carried out by an appropriately delegated individual.

On remand, the ALJ found, *inter alia*, that: pursuant to *N.J.S.A.*18A:7A-35(d), a State-Appointed Superintendent for a school district under full State intervention has the authority to perform duties and possess such powers as are deemed appropriate by the Commissioner; pursuant to *N.J.S.A.*18A:7A-42(b), a State-Appointed Superintendent "may delegate to subordinate officers or employees in the district any of his powers or duties as he may deem desirable to be exercised under his supervision and direction"; it is inconceivable, in a district as large as Newark, that a superintendent would micro-manage every personnel decision; within the Newark school district, it is evident that the position of Chief Talent Officer not only reports to the Superintendent, but is charged with providing leadership in human resource matters, including recruitment and selection of personnel, workforce planning and vacancy projections, evaluation/performance management, and strategic labor relations; moreover, the District contended that what was delegated to the Chief Talent Officer was the responsibility to communicate with District employees regarding their employment as well as to hire and fire non-civil service employees; as the party seeking relief herein, the petitioner bears the burden of proof; petitioner provided no evidence to sustain her claim that the State-Appointed Superintendent failed to delegate authority to terminate her to the Chief Talent Officer; and all un-refuted evidence supports the District's claim of proper delegation of authority. The ALJ concluded that petitioner's termination was not in violation of the statutory provisions regarding the authority of a State-Appointed Superintendent, including the authority to delegate duties; accordingly, the ALJ ordered the petition dismissed.

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

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

Issued 7/28/16

OAL DKT. NO. EDU 03970
(EDU 15475-14 ON REMAND)
AGENCY DKT. NO. 301-10/14

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|---|---|---|
| BRENDA MILLER, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION ON REMAND |
| RESPONDENT. | : | |

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) dated December 9, 2015, and the subsequent Initial Decision of the OAL dated June 20, 2016 (issued pursuant to the Commissioner's remand) have been reviewed. The petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the District's reply thereto were also considered by the Commissioner.

In her exceptions, petitioner essentially recasts and reiterates the arguments made in her submissions at the OAL, arguing that the State District Superintendent never specifically delegated the authority to hire and fire employees to the District's Chief Talent Officer. Petitioner emphasizes that the job description for the Chief Talent Officer and the Chief Talent Officer's certification fail to demonstrate that the State District Superintendant ever made such a delegation. Accordingly, the petitioner maintains that the decision to terminate her was invalid.

In reply, the District emphasizes that – as set forth in the certifications submitted by the State-District Superintendent and interim Chief Talent Officer – the Superintendent

delegated the authority to make employment determinations to the Chief Talent Officer, consistent with statutory authority. Further, the District points out that the petitioner did not provide any rebuttal evidence to the District's certifications; as such, the Initial Decision should be adopted.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the State District Superintendent had the authority to make employment determinations pursuant to *N.J.S.A.* 18A:7A-42(a)(1), and that she delegated that authority to the Chief Talent Officer in accordance with *N.J.S.A.* 18A:7A-42(b). Considering the certifications of the interim Chief Talent Officer and State District Superintendent which were submitted by the District – and the lack of evidence by petitioner to refute them – the Commissioner agrees with the ALJ that the petitioner failed to sustain her burden of proving that the Chief Talent Officer lacked authority to make personnel decisions.

Accordingly, the Initial Decision is adopted – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/28/16

Date of Mailing: 7/29/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 03970-16
EDU15475-14 **(ON REMAND)**
AGENCY REF. NO. 301-10/14

**BRENDA MILLER**,
Petitioner,
v.
**STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY**,
Respondents.

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**Nancy I. Oxfeld**, Esq., for petitioner (Oxfeld, Cohen, attorneys)

**Ramon E. Rivera**, Esq., for respondent (Scarinici Hollenbeck, attorneys)

Record Closed: June 1, 2016 Decided: June 20, 2016

BEFORE **JESSE H. STRAUSS**, ALJ t/a:

## STATEMENT OF THE CASE

Petitioner, Brenda Miller, contends that the State-Operated School District of the City of Newark (District) improperly terminated her despite her tenure and seniority while retaining persons who were non-tenured and/or were tenured but with less

seniority than her in positions for which she had acquired tenure and seniority. She also contends that the person who terminated her had not properly had such duties delegated to her by the State-Appointed Superintendent.

The District contends that Miller was an unclassified employee within a school district that adheres to the Civil Service Act. As such, she is not entitled to tenure or seniority under the Tenure Act (Title 18A); rather she is afforded only those rights conferred by the Civil Service Act (Title 11A).

## PROCEDURAL HISTORY

On October 10, 2014, petitioner filed a Petition of Appeal. After the District filed a timely Answer, the Department of Education's Office of Controversies & Disputes transmitted the matter, pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, to the Office of Administrative Law (OAL), which filed it for hearing and determination as a contested case on November 26, 2014. After two adjournments requested by the parties, I received a Motion for Summary Decision from the District on August 4, 2015. Miller filed papers in opposition. On December 9, 2015, I issued an Initial Decision Summary Decision ordering that the District reinstate Miller to a full-time position or assignment as is appropriate to her tenure. I did not address the issue of whether the person who terminated her had the proper delegation of authority from the State-Appointed Superintendent. On March 8, 2016, the Commissioner issued a Decision wherein he rejected the Initial Decision and ruled that Miller had not earned tenure. He remanded the matter back to the OAL to determine whether Miller's termination was done by an individual to whom said duties had not been appropriately delegated, in which event, Miller argues, her termination would be void pursuant to law.

Both parties requested to submit on the remanded count on filed papers rather than participate in a plenary hearing. The District filed its papers on May 27, 2016, and Miller filed on June 1. The District filed a reply brief on June 17, 2016, at which time the record closed.

## FACTUAL DISCUSSION

On August 15, 2014, the District's Chief Talent Officer was Vanessa Rodriguez. Cami Anderson was the State-Appointed Superintendent. Neither is still associated with the District. Larisa Shambaugh assumed Rodriguez's duties around January 19, 2016, under the title of Interim Chief Talent Officer. Christopher Cerf, the current State-Appointed Superintendent for the District, replaced Anderson on July 8, 2015. On November 18, 2013, Rodriguez advised Miller that, as a result of her reassignment from her position of Secretarial Assistant Typist Confidential to that of Confidential Assistant, her employment status changed from non-instructional (governed by NJ Civil Service Commission) to unaffiliated. (Shambaugh Cert. Ex. 1.) On August 15, 2014, Rodriguez, using Newark Public School Talent Office letterhead bearing the name Cami Anderson as State District Superintendent and Vanessa Rodriguez as Chief Talent Officer, informed Miller by a hand-delivered letter that "[a]s an unaffiliated, at-will employee, the Newark Public Schools (the 'District') is exercising its right to terminate your services as a Confidential Assistant, effective the close of business Friday, August 15, 2014." (Shambaugh Cert. Ex. 2.)

Although the District did not submit a specific job description for Chief Talent Officer, Shambaugh provided the job posting from December 9, 2011, for that position that specified qualifications and requirements and basic functions and responsibilities for that position. (Shambaugh Cert. Ex. 3.) "Superintendent Anderson seeks a Chief Talent Officer to lead the charge around ensuring that the district has the best talent management practices possible to meet the needs of Newark's students and their schools. This includes the design and strategic implementation of high-quality recruitment and selection, staff on-boarding, performance evaluation, professional development and labor relations systems. . . ." The posting listed the Chief Talent Officer's responsibilities to include:

1. Report to the Superintendent and provide leadership in all matters related to talent management and people development, including the recruitment and selection of personnel, workforce planning and vacancy projections, new staff on-

boarding and induction, staff development and evaluation/performance management, and strategic labor relations." (emphasis supplied)

7. Oversee district employee policy and labor relations strategy . . . to ensure compliance with and effective implementation of relevant policies and negotiated contracts."

Shambaugh has certified that the State-Appointed Superintendent oversees all human resource decisions, including hiring and firing of employees. The State-Appointed Superintendent delegates to the Chief Talent Officer the responsibility to communicate with District employees regarding their employment.

Cerf has certified that, pursuant to his authority to oversee all human resource decisions, including hiring and firing of employees, he was empowered to, and indeed did, delegate certain responsibilities to appropriate individuals. Cerf has further certified that Anderson had hired Rodriguez who remained in her same capacity when he assumed the position of State-Appointed Superintendent. Rodriguez was delegated with authority to hire and fire non-civil-service employees by Anderson, and, upon Cerf's assumption of Anderson's position, he also delegated that responsibility to Rodriguez. Upon Rodriguez's resignation, Cerf delegated the same authority to hire and fire non-civil-service employees to Shambaugh.

Miller has presented nothing to challenge the certifications of Shambaugh and Cerf.

## ANALYSIS AND LEGAL CONCLUSIONS

A State-Appointed Superintendent for a school district such as Newark under full-intervention has the authority to perform duties and possess such powers as deemed appropriate by the Commissioner of Education. N.J.S.A. 18A:7A-35(d). He or she also has the power to perform all acts and do all things that the Commissioner deems necessary for the proper conduct, maintenance, and supervision of the schools in the district. N.J.S.A. 18A:7A-35(d). The State-Appointed Superintendent may also make

all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional. N.J.S.A. 18A:7A-42(a)(3). Most importantly, the State-Appointed Superintendent "may delegate to subordinate officers or employees in the district any of his powers or duties as he may deem desirable to be exercised under his supervision and direction." N.J.S.A. 18A:7A-42(b).

The parties differ as to what was allegedly delegated to the Chief Talent Officer. Miller contends that it was the decision to terminate her. The District contends that it was the responsibility to communicate with District employees regarding their employment as well as the right to hire and fire non-civil-service employees.

Miller contends that, although State-Appointed Superintendent Anderson had the authority to terminate her on August 15, 2014, there is no evidence submitted by the District that she had delegated that authority to Rodriguez as a subordinate officer. She diminishes the impact of Exhibit 3 as a job posting rather than a job description. She argues that, although the posting for the position of Chief Talent Officer refers to hiring, there is no reference to terminations and no reference to being the ultimate decision maker; although the document indicates that the Chief Talent Officer "provides leadership", nothing in it indicates that she is the final decision-maker; and Shambaugh's certification indicates that the State-Appointed Superintendent delegates to the Chief Talent Officer only the responsibility to communicate with District employees regarding their employment and not the decision to terminate.

Miller unpersuasively attempts to parse specific words in order to make her case. The 2011 posting for the position of Chief Talent Officer indicates that the District then consisted of seventy-four schools serving 39,440 students. It is inconceivable that, in a District so large, a superintendent would micro-manage every personnel decision particularly for the purpose of communicating such personnel decisions. The full-intervention school districts in New Jersey have been among the largest. It is logical that the legislative decision to allow for the delegation of superintendent duties was influenced by the size of such districts. The recitation in the Basic Functions and Responsibilities section of the posting makes it abundantly evident that the Chief Talent Officer not only reports to the Superintendent but more importantly is to provide

leadership in all matters related to talent management. Moreover, the District contends that what was delegated to the Chief Talent Officer was the responsibility to communicate with District employees regarding their employment as well as to hire and fire non-civil-service employees. In the absence of a "smoking gun" written memorandum specifically delegating the authority to make and communicate a personnel decision to an employee, all of the logical circumstances support the contention that Rodriguez had the delegated authority to execute the matters related to Miller.

As the party seeking relief in this appeal, Miller bears the burden of proving her entitlement to the relief she seeks by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Miller has not sustained this burden. Beyond a bald assertion that the State-Appointed Superintendent did not delegate the authority, she provides no evidence to refute the certifications of Shambaugh and Cerf. Against the backdrop of the listed Chief Talent Officer duties and the unrefuted certifications of Shambaugh and Cerf, Miller has not established that the Chief Talent Officer lacked the delegated authority to act as she did. The letterhead of the August 15, 2014, termination letter has Rogriguez's name and title on it but only under that of then State-Appointed Superintendent Anderson. Again, all unrefuted evidence supports the claim of proper delegation of authority. As there is no genuine issue as to any material fact challenged, the District is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am. 142 N.J. 520, 530 (1995).

I **CONCLUDE** that the termination of Miller was not in violation of the statutory provisions regarding the authority of a State-Appointed Superintendent including her authority to delegate duties.

## ORDER

It is **ORDERED** that Miller's petition be **DISMISSED.**

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

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

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

June 20, 2016
DATE

Jesse H. Strauss
**JESSE H. STRAUSS**, ALJ t/a

Date Received at Agency:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUN 22 2016

id

286-16

OAL DKT. NO. EDU 4044-16
AGENCY DKT. NO. 72-3/16

| | | |
|---|---|---|
| J.B., on behalf of minor children, I.B., J.B. and S.B., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the first settlement payment is due June 1, 2016, the second payment is due June 15, 2016 and the third payment is due July 1, 2016. These dates have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of the settlement payments. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/16
Date of Mailing: 8/03/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 04044-16
AGENCY DKT. NO. 72-3/16

**J.B. ON BEHALF OF MINOR CHILDREN,**
**I.B., J.B. AND S.B.,**
Petitioners,

v.

**TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION,**
**ESSEX COUNTY**
Respondent.

---

**Charles D. Craig,** Esq., for petitioner (Law Office of Charles D. Craig, attorney)

**Stephen J. Christiano,** Esq., for respondent (West Orange Board of Education)

Record Closed: June 16, 2016 Decided: June 16, 2016

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

This matter was transmitted to the Office of Administrative Law on March 14, 2016 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

June 16, 2016
DATE

**ELLEN S. BASS**, ALJ

Date Received at Agency: 6-21-16

Mailed to Parties: JUN 21 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

Stephen J. Christiano, Esq.
179 Eagle Rock Avenue
West Orange, NJ 07052
(973) 736-1636
Attorney for Respondent

**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
**OAL DOCKET NO. EDU 4044-2016**

**J.B., ON BEHALF OF MINOR CHILDREN, I.B., J.B. AND S.B.,**

**Petitioner,**

**v.**

**SETTLEMENT AGREEMENT**

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

**Respondent.**

The parties hereby stipulate as follows:

1. The petition is withdrawn with prejudice.
2. Petitioner's children shall be permitted to attend school in respondent's district, so long as petitioner is domiciled at 49 Valley Way or at another bona fide West Orange address, and satisfies all school residency requirements for her children.
3. Petitioner agrees to pay tuition to respondent in the amount of $500. Payments shall be made in installments of $200, $200 and $100, with the first payment due June 1, 2016, the second payment due June 15, 2016 and the third payment due July 1, 2016. Any payment not made within 15 days of its due date shall cause petitioner, upon notice to her, to be held in default, which shall allow respondent to enter judgment against petitioner in the tuition amount of $3,000, less payments previously made.
4. Checks or money orders for the tuition payments shall be made payable to the

West Orange Board of Education and mailed/delivered to the office of Stephen J. Christiano, Esq., 179 Eagle Rock Avenue, West Orange, NJ 07052.

5. This settlement resolves all claims between the parties.

5/12/16

Jeminat Boxton, Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

By: Laura Lee
President

**EXTRACT FROM THE MINUTES OF A MEETING**
**OF THE WEST ORANGE PUBLIC SCHOOLS**
**BOARD OF EDUCATION, WEST ORANGE, ESSEX COUNTY, NJ**
**AS RECORDED IN THE OFFICIAL MINUTE BOOK**

The Board of Education of the West Orange School District, West Orange, in the County of Essex, New Jersey, convened in Regular/Work session on June 13, 2016 at 8:00 P.M., at West Orange High School, 51 Conforti Avenue, West Orange, NJ.

The following members of the Board of Education were present:
President Lab, Mr. Robertson, Mr. Charles, Mrs. Mordecai

The following motion was offered by Mrs. Mordecai and seconded by Mr. Charles and adopted by the Board of Education by the following roll call vote:

**Recommend approval of Settlement Agreement between the parents of Student #'s 1507092, 1507093, 1504075 and the West Orange Board of Education as stipulated in closed session.**

**ROLL CALL:** Ayes: Mrs. Lab, Mr. Robertson, Mr. Charles, Mrs. Mordecai

Abstain: None

**CERTIFICATE**

I, John Calavano, Secretary of the Board of Education, of the West Orange Public Schools, West Orange, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on June 14, 2016, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Orange Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 14th day of June, 2016.

John Calavano, Board Secretary

287-16

OAL DKT. NO. EDU 04711-15
AGENCY DKT. NO. 310-10/14

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION OF THE | : | |
| TEACHING CERTIFICATE OF DAWN McDERMJD, | : | COMMISSIONER OF EDUCATION |
| UNION COUNTY VOCATIONAL TECHNICAL | : | DECISION |
| SCHOOL DISTRICT, UNION COUNTY. | : | |

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

Upon review, the Commissioner observes that the Superintendent of the Union County Vocational Technical School District signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/16

Date of Mailing: 8/03/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 04711-15
AGENCY DKT. NO. 310-10/14

**IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DAWN MCDERMID, UNION COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, UNION COUNTY**

---

**Christina M. DiPalo**, Esq., for Union County Vocational Technical School District (La Corte, Bundy, Varady and Kinsella, attorneys)

**Leonard C. Schiro**, Esq., for Dawn McDermid (Mets Schiro McGovern, attorneys)

Record Closed: June 17, 2016 Decided: June 20, 2016

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

This matter was transmitted to the Office of Administrative Law for determination as a contested case on April 7, 2015, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

6/23/16
DATE

**KELLY J. KIRK**, ALJ

Date Received at Agency:

6-23-16

Date Mailed to Parties: JUN 23 2016
Attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## SETTLEMENT AGREEMENT AND RELEASE

**THIS SETTLEMENT AGREEMENT AND RELEASE,** (hereinafter referred to as "Agreement"), is made between Petitioner (Union County Vocational Technical School District); and Respondent (Dawn McDermid).

**WHEREAS**, Petitioner commenced an action against Respondent in a matter entitled, McDermid, Dawn/Union County Vocational-Technical School District, Union County , OAL Dkt. No. EDU-04711-2015N- Agency Ref. 310-10/14, (hereinafter referred to as the "Petition"); and

**WHEREAS**, the parties to this Petition having reached a negotiated agreement to fully, and finally, settle all claims among them, including those asserted in the Petition; and

**NOW, THEREFORE,** in consideration of the mutual promises and undertaking said forth herein, the parties agree as follows:

1. Respondent, Dawn McDermid, agrees that she signed an Employment Contact with the Board of Education of the Union County Vocational-Technical School District on July 15, 2014 to work as a non-tenured teacher from September 1, 2014 to June 30, 2015. The Employment Contract signed by Ms. McDermid required her to give sixty (60) days written notice to terminate the contract. On September 4, 2014, Ms. McDermid resigned from her position as a teacher without the proper notice required by contract.

2. Respondent, Dawn McDermid, shall have her teaching certification suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 for a period of three (3) months, commencing the date this Agreement is approved by the Commissioner of Education.

3. This Agreement shall be forwarded to the State Board of Examiners for implementation.

4. The parties agree that the language of this Agreement has been negotiated, is a product of the draftsmanship of all of the parties and that the usual rule that the provisions of a document are to be construed against the drafter shall not apply to the interpretation of any provisions hereof.

5. The signatures of the parties below indicate they have had an opportunity to review this Agreement with their respective Counsel, that they have read and understood the provisions, and that they have executed it voluntarily with full knowledge of the significance of all provisions.

6. This Agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

7. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

Dawn McDermid

Peter A. Capodice, Superintendent of Schools
Union County Vocational Technical Schools

Dated: June 1, 2016

2-55-16

OAL DKT. NO. EDU 13594-15
AGENCY DKT. NO. 225-8/15

| | | |
|---|---|---|
| L.S., on behalf of minor child, K.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Upon such review, the Commissioner observes paragraph 3 of the Agreement, states that:

> The Board of Education will rescind the finding that ... [K.S.] engaged in "harassment, intimidation or bullying," and revise all related reports filed with the New Jersey Department of Education, with the understanding that this action does not constitute an acknowledgment that its decision was incorrect, but merely reflects the desire of all parties to address the children's underlying issues through the mechanism of this settlement agreement.

Pursuant to *N.J.A.C.* 6A:16-5.3(d)1, the chief school administrator is required to submit each instance of HIB to the Commissioner of Education utilizing the Electronic Violence and Vandalism Reporting System (EVVRS). The reports must be submitted twice each year: once for incidents occurring between September 1 and January 1, and once for incidents occurring between January 1 and June 30. *N.J.A.C.* 6A:16-5.3(d)1i. On June 22, 2015, the Board found that K.S. committed an act of HIB; therefore, the incident should have already been entered into EVVRS. The Department of Education is unable to delete or modify EVVRS data from the previous school year subsequent to district verification in mid-July of the school year in which it was reported.

Moreover, the EVVRS requires that the district enter the NJSMART number of each victim and offender involved in all HIB incidents. Therefore, the Commissioner cannot approve an Agreement wherein the Board represents that it will rescind the report that it has already provided to the Department of Education. It should be noted, however, that the data in EVVRS and NJSMART are not connected in any way; therefore it is not possible for the data entered into EVVRS to be accessed by another district or any other unauthorized user.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/16

Date of Mailing: 8/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 13594-15
AGENCY DKT. NO. 225-8/15

**L.S., ON BEHALF OF MINOR CHILD, K.S.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,**
Respondent.

---

**L.S.**, petitioner, pro se

**David Rubin**, Esq., for respondent

Record Closed: June 16, 2016 Decided: June 17, 2016

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On September 1, 2015, the Department of Education, Bureau of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On May 24, 2016, the parties appeared for the hearing but settled the case before it began. The parties worked long and hard to reach this settlement and are commended for their efforts. Given their hard work, the parties placed the terms of their settlement on the record that day.

Having reviewed the terms of the settlement as they were read into the record, and having heard the testimony of the parties after the terms of the settlement were read into the record, I **FIND** that the parties have entered into their settlement voluntarily.

In addition, I **CONCLUDE** that the settlement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement (a summary of which is attached to this decision and is entitled "Terms of Settlement") and that these proceedings are now closed.

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

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

6/17/16
DATE

**BARRY E. MOSCOWITZ**, ALJ

Date Received at Agency:

6-22-16
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUN 22 2016
dr

**Terms of Settlement**

1. The families of Kayla Sabo, Garifalia ("Lia") Manoussakis, Haily Sosnowski and Jenna Chayko agree to abide by the following:

   a. All families agree to discuss with their children, at home, how to interact with the other students involved during the school year.

   b. Students will be able to say hello, wave, acknowledge each other inside and outside of the school, but there is no expectation that the students will interact with each other beyond being friendly with each other.

   c. Issues will arise during the year. However, all families agree that those issues will first be handled like any other school conflict. Each family's child will work with the principal, teachers and support staff to remediate the conflict. All families agree that the first step to remediating a conflict will ***not*** be filing a HIB report. Instead, families will work with the school to bring a positive resolution to the conflict.

   d. Each child will identify a staff member they feel comfortable working with should a conflict arise.

2. All children will participate in a social skills training program to be developed by the School District, which will be administered by a staff member other than Catherine Glass, and feature the following topics adapted as necessary to the

individual students' needs and their perception of the current situation:

- Sensitivity Skills
- Empathy Skills
- Conflict Resolution
- Friendship Skills
- Self Esteem
- Problem Solving
- Taking Turns in Conversations
- "I" messages that identify their emotions

Resources included but not limited to:

1. The book titled, "Ready to Use Social Skills Lessons and Activities," by Ruth Weltmann Begun.

2. The program" Words Work" as a curriculum resource with the following components:

- Part One: Breaking the Ice and Creating a Community
- Part Two: Communication: Telling It, Hearing It, Talking It out!
- Part Three: Relationships, People and Behavior, Think about It!
- Part Four: Leadership, Group Decision-Making, Using Skills and Reaching Goals
- Part Five: Problem Solving and Working Together

It is also recommend students join the Human Relations Club (HRC) after school (Wednesdays) when students are identified as needing mentors regarding friendship and social skills. Students from the High School work on different activities with the Middle School students.

3. The Board of Education will rescind the finding that Kayla Sabo engaged in "harassment, intimidation or bullying," and revise all related reports filed with the New Jersey Department of Education, with the understanding that this action does not constitute an acknowledgment that its decision

was incorrect, but merely reflects the desire of all parties to address the children's underlying issues through the mechanism of this settlement agreement.

4. All families acknowledge that all currently pending or threatened allegations of "harassment, intimidation or bullying" are hereby withdrawn, with the intention that any underlying issues be addressed as provided for in this settlement agreement.

2-89-16

OAL DKT. NO. EDU 08390-16
(EDU 12704-14 ON REMAND)
AGENCY DKT. NO. 229-8/14

| | | |
|---|---|---|
| A.P.W., ON BEHALF OF MINOR CHILDREN, A.T.W. AND N.A.W., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON REMAND |
| BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL, MERCER COUNTY, | : | |
| RESPONDENT. | : | |

The record, proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's June 1, 2016 determination that the prior settlement agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf. Since the settlement agreement now contains a copy of the Board resolution approving the settlement, the Commissioner can approve the within agreement in its present form.

To the extent that Paragraph 7 of the agreement provides for confidentiality, the parties are reminded that the settlement agreement may be subject to disclosure pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/16

Date of Mailing: 8/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 8390-16
(ON REMAND OAL DKT. NO. EDU 12704-14)
AGENCY DKT. NO. 229-8/14

**IN THE MATTER OF A.P.W. ON BEHALF OF MINOR CHILD, A.T.W. AND N.A.W., PRINCETON CHARTER SCHOOL, BOARD OF TRUSTEES, MERCER COUNTY.**

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**A.P.W.**, petitioner, pro se

**Derlys M. Gutierrez**, Esq., for respondent (Adams, Gutierrez and Lattiboudere, LLC)

Record Closed: June 22, 2016 Decided: June 23, 2016

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 2, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

June 23, 2016
DATE

Susan Scarola
**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: June 23, 2016

Date Mailed to Parties: 6/24/16

/cb

From the Minutes

# Princeton Charter School

*Board of Trustees*

Meeting of the Board of Trustees
March 9, 2016
575 Ewing Street, Princeton, N.J.

Board members present: Paul Josephson, Amanda Rose, Shannon Daley-Harris, Brandice Canes-Wrone, Randy Hubert, Khalid Anwar, Maryellen McQuade

Board Members Excused: Kinga Kaminska , Trusha Shah

Others present: Lawrence D. Patton, PCS's Head of School, Lisa Eckstrom and Gail Wilbur, PCS's Assistant Heads of School, Robert Long, Interim School Business Administrator and Board Secretary, Roxy Choe, President, Friends of PCS.

Paul Josephson announced that this meeting was being held in accordance with the Open Public Meetings Act and that forty-eight hours advance notice of the date, time and location, had been provided to the Princeton Public Library; The Trenton Times; The Town Topics; Princeton; Mercer County Clerks; Princeton Public Schools Business Office; the Mercer County Superintendent of Education; Peapack-Gladstone Bank in the public notice on May 30, 2015

APPROVAL OF ENGAGEMENTS/CONTRACTS/SETTLEMENTS
The settlement agreements on the following matters were raised and discussed: EDU 12704-2014S; Agency Ref. No. 2016-23889; and Agency Ref. No. 2016-23411. Shannon Daley-Harris moved that the settlement agreements be accepted; Amanda Rose seconded and the Board unanimously approved the following:

RESOLVED, that the Board of Trustees has reviewed and accepted the noted settlement agreements.
**Board Resolution [03-09-16-16]**

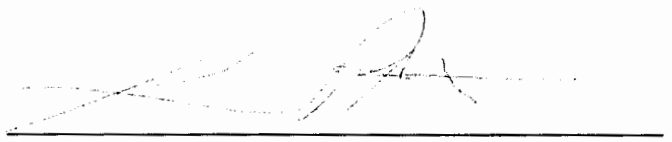
The meeting adjourned at **10:04 p.m.**, Shannon Daley-Harris proposed, Amanda Rose seconded.

Respectfully submitted,

Robert Long
Board Secretary

I hereby certify that the Princeton Charter School Board of Trustees acted by a recorded roll call majority vote at its meeting on March 9, 2016 to approve the parties' settlement agreement in EDU 12704-2014S.

Princeton Charter School



Dated: March 22, 2016

By:

Seal

**ADAMS GUTIERREZ & LATTIBOUDERE, LLC**
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
Board of Trustees of the Princeton Charter School

**OFFICE OF ADMINISTRATIVE LAW**

| | |
|---|---|
| A.P.W. obo A.T.W. and N.A.W.<br><br>Petitioners,<br><br>v.<br><br>BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL,<br><br>Respondent. | Agency Reference No.: 229-8/14<br>OAL Docket No.: EDU 12704-2014 S<br><br>**SETTLEMENT AGREEMENT** |

WHEREAS, during the period September 2012-April 1, 2014, A.T.W. and N.A.W. were enrolled at the Princeton Charter School (PCS), with the Board of Trustees of the Princeton Charter School ("Board") being a local education agency responsible for providing educational services to A.T.W. and N.A.W. during that period; and

WHEREAS, A.P.W. is the parent of A.T.W. and N.A.W. ("Parent"); and

WHEREAS, the Parent filed a petition pursuant to the Anti-Bullying Bill of Rights Act requesting a hearing on behalf of her children A.T.W. and N.A.W., currently docketed as Agency Reference No. 229-8/14 and OAL Docket No. EDU 12704-2014 S;

WHEREAS, the Parent filed a Notice of Tort Claim with the Board and its insurance carrier providing notice of a Tort claim against the Board and/or its agents for claims of compensatory damages and expenses due to personal injuries to A.T.W. and emotional distress to A.T.W. and N.A.W. arising out of the facts alleged in said petition;

WHEREAS, without waiving their respective positions and without any admissions by either party, the Parent and the Board wish to fully resolve all outstanding litigations between the parties pursuant to the terms set forth herein;

NOW THEREFORE, on their own behalf and on behalf of both A.T.W. and N.A.W., the Parent and the Board hereby agree to the following terms:

1. The Board or its insurance carrier shall make a one-time payment to Parent in the amount of twenty-nine thousand dollars ($29,000.00). Payment shall be made within thirty (30) days following execution of the Agreement by all parties.

2. The payment under paragraph 1 shall be in full and final settlement of any and all claims known claims that could have been made through the date of execution of this Agreement, including any claims for compensatory damages, fees, compensatory educational services, or costs. Said payment shall represent the Board's entire financial obligation to the Parent.

3. Parent agrees to dismiss with prejudice the petition filed on behalf of her children A.T.W. and N.A.W., currently docketed as Agency Reference No. 229-8/14 and OAL Docket No. EDU 12704-2014;

4. In consideration of the above, Parent, individually and on behalf of A.T.W. and N.A.W. fully and completely releases the Board, its agents, and representatives, from any and all known claims they have or may have accrued as of the date of this Agreement under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794(a), § 705(8), the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g et seq., 42 U.S.C. § 1983, 42 U.S.C. § 1988, 29 U.S.C. § 705(20), the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 et seq., the Rehabilitation Act of 1973, 20 U.S.C. § 7801, Title II of the ADA, 42 U.S.C. § 12132 et seq., N.J.A.C. 6A:14-1.1 et seq., N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., the ADA, 42 U.S.C. § 621 et seq., the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-3.2 et seq., the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., all as amended, any statutes of New Jersey, including but not limited to Title 18A and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or any other claims which have been or could have been asserted by A.T.W. or his parent on behalf of A.T.W. or asserted by N.A.W. or her parent on behalf of N.A.W, or the Board, in any forum arising out of or connected with A.T.W.'s or N.A.W.'s education at the PCS, including any claims for compensatory damages, fees or costs, to the extent permitted by applicable law through the date this Agreement is executed. Parent agrees to withdraw with prejudice the petition for due process filed on behalf of her son, captioned A.P.W. obo A.T.W. v. Princeton Charter School, Agency Reference 2016-23889.

5. Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the parties seeking to enforce any term or provision of this Agreement.

6. Neither party shall be deemed a prevailing party and both parties are responsible for their own counsel fees, expert fees and costs.

7. As a result of this Agreement, the parties agree to keep confidential and not share any information as to the terms of the settlement with any third party hereto, except as required pursuant to a properly-served subpoena or court order. In the event either party receives a subpoena or court order requiring disclosure of the terms of this settlement, notice of said subpoena or court order shall be provided to the other party hereof, as soon as reasonably possible.

8. This Agreement is subject to the approval of the Board of Trustees of the Princeton Charter School.

9. In the event payment is not timely made to petitioners as required by this Agreement, A.W. may recover reasonable attorneys' fees and costs in any enforcement action necessitated by said failure to pay.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

BOARD OF TRUSTEES OF THE PRINCETON CHARTER SCHOOL

By Paul N. Josephson
Board President

March 9, 2016.
Date

A.W.

Feb. 23, 2016
Date

OAL DKT. NO. EDU 9030-16
AGENCY DKT. NO. 163-6/16

| | | |
|---|---|---|
| ASHLYNN DIAZ, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the matter is now moot because the only relief sought by the petitioner was the ability to attend the high school graduation ceremony and Project Graduation, which were held on June 23, 2016. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/16
Date of Mailing: 8/03/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSAL**
OAL DKT. NO. EDU 09030-16
AGENCY DKT. NO. 163-6/16

**A.D.,**

Petitioner,

v.

**TOWN OF WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY**,

Respondent.

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**Mario M. Blanch**, Esq.

**Michael Goldman,** Esq., for respondent

Record Closed: June 27, 2016 Decided: June 28, 2016

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

In this case, petitioner A.D. is a high school senior seeking emergent relief to allow her to attend and participate in the high school graduation ceremony scheduled for June 23, 2016 as well as Project Graduation on that same evening. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on June 17, 2016, on petitioner's application for emergency relief. The matter was scheduled for oral argument at 10:00 a.m. on June 21, 2016 and heard on that date. At

The undersigned found that for purposes of deciding this application for emergency relief, petitioner failed to establish the existence of irreparable harm, that petitioner's claim is based upon a settled right and that petitioner is likely to prevail on the merits. Petitioner failed to establish the four requirements for emergency relief. I concluded that petitioner's request should be denied since the emergent relief was the only relief being requested in this matter. I further concluded that this matter should be dismissed. On June 22, 2016 the Commissioner adopted the Order and stated that this matter shall continue at the OAL with such proceedings as the parties and the undersigned deem necessary to bring it to closure.

## ORDER

Based on the Commissioner's decision and the fact that the high school graduation ceremony has passed, it is hereby **ORDERED** that this matter be **DISMISSED** and returned to the agency.

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

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

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

June 28 2016
DATE

**JOANN LASALA CANDIDO**, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 30 2016
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## DOCUMENTS RELIED ON

- Commissioner of Education's Decision on Application for Emergent Relief
- Order denying Emergent Relief

2-91-16

#291-16 (OAL Decision: http://njlaw.rutgers.edu/collections/oal/html/initial/edu08980-15_1.html)

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION : | | |
| OF THE BOARD OF EDUCATION OF THE : | | |
| BOROUGH OF FREEHOLD, | : | COMMISSIONER OF EDUCATION |
| MONMOUTH COUNTY, FOR AN ORDER : | | DECISION |
| DIRECTING ISSUANCE OF BONDS : | | |
| PURSUANT TO *N.J.S.A.* 18A:7G-12. : | | |

## SYNOPSIS

Petitioning Board of Education of the Borough of Freehold sought to compel the Commissioner to direct the issuance of school bonds for a capital improvement project in order to fulfill the Borough's constitutional mandate to provide a thorough and efficient public education to its students. The action was taken pursuant to the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 to 48, which directs that a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice in a three-year period may apply to the Commissioner for approval to issue school bonds for the local share of the project. In the instant case, the Board seeks to have the Commissioner direct the issuance of bonds after two referenda failed to obtain voter approval. The Department's Office of School Facilities (OSF) reviewed the petition, and determined that it contained the information necessary for the Board to seek an Order from the Commissioner directing the issuance of bonds.

The ALJ found, *inter alia,* that: compelling evidence has established that the Board's Park Avenue Elementary/Middle School and the Learning Center are severely overcrowded; this overcrowding seriously impedes the ability of both general education and special education students to access their education and to achieve core curriculum objectives; despite the concern and resentment of some residents over the anticipated expense of the planned facility improvements, most of the residents acknowledge the serious overcrowding problem in the borough schools, and the negative effect this has had on the children of the district; New Jersey's courts have long upheld the State's responsibility to ensure that children receive a thorough and efficient education as guaranteed under the State constitution; and *N.J.S.A.* 18A:7G-12 provides for the Commissioner's review and approval of school facilities projects preliminary to his authorization of the issuance of bonds. Accordingly, the ALJ concluded that capital improvements to Freehold schools are necessary, and that the Commissioner should permit the Borough to issue bonds in the amount of $32,902,400.

Upon review, the Commissioner concurred with the ALJ's findings, and adopted her comprehensive Report and Recommendation as the final decision in this matter.

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

August 4, 2016

Issued 8/04/16

OAL DKT. NO. EDU 8980-15
AGENCY DKT. NO. 42-3/15

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION | : | |
| OF THE BOARD OF EDUCATION OF THE | : | |
| BOROUGH OF FREEHOLD, | : | COMMISSIONER OF EDUCATION |
| MONMOUTH COUNTY, FOR AN ORDER | : | DECISION |
| DIRECTING ISSUANCE OF BONDS | : | |
| PURSUANT TO *N.J.S.A.* 18A:7G-12. | : | |

The record of this matter, and the Report and Recommendation of the Administrative Law Judge (ALJ) issued by the Office of Administrative Law following hearing[1] pursuant to *N.J.S.A.* 52:14F-5(o), have been reviewed. No comments were filed by the Board of Education (Board) pursuant to *N.J.A.C.* 6A:26-3.7(h)3i.

Upon review, the Commissioner concurs with the ALJ that the Board has demonstrated the necessity of its proposed project for the provision of a thorough and efficient system of education in the district. Additionally, the Commissioner finds that the proposed project's scope and costs are sufficiently narrowly tailored to protect the interests of taxpayers while ensuring that the Borough's students will receive the thorough and efficient education to which they are constitutionally entitled. For these reasons, the ALJ's comprehensive Report and Recommendation is adopted as the final decision in this matter.

The Commissioner emphasizes that this decision to authorize the issuance of bonds outside of a referendum represents an extraordinary remedy that has been exercised only

[1] The record contains transcripts of the public hearings held September 24 and September 25, 2015 at Park Avenue School in Freehold Borough.

after the development of a full and complete record clearly demonstrating that the failure to act will deprive children in this community of the educational opportunity that they will need to succeed in life. All such petitions for relief must be subjected to a high level of scrutiny and, for this reason, the Commissioner cautions that the facts and application of law are highly specific to this situation and not broadly applicable to other districts.

Additionally, in order to alleviate the impact of this decision on taxpayers of the district, I will treat the district's Petition as a timely application for a Section 15 school facilities grant pursuant to *N.J.A.C.* 6A:26-18.1 through 18.4 for the proposed new construction. Judge Scarola's findings make clear that the proposed new construction would qualify for funding pursuant to *N.J.A.C.* 6A:26-18.1 and, thus, the district is awarded a grant in the amount equal to all costs associated with the proposed new construction. With respect to the proposed rehabilitation, the district is authorized to issue bonds, pursuant to *N.J.S.A.* 18A:7G-9, for the local share of the total cost of the rehabilitation.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/04/16

Date of Mailing: 8/04/16

[2] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), and in accordance with applicable court rules.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**REPORT AND RECOMMENDATION**
OAL DKT. NO. EDU 8980-15
AGENCY REF. NO. 42-13/15

**IN THE MATTER OF THE BOROUGH OF FREEHOLD BOARD OF EDUCATION'S APPLICATION FOR AN ORDER DIRECTING THE ISSUANCE OF BONDS.**

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**Ronald J. Ianoale**, Esq., appearing for applicant Borough of Freehold Board of Education (McManimon, Scotland, Baumann, attorneys)

Record Closed: September 25, 2015 Decided: December 16, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

## STATEMENT OF THE CASE

Pursuant to the Educational Facilities Construction and Financing Act ("EFCFA" or "Act"), N.J.S.A. 18A:7G-1 to 48, effective July 18, 2000, a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice within a three-year period may apply to the Commissioner of Education ("Commissioner") for approval to issue school bonds for the local share of the project. Specifically, the statute authorizes the Commissioner to order issuance of such bonds if "the project is necessary for the provision of a thorough and efficient system of education in the district."

education in the district." N.J.S.A. 18A:7G-12. The Board of Education ("BOE" or "Board") of the Borough of Freehold ("Borough") has filed an application seeking to compel the Commissioner to direct the issuance of school bonds for a capital improvement project said to be necessary to fulfill the Borough's constitutional mandate to provide a thorough and efficient public education to its students after two referenda failed to obtain voter approval.

## PROCEDURAL HISTORY

On or about March 3, 2015, the Board petitioned the Commissioner for appropriate relief under the statute. On May 1, 2015, the New Jersey Department of Education's Office of School Facilities ("OSF") completed its review of the petition and determined that the petition contained the information necessary for the Board to seek an Order from the Commissioner directing the issuance of bonds.[1] The Commissioner then solicited written comments from any interested person to be filed by June 8, 2015.[2] On June 16, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for determination as an uncontested case.[3] N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The OAL held public hearings in the Park Avenue School in the Borough on September 24 and 25, 2015,[4] during which the Board offered sworn testimony on the constitutional need for the bond issue. Once the Board's proofs were completed, the

[1] The OSF also found that the proposed improvements were consistent with facilities efficiency standards.

[2] In accordance with the Commissioner's instructions, the Board caused notice soliciting written comments to be published in a newspaper of statewide circulation, the *Star-Ledger*, on May 12, 2015, and in a newspaper of local circulation, the *Asbury Park Press*, on May 12, 2015, and to be announced at its public meeting on May 11, 2015. A breakdown of the written comments received was prepared by the Board: approximately 385 correspondents were in favor of the bond issue, 8 were neutral, and 15 were opposed.

[3] An "uncontested case" is a proceeding designed to afford interested parties the opportunity to present their views; it includes rule-making and investigative hearings.

[4] The Board arranged for notice of the hearing to be published in the *Star-Ledger* and the *Asbury Park Press* by July 24, 2015, and to be announced at its public meeting on July 20, 2015. Testimony commenced at noon on September 24, and at 9:00 a.m. on September 25, 2015.

hearing was opened to comments from the general public and remained open until all who wished to comment had the opportunity to do so. The record closed thereafter.[5]

## FINDINGS OF FACT

### Undisputed Facts

The Freehold Borough School District is a Type II school district educating students from pre-kindergarten to eighth grade. Its high-school students in grades nine to twelve are educated in the Freehold Regional High School District, which consists of seven constituent school districts. Besides Freehold Borough, the Freehold Regional High School District ("FRHSD") consists of Colts Neck Township, Freehold Township, Howell Township, Farmingdale Borough, Marlboro Township, and Manalapan-Englishtown Regional school districts.

The Freehold Borough School District has been designated as a district factor group, or DFG, of "B."[6] Its board of education consists of nine elected-at-large residents of the Borough of Freehold. The school district consists of three schools—Park Avenue Elementary School, Park Avenue Middle School, and Freehold Learning Center—in two locations.[7]

In keeping with the requirements of the Facilities Law, the Board submitted a bond proposal and interpretative statement to the Borough's voters on two different referendum dates. The bond proposals read, in part, as follows:

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[5] An extension of time was provided for the issuance of this Report and Recommendation.

[6] The New Jersey Department of Education measures a school district's relative socio-economic status with its DFG ranking system, based on the following six criteria: (1) percentage of adults with no high school diploma, (2) percentage of adults with some college, (3) occupational status, (4) unemployment rate, (5) percentage of individuals in poverty, and (6) median family income. The classifications are A, B, CD, DE, FG, GH, I and J, with a DFG of "A" having the lowest socio-economic status and "J" being the highest. It is significant that the other six districts' DFG ratings range from "D/E" for Farmingdale (the next lowest) to "I" for Colts Neck and Marlboro Townships (the highest).

[7] The elementary school and the intermediate school are in one location (Park Avenue Elementary/Middle School).

**BOND PROPOSAL**

> The Board of Education of the Borough of Freehold in the County of Monmouth, New Jersey is authorized: (a) to undertake various improvements, renovations, and additions to the Park Avenue Elementary/Middle School and the Freehold Learning Center; (b) to acquire the necessary furniture and equipment as well as undertake any associated site work; (c) to appropriate $32,902,400 for such improvements funded, in part, with debt service aid from the State of New Jersey at the rate of 66.89% of a project's eligible costs; (d) to issue bonds in the amount of $32,902,400 . . . .
>
> The total final eligible costs for the proposed improvements approved by the New Jersey Commissioner of Education are $18,702,011, consisting of $14,969,163 for the Park Avenue Elementary/Middle School and $3,732,848 for the Freehold Learning Center. The proposed improvements do not include school facility construction elements in addition to the facilities efficiency standards developed by the Commissioner of Education or not otherwise eligible for State support pursuant to N.J.S.A. 18A:7G-5(g).
>
> **Interpretative Statement**
>
> Aside from numerous health and safety improvements to each of the schools, the building additions at the Park Avenue Elementary/Middle School consist of classrooms, gymnasium, girls' locker room, library, and cafeteria. The Freehold Learning Center's building additions consist of new classrooms and a cafeteria addition.

The referendum was driven by the need, in part, for new space. For example, the new classroom space would have accommodated 429 "unhoused"[8] students, as that term is defined in the EFCFA, based on the computation of the functional capacity of the three schools. The remaining improvements in the bond proposal consisted generally of health and safety upgrades to the two buildings' aging electrical and environmental systems.

[8] "'Unhoused students' means the number of students in excess of the functional capacity of a school facility." N.J.A.C. 6A:26-1.2. At the time that the petition was filed, the number of unhoused students was 429. That figure grew to 544 as of the date of the public hearings.

The first referendum was conducted on September 30, 2014. The vote was 273 in "favor" and 374 "against." The second referendum was conducted on December 9, 2014. The vote was 241 in "favor" and 370 "against."

At the Board's meeting of January 29, 2015, it unanimously approved a resolution asking the New Jersey Commissioner of Education to request that the New Jersey Legislature authorize an appropriation to fund fully the bond proposal. The resolution also authorized, as an alternative remedy, that the Commissioner authorize the issuance of bonds in the amount of the failed referenda.[9]

The Board of Education adhered to the legal requirements in advancing its petition to have the Commissioner authorize bonds by taking the following actions:

- It adopted a resolution at its meeting of May 11, 2015, authorizing all "interested persons"[10] to submit comments about the referendum and the proposed improvements to the New Jersey Department of Education, with copies to the secretary to the Board of Education. The comment period ended on June 8, 2015. This announcement was published in the *Asbury Park Press* and the *Star-Ledger* on or about May 18, 2015. At the end of the comment period, there were 408 submitted written comments; the overwhelming majority of the comments were in favor of the referendum. (See Exhibit P-3 for Summary of Written Comments.)

- After acknowledging receipt of the petition, the Commissioner of Education on June 16, 2015, transferred the matter to the OAL for assignment to an administrative law judge to serve as a fact-finder for the Commissioner of Education.

[9] The statutory constructions of the two remedies being sought are not mutually exclusive, but, in some instances, could complement each other.

[10] The term "interested persons" is used in the regulations that outline the procedures for a school district filing a petition with the Commissioner of Education to authorize bonds. This term, however, is not defined in the regulations. For the purposes of the petition, it was assumed that any resident, taxpayer, student or employee of the Freehold Borough School District qualified as an "interested person." It was also assumed that any member of the public who has a student in the school district, regardless of his or her voting status, was also an "interested person."

- At its meeting of July 20, 2015, the Board of Education adopted another resolution establishing the meeting dates and times for the evidentiary hearings. The Board also caused this information to be published in the *Asbury Park Press* and the *Star-Ledger*, which it was on or about July 24, 2015.

**Testimony and Documentary Evidence**

The Board presented the following documents and testimony.

**Dr. Rocco Tomazic**, the superintendent of schools for the Borough, testified that the students are not getting a thorough and efficient education because of extreme overcrowding and the inability to provide adequate instruction. Based upon the physical facilities required by the statute, pre-kindergarten to fifth grade should have 125 square feet per student, and grades six to eight should have 134 square feet. The Borough has a current capacity of 1,148 students, and as of April 4, 2015, 349 students were unhoused. As of the date of the hearing, 1,700 students were enrolled, for a total of 552 unhoused students. If the classrooms rented in Freehold Township by the Board were considered as available space, the total unhoused student population would be reduced to 365 students, still a significant percentage of the student population.

The Borough is a "high-poverty" district, with 76.7% of the students qualifying for free or reduced-cost lunch. At least 40% of the student population is considered at risk. As a high-poverty district, the class sizes cannot exceed 21 students in grades kindergarten through three; 23 students in grades four and five; and 24 students in grades six through eight. N.J.A.C. 6A:13-3.1(b). As of the hearing date, grades kindergarten through third grade had 79% of classes above the limit (26 of 33); grades four and five had 77% of classes above the limit (10 of 13); and grades six through eight had 14% above the limit (15 of 105). These statistics did not include health, gym, music or art classes. The goal would be to improve class size in order to improve literacy and mathematical skills.

When Dr. Tomazic arrived at the district approximately two years ago, the district was not able to provide the 150 minutes per week of health and physical education required by statute. This was changed, but caused great strain on accommodating the master schedule. Nor was the district able to provide sufficient technology skills so that students met the curricular goal of technological literacy by the end of eighth grade. In 2013, the proficiency of the Borough's eighth graders was 37%. Following reestablishment of a middle-school technology lab and the hiring of a technology teacher, the level rose to 86.8%, but at the cost of other programs.

In order to fit all the students into the school, the administration made unacceptable degradations to the educational programs. Gym had been cut below the legal limit, technology was gutted, and the library space was shut down and converted to other support roles. This affected all the students. Lunch had to be started at 10:30 a.m. to accommodate the overcrowding.

Dr. Tomazic noted that the eighth grade had no library or media center. Art and music were taught by the use of a cart that was wheeled from classroom to classroom. There was one library for the whole district; there was no middle-school library, and only minimally functioning elementary school libraries. At the Park Avenue School, there was no library because it was used for instruction. All academic areas were impacted by the lack of space.

Dr. Tomazic noted that there was not enough staff for the special-education students, and resource-room pull-out could not be covered 100%. Dr. Tomazic found that instructional minutes for language arts and math for special-education students was unusually low, particularly since the assessment scores on the NJASK were well below the State average and even below the average of all DFG B districts. The correlation between that and the lack of space was unsettling. The schools simply did not have enough space to conduct all the resource replacement required for these students. All the classrooms were full. The only thing left would be to have instruction in the hallways and closets. The middle school has been designated as a Focus School because of the wide gap between general and special-education performance.

Bilingual programs were suffering as well. The regulations require two periods of English as a second language (ESL). Hispanic students represent 72.3% of the district,[11] and 16.7% of students require bilingual and ESL classes, but the district is only able to offer one period and struggles to find the space for that. The NJASK showed many students with limited English proficiency. The Borough did not meet Annual Measurable Achievement Objectives (which measures individual student proficiency in English) for two years, and is now in a corrective-action plan to improve this area.

For basic skills, the Borough is a high-needs district as defined by the statute. Requirements need to be met in literacy and mathematics. The district has no basic-skills teachers devoted to mathematics at the elementary school level as the result of a lack of space.

Borough students leave the district to attend the FRHSD. The resource disparity among the districts feeding into the FRHSD is reflected in the disparate academic achievement of Borough students as they continue to secondary education. The amount of money spent on students at the elementary level within the high school district ranges from $11,846 per student in Freehold Borough to $22,345 per student in Colts Neck. Poverty and language barriers, when combined with the large class sizes, disproportionately impact many students, particularly Hispanic children. The FRHSD opportunity index for honors classes, advanced-placement classes, and the International Baccalaureate, has the Borough in last place. It is unfair to students who leave the Borough's elementary-school system to attend the regional high-school system and have to try to compete with students who have had substantially more educational opportunity provided in their elementary schools.

Without the requested relief of bonding for additional classroom space and mechanical upgrades, the Borough schools may be compelled to have split sessions:

[11] Most of the students are American citizens.

this would further reduce instructional time, but would also adversely impact families who reside within the Borough.

Even with improvements, the Borough schools would still be short of space, but the proposed improvements are essential to the educational progress of the students. Their needs must come first, as the alternative to providing these services would fail both the students and the community.

In formulating its school-improvement plans, the Board also took into consideration projections for population growth, which have consistently underestimated the number of children who would be attending school within the district. Based on a demographic study in 2013, enrollment for the 2014–2015 school year was estimated to be 1,579 students. Actual enrollment as of December 2014 was 1,638 students, or 59 more than anticipated. A similar enrollment disparity had occurred the previous school year, where the demographic study had estimated 1,515 students, but 1,586 students were enrolled as of May 2014, a difference of 71 students. Elementary-school population is expected to continue to grow in the Borough in coming years, as the community's student population comes from sources other than live births, the methodology used by the New Jersey Department of Health and Senior Services to estimate population growth.

**Ted Hopkins**, the AIA architect, testified that he prepared the schematic drawings for the improvements to the school facilities. The improvements to the Learning Center include classrooms, technical upgrades, utility upgrades, fire alarm, public-address system, and gas service (to replace the electric heat). The Park Avenue Elementary/Middle School would have a library, a gymnasium, and classrooms. Other technical improvements would also be made.

Hopkins testified that as to the Learning Center, the design that was selected was the one that offered the maximum amount of space at the least cost and least loss of outside area. The fire-alarm system is forty years old and needs to be modernized. Additional cafeteria space was created to handle the new classrooms. The Park Avenue Elementary/Middle School plans were designed to afford the additional

classroom space and additional cafeteria space with minimal impact upon the existing structures, with modernization of the utilities.

**Fiscal Projections**

The Board of Education retained the independent financial advisory firm of Phoenix Advisors, LLC, to project the tax increase of a $32,902,000 bond issue. Phoenix Advisors, LLC, is an independent financial-advisory firm registered with the United States Securities and Exchange Commission to assist municipalities and school districts with their financial projections.

Phoenix Advisors updated its projections on September 18, 2015 (just prior to the hearings). Based on a residential property assessed at $250,499—which is the average assessed valuation of a real property in the Borough of Freehold in 2015—Phoenix Advisors projected an average annual property-tax increase of $279.38 given the following assumptions:

(i) Blended debt service aid rate of 38.02%;[12]

(ii) 30-year bond term;

(iii) projected fixed annual interest rate of 4.00%;

(iv) 2015 total assessed valuation of the Borough of Freehold in the amount of $1,029,213,400; and

(v) no increase in the Borough's total assessed valuation for the 30 year bond term.

(See Exhibit P-4 for "Analysis of Tax Impact—Summary.")

[12] In the case of new construction, even though Freehold Borough School District is entitled to receive 66.89% of debt-service aid, the Facilities Act only provides that percentage of aid on $143/square foot for new construction. The actual cost for new construction under current market conditions is twice that amount, thus reducing the debt-service aid percentage by approximately one-half. See N.J.S.A. 18A:7G-3, "area cost allowance." This explains generally why the Freehold Borough School District is only receiving a "blended" debt-service rate of 38.02%, because approximately one-half of the proposed improvements are for new construction. The "blended" debt-service rate was calculated as follows: 66.89% (DAP) of $18,702,011 (eligible costs) = $12,509,775 (funded aid amount). The ratio between the funded aid amount of $12,509,775 and the bonds to be authorized of $32,902,400 is 38.02%.

The fiscal analysis also considered the effects of the repealed provisions for the 55% Districts in the Facilities Law. Phoenix Advisors calculated the tax projections for the average assessed valuation if the Freehold Borough School District were to receive aid on 66.89% of its proposed new construction instead of 66.89% on $143 per square foot. This computation was based on the same assumptions as the bond issue for $32,902,000 in the P-4 exhibit. It was estimated earlier that the Freehold Borough School District lost almost $9.5 million of facilities aid as a result of the repeal of the 55% Districts provision. Phoenix Advisors was asked to compute a new average annual property-tax increase if the school district were to issue $9.5 million fewer bonds, or $23,402,000.[13] That amount is $198.41. (See Exhibit P-5.)

**Public Comment/Testimony**

Public comment came in writings submitted to the Commissioner in June, and with public testimony at the hearings. Members of the public who testified included resident taxpayers, present and former students, teachers, Board members, Latino Action representatives, and a legislator. Almost everyone agreed that the lack of space and overcrowding in the schools was severe and affected learning. Generally, criticism was focused not on the need to improve the schools and to alleviate overcrowding, but rather on the source of funding for the project. Most commentators and witnesses thought the Legislature should appropriate more funds for the non-Abbott school districts: it was not fair for the Borough—a district in such need and with such a limited tax base—to have to pay such a large percentage of the costs when Abbott districts were 100% funded.[14]

[13] Phoenix Advisors was not asked to take 66.89% of $32,902,000 because the Facilities Law requires non-SDA districts to measure their district aid percentage against $143 per square foot for new construction. If, however, the commissioner of education were to ask the legislature to approve a supplemental appropriation, as still permitted for a "B" DFG district under N.J.S.A. 18A:7G-5(k), then the Borough of Freehold taxpayers would receive the same economic benefit that the 55% Districts did before this provision was repealed. If such appropriation was approved by the legislature, the commissioner would be faced with authorizing no more than the balance of the bonds required to fully fund the two failed referenda, or $23,402,000.

[14] In a sense, the commentators felt that the Borough was being penalized for the Herculean efforts made by the teachers and professional staff to provide educational services to the Borough's children.

Senator Jennifer Beck noted her efforts to try to obtain funding in the Legislature to pay for more of the cost of necessary school improvements. While Abbott districts get complete funding, and more affluent districts also get State aid, the aid for districts such as Freehold Borough—where the need is just as great or greater—is limited. She noted that teachers in the school had taken salary decreases to avoid layoffs, and that the residents were aware of how committed their teachers were to education. The State needed to do the right thing and to allow for school expansion with adequate funding.

Dr. Michael Lichardi, president of the Freehold Elementary School Board, is a conservative on fiscal issues, yet recognized that the district was "running on fumes" and that the quality of the school system has an impact on property values. He felt that taxpayers were asked to do more than elsewhere, but he did not want to see the district fail. Homeowners cannot allow the system to collapse, and residents will suffer if the school fails. He acknowledged that some commentators suggested that some children should not be educated, but opined that marginalizing all children by not supporting education would only result in urban blight.

Linda McCarthy, a special-education teacher in the district and president of the Freehold Borough Education Association (an affiliate of the New Jersey Education Association), testified that she supported the issue because of the impact it would have on the children. She said the children trip over each other; lockers are shared among two or three students; library, art and music come into class on a cart. Third-graders share a gym with eighth-graders. The students had no technology class to go to. Teachers had no privacy to speak with parents. Other teachers and parents agreed as to the conditions within the schools. They noted that it is even more difficult for special-education students, who, when there is no room for push-in support, are kept in the same classroom with two groups of students and two teachers, making more noise, so the students are less able to concentrate.

Other residents and taxpayers, such as Lynn Reich, Ron Reich, and Patricia Koloski, emphasized the need to stabilize property values and to educate all the children residing within the borough. While all felt that other communities and the State should contribute to Borough (the county seat), the net opinion was that this was not

going to happen, and that the Borough must take care of all of its students. Others noted that the tax burden would be passed along by landlords, and that those who may not be homeowners nevertheless would be paying their share of taxes when they paid rent.

Several representatives of the Latino Action Network spoke, and noted that most of the Borough's Hispanic students are American citizens and deserve to be educated. The overcrowding has been more than a decade in the making. The impact on the children affects their future. The cost to the average homeowner would be $5 per week, and children are worth much more than this. It is so hard to learn in an overcrowded classroom and the future of these children is at stake. Again, all felt that more State assistance is required. If deprived in elementary school, it is unlikely that the difference for the students could ever be made up later.

Negative comments about the proposed bond issue concerned the probable increase in taxes, particularly for those on a fixed income and senior citizens; the alleged overcrowding of homes by landlords, which led to overcrowding in the schools; the need for charter schools to take some of the students out of the schools; the overturning of the vote against the will of the people; the cost of the project; the alleged failure of some persons in the borough to pay taxes because of their status; the failure to use or rehabilitate other older buildings within the borough for use as schools; and the failure of the State and the federal government to address the underlying issues that caused this situation to occur.

Gianna Dellomo thought that the plans were too expansive and should be reduced. She wanted a cost-effective approach to improve the schools. Sharon Shutzer felt that the problem was not the fault of the Borough, the Board or the schools, but that the problem was created by the State and the federal government, and that they should take responsibility. The Borough has not been treated fairly. She wants the children to have classroom space, but the Borough and its taxpayers cannot afford this project. Ronald Griffiths pointed out that because it is the county seat, the Borough has much property that is not taxed, and that its revenue stream has been decimated by the

State. The Borough has been shortchanged with declining State aid; the State should pay for these school improvements, not the taxpayer.

**Rebuttal**

In rebuttal, Dr. Tomazic noted that there was no evidence of students being driven into the Borough to go to school, or of overcrowding in homes, as they are constantly checked and inspected by the Borough. The old buildings that were suggested to be used as schools might have provided a few classrooms, but only after extensive renovation and retrofitting in order to be compliant with modern code and access requirements. It was more cost effective and efficient to add on to the buildings they had, as the proposed plans indicated. The proposed improvements were reviewed by the State and found to have no "excess costs." Dr. Tomazic recognized the inequity of the current funding formula, but that is the law. The Board did make a formal request through the Commissioner for increased state aid, but no response and no additional funding have been forthcoming.

**Personal Observations**

Prior to the hearings, I was able to tour the school facilities and to observe firsthand the extreme overcrowding. In multi-purpose rooms, classrooms had been created on the stage. Noise from students in the cafeteria and lunch preparation in the cafeteria interfered with studies. In the Learning Center, students were learning in an open environment. Lessons from one class could be heard in another. Students had to keep their voices low to avoid interference with other classes. Teachers tried to instruct in small groups for resource support, but the diversions were multiple. People were walking by, and the noise level was high in spite of efforts to contain it. Generally, it did not seem conducive to effective learning. Indeed some of the student and teacher witnesses later commented on this at the hearings. One student was being offered support by a teacher at a desk in the hallway. The library was almost non-existent and technology assistance was limited. Without a doubt, these schools are severely overcrowded.

**Findings**

I accept the testimony and the documentary evidence presented by the Borough as fact. I **FIND** that compelling evidence establishes that the Park Avenue Elementary/Middle School and the Learning Center are severely overcrowded and that such overcrowding seriously impedes and has impeded the ability of the students, both general-education students and special-education students, to access their education and to achieve the core-curriculum objectives. Despite the concern of and resentment by some residents over the anticipated expense of the improvements, most of the citizenry and residents acknowledged the serious problem of overcrowding confronted by the Borough and the Board, and the deleterious effect this has had on all of the children of the district and their educators.

## LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether the Commissioner of Education should direct the issuance of school bonds in the amount of $32,902,400 for a capital improvement project said to be necessary to fulfill the Freehold Borough's constitutional mandate to provide a thorough and efficient public education to its students after two referenda failed to obtain voter approval.

### General Background Information

Long before adoption of the EFCFA, New Jersey courts declared the State's responsibility to ensure that children receive the "thorough and efficient system of free public schools" guaranteed under the State constitution. N.J. Const., Art VIII, § IV, ¶ 1. As early as 1966, the New Jersey Supreme Court recognized the Commissioner's broad authority to review local budgetary decisions and ascertain whether the amount fixed is sufficient to satisfy minimum educational standards for the mandated thorough and efficient education. Bd. of Educ. of E. Brunswick v. E. Brunswick Twp. Council, 48 N.J. 94 (1966) (Commissioner has power to reject annual school budget and direct an increase over the amount fixed by the governing body); see also Bd. of Educ. of Elizabeth v. City Council of Elizabeth, 55 N.J. 501 (1970) (Commissioner has power to

reject operating budget and restore cuts where the budget proposed by the school board was rejected by voters).

In the case of In re Upper Freehold Regional School District, 86 N.J. 265 (1981), the New Jersey Supreme Court dealt with the specific issue of the Commissioner's affirmative duty to order issuance of school bonds to alleviate unsafe or unhealthy building conditions. Deteriorating conditions were found to exist at the high school in Upper Freehold, among which were sagging roof planks, water leakage onto ceiling tiles, short-circuited electrical systems, slippery floors, and danger from shattering glass. Citing Robinson v. Cahill, 62 N.J. 473, 520 (1973), the Court reiterated that the obligation of the State to fulfill its constitutional duty extends to capital expenditures as well as current operating expenses. Upper Freehold, supra, 86 N.J. at 275. Since deteriorating building conditions made delivery of minimally acceptable education "inadequate and inefficient, if not impossible," the Court held that "those conditions contravene the constitutional right of the students to a thorough and efficient education and justify invocation of the power of the Commissioner to vindicate that right." Id. at 278. Consequently, the Court concluded that, "after voter rejection, the Commissioner may authorize the issuance of bonds for a capital project for a public school." Id. at 279. Abundant precedent, therefore, allows the Commissioner to intervene in local budgetary affairs when necessary to protect school children from unsafe or dangerous building conditions.

In 1998, the Court had opportunity to reassert these fundamental principles. Confronted with crumbling and obsolete school buildings in such grave state of disrepair as not only to prevent children from receiving a thorough and efficient education but also to threaten their health and safety, the Supreme Court upheld an ambitious State plan to finance the construction and repair of school facilities. Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"). While Abbott V arose in the context of disadvantaged school districts with special needs, the basic right to a thorough and efficient education belongs to every child attending public school in this state.

Against this backdrop, the Legislature enacted the EFCFA to help school districts finance construction costs of providing a through and efficient education, including

"ensuring that children are educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2(a). The EFCFA represents "the largest, most comprehensive school construction program in the nation." Lonegan v. State, 174 N.J. 435, 458 (2002). Realizing that "educational infrastructure inadequacies are greatest in the Abbott districts," the Legislature nevertheless acknowledged that

> [i]n other districts, the State must also identify need in view of anticipated growth in school population, and must contribute to the cost of renovation and construction of new facilities to ensure the provision of a through and efficient education in those districts.
>
> [Id. at 458–59 (quoting N.J.S.A. 18A:7G-2(c)).]

To effectuate its goals, the EFCFA designated the New Jersey Economic Development Authority ("EDA") as the State agency responsible "for the financing, planning, design, construction management, acquisition, construction, and completion of school facilities projects." Id. at 459 (quoting N.J.S.A. 18A:7G-13(a)). Moreover, the act established a formal mechanism for the Commissioner to review school-facilities projects rejected by voters at two elections. N.J.S.A. 18A:7G-12 provides, in pertinent part:

> A district . . . that sought approval . . . of a school facilities project without excess costs but failed to receive that approval, and within the three years prior to that, sought and failed to receive approval of that school facilities project with or without excess costs, may submit the project to the commissioner and request that the commissioner approve the project and authorize the issuance of school bonds for the local share of the project. Upon receipt of the request, the commissioner shall review the school facilities project and determine whether the project is necessary for the provision of a thorough and efficient system of education in the district. If the commissioner concludes that the project is necessary, the commissioner may approve the project without excess costs and authorize the issuance of school bonds to fund the local share.

As expressly stated, the Commissioner can only approve a construction project "without excess costs." The EFCFA defines "excess costs" to mean "the additional

costs, if any, which shall be borne by the district, of a school facilities project which result from design factors that are not required to meet the facilities efficiency standards." N.J.S.A. 18A:7G-3. Effective November 21, 2000, the Commissioner adopted facilities efficiency standards constituting the characteristics of instructional spaces, specialized instructional areas, and administrative spaces that are educationally adequate to support the achievement of the core-curriculum content standards. 32 N.J.R. 4473(a) (Dec. 18, 2000).

Since all of the improvements proposed by the Board comply with, but do not exceed, the parameters set by the facilities efficiency standards, the project does not involve any "excess costs."

In In re Application of the Board of Education of the Township of Clark for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12, No. 261-03, Comm'r (June 2, 2003), <http://www.nj.gov/education/legal/commissioner/index.html>, the Commissioner affirmed the findings of the administrative law judge ("ALJ") that renovations and repairs were necessary for the board's high school, and that the capital project for which the board sought the issuance of school bonds was necessary in order for the board to continue to provide its students with a thorough and efficient education. The Commissioner authorized the board to prepare for the issuance of bonds in the amount of $19.2 million to fund the local share of the project.

The Commissioner also followed the recommendations of the ALJ to deny bond issuance in the amount of $12.2 million to construct additions to two elementary schools, finding that the board did not demonstrate how the overcrowding had affected student performance or compromised the board's ability to provide a thorough and efficient education.

In In re Application of the Board of Education of the Borough of Milford for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12, No. 427-08, Comm'r (Oct. 24, 2008), <http://www.nj.gov/education/legal/commissioner/index.html>, the Commissioner concurred with the ALJ's recommendations that the board's facilities were in desperate need of repair to address core health, safety and security issues, and

that the capital project for which the board sought issuance of school bonds was necessary in order to continue to provide its students with a thorough and efficient education. Accordingly, the Commissioner ordered and authorized the board to prepare for the issuance of bonds in the amount of $800,000 to fund the local share of the project.

In the matter presented here, a distinction can be drawn between the determination in Clark to deny issuance of bonds for school expansion. The Board has presented evidence not just of severe overcrowding which has resulted in hundreds of unhoused students—which overcrowding is anticipated to continue—but also has shown the effect the overcrowding has had on the ability of the students to access their education. Classes have been limited; instruction has been curtailed. The Board is in a corrective-action plan for bilingual students not meeting English proficiency, and the middle school is a focus district because of the disparity between special-needs students and general-education students. As these students enter the regional high-school district, their achievement is the lowest of all schools feeding into the District.

Insofar as the Commissioner accepts the recommended findings that the school district is severely overcrowded, which condition has affected and will continue to affect the students' ability to access their education and to meet core-curriculum content standards, and which condition is anticipated to be ongoing, and that capital improvements to the schools are necessary to provide the children of the Borough with a suitable environment conducive to learning so that the students (both general-education and special-needs) can receive the thorough and efficient education to which they are constitutionally entitled, I **CONCLUDE** that the Commissioner should permit the Borough to issue bonds in the amount of $32,902,400.[15]

[15] The total final eligible costs for the proposed improvements would be $18,702,011, consisting of $14,969,163 for the Park Avenue Elementary/Middle School and $3,732,848 for the Freehold Learning Center, but the exact amounts would be determined after receipt of the State's contribution.

## RECOMMENDATION

It is recommended that the Commissioner order issuance of bonds totaling $32,902,400 by Freehold Borough to fund improvements, renovations and repairs necessary to provide a thorough and efficient education to the students of the Freehold Borough School District.

I hereby **FILE** my report and recommendation with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

December 16, 2015
DATE

**SUSAN M. SCAROLA, ALJ**

Date Received at Agency: December 16, 2015

Date Mailed to Parties: December 16, 2015

## APPENDIX

## WITNESSES

**Testimonial Witnesses:**

1. Dr. Rocco Tomazic
2. Ted Hopkins, AIA

**Opportunity for Public Comment:**

1. Nick Palumbo
2. Daniel M. Savino
3. John LaRosa
4. Dr. Michael Lichardi
5. Linda McCarthy
6. Lauren Filipek
7. Deborah O'Melia
8. Diane Dispenza
9. Susan Greitz
10. Kevin Coyne
11. Yeimi Hernandez
12. Joan O'Doud
13. Lynn Reich
14. Ron Reich
15. Patricia "Donna" Koloski
16. Joan Leuth
17. Olivia Edmunds
18. Reimer Leuth
19. Gianna Dellomo
20. Ursula Hurley
21. Joseph Santocita
22. Sharon Shutzer
23. Rita Gravatt

24. Ronald Griffiths
25. Lazaro Cardenas
26. Patrick Martinez
27. Adam Pacheco
28. Frank Argote-Friyre
29. Katherine Mulholland
30. Jean Holtz
31. Senator Jennifer Beck
32. Charles Jewell
33. Gary Corliss
34. William Edwards
35. Joseph Hemphill
36. Denise Furlong
37. Marguerita Dentino
38. Ronnie Dougherty
39. Jillian Lazaro
40. Alyssa Townsend
41. Robert Mututis
42. Becky Axtell
43. Dina Levine

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# State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

August 10, 2016

Hector Ferrer, *pro se*
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136 Central Avenue
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Re: *Board of Education of the Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside, Bergen County and Hector Ferrer, OAL Dkt. No. EDU 9966-15, Agency Dkt. No. 124-6/15.*

Dear Parties,

I have considered the papers filed in connection with the petitioner's request for interlocutory review of the July 12, 2016 Order of Administrative Law Judge Evelyn J. Marose in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.*

Sincerely,

Peter Shulman
Acting Commissioner

c: Honorable Evelyn J. Marose
County Superintendent
State Law Library

DCH/MKD/JKH
**Via Facsimile and Regular Delivery**

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

301-16

| | | |
|---|---|---|
| S.C., on behalf of minor child, K.C., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

The petitioner challenged the determination of the respondent Board that his daughter, K.C., engaged in behavior that fell under the school district's policy against harassment, intimidation and bullying (HIB). This case stems from an incident between three female students, K.C., G.T., and M.M., during lunch at Montgomery High School in June 2015. In accordance with the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 *et seq.* (the Act), an investigation was conducted by the school's anti-bullying specialist. The investigation determined that K.C. had committed acts of HIB stemming from verbal communications she made that were reasonably perceived as being motivated by a distinguishing characteristic – namely, M.M.'s eating habits, which her friends labeled as anorexic – which substantially interfered with the rights of M.M., and had the effect of insulting or demeaning her. The HIB investigation report concluded that K.C.'s conduct met the statutory definition of HIB, as set forth in *N.J.S.A.* 18A:37-14. A Board-level hearing took place in July 2015 at the request of K.C.'s parents, after which the Board affirmed the initial finding of HIB. Thereafter, S.C. filed the within petition. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for determination on cross-motions for summary decision depending on the resolution of the sole legal issue in dispute herein: namely whether conduct reasonably perceived as being motivated by a student's apparent eating disorder can be found to constitute HIB within the meaning of the Act; in this case, K.C. admitted making comments to M.M. about the fact that K.C. felt her friend was anorexic because her eating habits had changed; K.C. also admitted taking M.M.'s iPod to text M.M.'s boyfriend about the issue; M.M. herself stated that she felt hurt by her friends and cried in the bathroom; these comments are reasonably perceived to be motivated by the distinguishing characteristic of M.M. having a perceived eating disorder. The ALJ concluded that K.C.'s comments constituted a violation of HIB, and petitioner has not met the burden of proof that the Board acted in an arbitrary, capricious, or unreasonable manner in concluding that C.C.'s conduct constituted HIB under the New Jersey Anti-Bullying Bill of Rights Act. Accordingly, the Board's motion for summary decision was granted, the petitioner's cross motion was denied, and the petition was dismissed.

Upon review, the Assistant Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-34 – concurred with the ALJ that the petitioner failed to sustain his burden to show that the Board's actions regarding K.C.'s conduct in June 2015 were arbitrary, capricious or unreasonable. Accordingly, the Assistant Commissioner adopted the Initial Decision as the final decision in this matter.

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

Issued 8/11/16

OAL DKT. NO. EDU 18290-15
AGENCY DKT. NO. 325-10/15

| | | |
|---|---|---|
| S.C., on behalf of minor child, K.C., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board of Education's (Board) reply thereto. In this matter, the petitioner is challenging the Board's determination that K.C. committed an act of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*

Upon a comprehensive review of the record in this matter, the Assistant Commissioner[1] concurs with the ALJ – for the reasons stated in the Initial Decision – that the Board's determination that K.C. committed an act of HIB was not arbitrary, capricious or unreasonable. When a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). The Commissioner cannot find that it has been demonstrated that the Board's handling of this matter

[1] This matter has been delegated to the Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

was carried out in a manner that was arbitrary, capricious, unreasonable, or otherwise contrary to the Act. Moreover, the Commissioner finds the exceptions submitted by the petitioner to be unpersuasive. The petitioner's exceptions largely replicate the arguments advanced at the OAL, which were fully considered and appropriately addressed by the ALJ in the Initial Decision.

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

IT IS SO ORDERED.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 8/11/16

Date of Mailing: 8/12/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 18290-15
AGENCY DKT. NO. 325-10/15

**S.C. ON BEHALF OF K.C.,**
Petitioner,
v.
**BOARD OF EDUCATION OF**
**THE TOWNSHIP OF MONTGOMERY,**
**SOMERSET COUNTY,**
Respondent.

---

**S.C.,** petitioner, pro se

**Stephen Fogarty,** Esq., for respondents (Fogarty & Hara, attorneys)

Record Closed: May 20, 2016 Decided: June 29, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 15, 2015 the petitioner, S.C. on behalf of K.C., filed a Petition of Appeal to the Commissioner of Education, in which they dispute respondent's finding that K.C. committed an act of harassment, intimidation or bullying ("HIB") pursuant to N.J.S.A. 18A:37-13.2 et seq. and request that the Commissioner overturn such finding

on the grounds that K.C.'s act was not reasonably perceived as being motivated by a distinguishing characteristic. Respondent, Board of Education of the Township of Montgomery, has moved for summary decision asserting that the Board's finding that K.C. committed an act of HIB. Petitioner cross moved for summary decision that respondent school board's action was improper.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on November 13, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties filed several briefs in support of the motion and cross-motion and the record closed on May 20, 2016.

## FACTUAL DISCUSSION

The following facts are undisputed by and between the Parties, S.C. on behalf of the minor child K.C., and the Board of Education of the Township of Montgomery, Somerset County ("the Board") (collectively, "the Parties") and I therefore **FIND** them as **FACT**:

1. On June 2, 2015, an incident occurred during lunch at Montgomery High School in the Montgomery Township School District ("the District") between three female students, K.C., G.T. and M.M., all of whom were friends at the time.

2. Later that day, M.M.'s mother reported the incident as a potential instance of harassment, intimidation or bullying "HIB", as defined by the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. (the "Act"), wherein she alleged that K.C. and G.T. bullied M.M. by commenting that she was anorexic and took her iPod and used it to send a text message to a boy M.M. was dating which stated that M.M. was anorexic.

3. On June 4, 2015, the parents of M.M., G.T. and K.C. were notified of the incident and were informed that an investigation was being conducted.

4. Keith Glock, Anti-Bullying Specialist at Montgomery High School, conducted the investigation and concluded that K.C. and G.T. did comment to M.M. about the fact that they felt she was anorexic because her eating habits had changed. Glock noted that K.C. and G.T. had good intentions, but they went too far by "harping on the subject" and taking M.M.'s iPod out of her hands to send a message to M.M.'s boyfriend that stated M.M. was not eating ( See, Gartenberg Cert., Exhibit E attached to respondent's brief). M.M. reported that this incident put her in the awkward position of having to explain the message to her boyfriend and she felt hurt by her friends and cried in the bathroom (Ibid.) K.C. and G.T. gave statements during the investigation admitting that the incident occurred. K.C. admitted using M.M.'s iPod to send a text message to M.M.'s boyfriend (Ibid.)

5. The HIB investigation report concluded that K.C.'s conduct met the statutory definition of HIB, as set forth in N.J.S.A. 18A:37-14. The District concluded that K.C. made verbal communications that were reasonably perceived as being motivated by a distinguishing characteristic between the girls, namely M.M.'s eating habits, which substantially interfered with the rights of M.M. and had the effect of insulting or demeaning her.

6. The findings of the HIB investigation were reported to the Board at its next meeting on June 16, 2015. Notice of the finding and information on the outcome, pursuant to N.J.S.A. 18A:37-15b(6)(d), was sent home to the parents of M.M. and K.C. by letters, dated June 23, 2015.

7. Thereafter, the parents of K.C. requested a Board-level hearing in accordance with N.J.S.A. 18A:37-15b(6)(d), which request was granted.

8. The Board-level hearing took place on July 21, 2015, at which time the Board heard from the school anti-bullying specialist, Mr. Glock, the parent and K.C. Following the Board-level hearing, the Board affirmed the superintendent's initial finding of HIB. The parents were later notified of the Board's decision.

9. On October 15, 2015, the petitioner, S.C. on behalf of K.C., filed a Petition of Appeal to the Commissioner of Education, in which they dispute the finding of HIB and request that the Commissioner overturn such finding on the grounds that K.C.'s act was not reasonably perceived as being motivated by a distinguishing characteristic.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:12-5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:12-5(b). The provisions of N.J.A.C. 1:12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. This tribunal is required to do "the

same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-540. Like the New Jersey Supreme Court's standard for summary judgment, summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

I **FIND** as **FACT** that there are no material facts in dispute, and this matter is ripe for determination on cross-motions for summary decision, with one party or the other being entitled to decision, as a matter of law, depending on the resolution of the sole legal issue in dispute above.

New Jersey enacted the Anti-Bullying Bill of Rights Act to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or

> emotional harm to his person or damage to his property;
>
> (b) has the effect of insulting or demeaning any student or group of students; or
>
> (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The sole issue in dispute in the within matter is whether conduct reasonably perceived as being motivated by a student's perceived eating disorder can be found to constitute HIB, within the meaning of the Act, as HIB is defined at N.J.S.A. 18A:37-14. Petitioner asserts that once Glock determined that K.C.'s intentions were good, the actions could no longer meet the statutory definition of HIB. K.C.'s motivation was to protect the health of her friend and not to insult or demean her. In W.C.L. and A.L. o/b/o L.L. v. Board of Education of the Borough of Tenafly, EDU 3223-12, Initial Decision (November 26, 2012), aff'd Commissioner (January 10, 2013) a student's comments relating to head lice on another student was perceived as being motivated by a distinguishing characteristic. In R.G.B. v. Village of Ridgewood Bd. Of Ed., EDU 14213-12, 2013 N.J. AGEN LEXIS 130 (May 15, 2013) a student calling another student a "horse" and a "fat-ass" was found to constitute HIB and reasonably perceived as motivated by the distinguishing characteristic of appearance or body-type. In C.C. o/b/o/ S.C. v. Bd. of Ed. Of Twp. Of Jefferson, EDU 10872-14, 2015 N.J. AGEN LEXIS 251 (April 6, 2015) a student's comments that another student "sucks at basketball" was found to constitute HIB because the comments were reasonably perceived as motivated by the distinguishing characteristic of height, intelligence and sports proficiency.

In this case, K.C. admitted making comments to M.M. about the fact that K.C. felt she was anorexic because her eating habits had changed. She also admits taking M.M.'s iPod to text M.M.'s boyfriend about the issue. M.M. herself stated she felt hurt by her friends and cried in the bathroom. I **CONCLUDE** that those comments and actions are reasonably perceived to be motivated by the distinguishing characteristic of M.M. having an perceived eating disorder. In K.L. v. Evesham Twp. Bd. of Ed. 423 N.J.Super. 337 the Appellate Division stated that the definition of bullying does not include harmful

or demeaning conduct motivated by other reason, for example a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation. The fact that M.M. felt hurt by this action demonstrates that the conduct had an effect of insulting or demeaning M.M. Therefore, I **CONCLUDE** that K.C.'s comments constitute a violation of HIB.

Respondent urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that K.C.'s conduct did constitute HIB. Therefore, the Petition of Appeal should be dismissed. Petitioner asserts that the board twisted comments about eating habits into other distinguishing characteristic: body type and the Board's decision was arbitrary, capricious, and unreasonable.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The administrative law

judge, (ALJ) found that the board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the board's actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious or unreasonable.

I have carefully reviewed the record. Petitioner has presented no credible evidence that the Board acted in an arbitrary manner. As I have previously concluded that K.C.'s comments and actions are reasonably perceived to be motivated by the distinguishing characteristic of M.M.'s perceived eating disorder, I **CONCLUDE** that petitioner has not met the burden of proof that the Board acted in an arbitrary manner in concluding that K.C.'s conduct constituted harassment, intimidation or bullying under the New Jersey Anti-Bullying Bill of Rights Act.

## ORDER

Based on the foregoing, it is **ORDERED** that:

1. Respondents' motion for summary decision is **GRANTED;**

2. Petitioner's cross-motion is **DENIED;** and

3. The petition in this matter is **DISMISSED.**

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

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

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

June 29, 2016
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency: 6/29/16

Date Mailed to Parties: 6/29/16

JSK/jb

303-16

**NEW JERSEY DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

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**IN THE MATTER OF:**

**THE TENURE HEARING OF CARLOS GONZALES AND THE SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY**

**AGENCY DOCKET NO. 311-10/15**

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**DECISION APPROVING SETTLEMENT AGREEMENT**

**Before**
**James W. Mastriani**
**Arbitrator**

**Appearances:**

**For the Petitioner:**
Derlys M. Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC

**For the Respondent:**
Robert M. Schwartz, Esq.
Schwartz Law Group, LLC

On November 2, 2015, I was appointed by the New Jersey Department of Education, Bureau of Controversies and Disputes to serve as arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, to hear and make a final determination on tenure charges filed by the School District of the City of Trenton [the "Petitioner"] against tenured Vice-Principal Carlos Gonzalez [the "Respondent"]. Upon receipt of that appointment, I reviewed the certified tenure charges and answer opposing the charges. Thereafter, I conducted a conference call with counsel for the parties on January 12, 2016, at which time the procedure for processing this case were discussed and mutually agreed upon. The parties requested, and I agreed, that the matter should proceed directly to formal hearing. Prior to hearing, Respondent requested that the arbitrator sign and issue subpoenas to seven individuals requiring them to appear and testify at the arbitration hearings.

Arbitration hearings in this matter were scheduled to be held on February 24, February 26, March 1 and March 2, 2016. At the commencement of the February 24, 2016 hearing, the arbitrator requested that Petitioner and Respondent voluntarily engage in informal discussions to ascertain whether the issues raised in this proceeding were susceptible to mediation and resolution. After lengthy joint discussions ensued, the parties were able to construct tentative terms for a Settlement Agreement. Those terms were adopted by the School District of the City of Trenton on March 21, 2016 and signed by

Respondent on May 6, 2016. The terms, formally adopted by the District, were signed by the Board President on behalf of the entire Board on August 12, 2016. Pursuant to those terms, the Respondent submitted an irrevocable resignation from employment as part of a lengthy and comprehensive Settlement Agreement that also included the withdrawal of the tenure charges upon approval of the signed Stipulation by the Arbitrator.

The arbitrator is required under N.J.A.C. 6A:3-5.6 to issue a decision approving the settlement of tenure charges and to explain why the arbitrator is approving the terms of settlement. I have approved these terms and have also signed the Stipulation reflecting my approval for the reasons that follow.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been satisfactorily addressed and resolved by the terms of settlement. In addition to the fact that these terms are mutually acceptable to the parties, I conclude that the interests of the public will be served as well by the settlement and the avoidance of extended litigation

The parties have agreed that the interests of all concerned will be served by Respondent's separation from employment by voluntary resignation as a condition precedent to the withdrawal of the tenure charges. The parties have acknowledged that these terms have been agreed upon without admission by

either party as to the merits of the claims raised by the tenure charges or by Respondent's defenses to the charges. The parties also acknowledge that the terms cannot serve as precedent in any future similar proceeding. The Settlement Agreement resolves Petitioner's desire that Respondent no longer be employed by the Board accompanied by consideration received by the Respondent that reflect an amicable termination of Respondent's employment. I also note that the Settlement Agreement avoids the potential for students having to testify during class time and the distress that can often accompany the rigors of being subject to an adversarial legal proceeding. The Board and the public will further benefit by the avoidance of substantial litigation costs and the uncertainties attendant to litigating of the tenure charges, including any potential for judicial review after the issuance of an Award.

Accordingly, and based upon all of the above, I hereby approve the parties' settlement agreement.

Dated: August 18, 2016
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 18th day of August, 2016, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

**CARLEEN PLOE**
**NOTARY PUBLIC OF NEW JERSEY**
**My Commission Expires Dec. 14, 2016**

**ADAMS GUTIERREZ & LATTIBOUDERE**
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for the Trenton Board of Education

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|---|---|
| IN THE MATTER OF TENURE CHARGES OF CARLOS GONZALEZ<br><br>and<br><br>TRENTON BOARD OF EDUCATION | **AGENCY REF. NO. 311-10/15**<br><br>**STIPULATION OF SETTLEMENT** |

The Trenton Board of Education (the "Board"), whose principal office is located at 108 North Clinton Avenue, Trenton, New Jersey 08609, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Carlos Gonzalez, residing at 124 Partridge Avenue, Trenton, New Jersey, 08610, ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the Board as a Vice Principal; and

**WHEREAS** the Superintendent of the School Board ("Superintendent") certified tenure charges of Unbecoming Conduct, Corporal Punishment and Other Just Cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges of Carlos Gonzalez, Trenton Board of Education* ("Tenure Charges"), and such charges were assigned Docket No. 311-10/15; and Respondent filed an answer opposing the charges; and the

Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in salary, and accordingly referred the matter to Arbitrator James W. Mastriani ("Arbitrator") for a hearing; and

**WHEREAS**, Respondent has denied the allegations set forth in the tenure charges; and

**WHEREAS**, the Parties are aware of the uncertainty of the outcome of arbitration; and

**WHEREAS**, due to the potential expenditure of resources for multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without litigation, avoids requiring a student to testify in this procedure and miss educational time, and further avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Respondent shall receive reimbursement of pay for the one-hundred and twenty day (120-day) unpaid suspension period from October 6, 2015 through February 3, 2016 totaling sixty-two thousand three-hundred and ninety-two dollars ($62,392) on or before June 30, 2016.
2. Respondent shall continue to earn his regular salary of one-hundred and twenty-four thousand seven-hundred and eighty-four dollars ($124,784) in regular payroll installments through June 30, 2016.

3. Respondent shall receive a payment of fifteen-thousand four-hundred and forty-two dollars and two cents ($15,442.02) on or before June 30, 2016 which reflects Respondent's 2015-16 per diem rate of $519.93 multiplied by his earned vacation days for 2015-16 of twenty-nine and a seventh (29.7) days for 2015-16.
4. On or before June 30, 2016, Respondent shall receive a lump-sum payment in the amount of $124,784.00 which reflects a projected salary for the 2016-17 school year on or before June 30, 2016 along with a 2016 Form 1099-MISC for tax purposes;
5. Respondent shall not earn any paid days (e.g. sick, personal or vacation) for any portion of the 2016-17 school year.
6. Concurrent with the execution of this Stipulation of Settlement, Respondent shall submit an irrevocable letter of resignation to the Board effective June 30, 2016 ("Effective Date") (See Exhibit A to the Stipulation, a copy of Respondent's signed letter of resignation).
7. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure, and seniority, will cease.
8. Respondent will not apply for reemployment with the Board at any time. Specifically, Respondent will be considered to have permanently resigned from his tenured position as a result of this Stipulation of Settlement. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.
9. Respondent's health benefits shall cease effective July 1, 2016. Should Respondent wish to continue health benefits, he may do so through COBRA at his own expense.

10. The Board agrees to release Respondent of any obligation to remain employed by the Board for three (3) school years following Respondent's completion of his doctoral degree. The Board thereby relinquishes any right to collect any monies it has paid towards Respondent's attainment of a doctoral degree.

11. The parties agree that any future tuition payments for Respondent's pursuit of his doctoral degree shall be solely borne by Respondent.

12. The Board agrees that its Human Resources Department shall submit a neutral letter of reference to Respondent's attorney Robert M. Schwartz, Esq. on or before June 30, 2016.

13. In accordance with N.J.A.C. 6A:3-5.6(a)6, the Board notified the State Board of Education of the tenure charges when they were filed with the Commissioner of Education. Additionally, pursuant to N.J.A.C. 6A:9B-4.4, the Respondent has been advised of the Board's duty to notify the State Board of Examiners of the Respondent's resignation. As this agreement does not reflect the substance of the charges brought by the Board, the Respondent's resignation does not constitute in any way any acknowledgment of wrongdoing. Rather, the Agreement and the resignation which is a part of the Agreement represents the determination made by both parties that settling this matter in accordance with the terms set forth herein is in the best and mutual interest of both the Board and the Respondent. Further, should there be any action filed by the State Board of Examiners as to the Respondent's educational certificates, the Board shall cooperate to the extent of and as required by law.

14. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees that it will not

pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

15. In exchange for the consideration set forth in paragraph 14 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board of Education and its members, the Trenton Public Schools, Former Superintendent Francisco Duran, Interim Superintendent Lucy Feria, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the

Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent also agrees to withdraw any and all pending complaints or actions that have been filed against the Board or any of its employees or representatives;

16. Notwithstanding the above, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims in Paragraph 15, Respondent agrees not to seek or accept any resulting relief whatsoever.

17. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

18. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any

person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive, the District agrees to advise Respondent through his counsel of the request before complying with the request. The Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

19. The Parties agree that they shall not speak of the terms of this agreement with any third parties unless required by law and further that they each shall refrain from speaking negatively about each other with any third party. This applies to all representatives who speak on behalf of the Board. The Board further agrees that if it receives any inquiries about the Respondent's employment, the Board and its

representatives shall only release information covering the dates of Respondent's employment and the positions he held.

20. This agreement shall not constitute a precedent in any matters involving other Board employees.

21. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

22. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

23. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

24. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

25. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

26. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

27. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

28. The parties agree that the terms of the settlement agreement are subject to approval by the Trenton Board of Education.

29. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: May 6 2016

Carlos Gonzalez

CARLOS GONZALEZ

TRENTON BOARD OF EDUCATION

Dated: 8/12/16

By: Jason Redd, Board President

## CERTIFICATION

I, Carlos Gonzalez, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: MAY 6, 2016

Carlos Gonzalez

CARLOS GONZALEZ

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 8/12/16

Derlys Maria Gutierrez, Esq.
**ADAMS GUTIERREZ & LATTIBOUDERE**
Attorneys for the Trenton Board of Education

**APPROVED:**
Dated: 8/18/16

James W. Mastriani, ~~Arbitrator~~

Carlos Gonzalez
124 Partridge Avenue
Trenton, New Jersey 08610

May 6, 2016

Ms. Lissa Johnson
Assistant Superintendent
Department of Talent Acquisition and Development
Trenton Board of Education
108 North Clinton Avenue
Trenton, NJ 08609

**Re: Irrevocable Letter of Resignation**

Dear Ms. Johnson:

Kindly accept this letter as my irrevocable resignation from my employment with the Trenton Board of Education, effective at the close of business on June 30, 2016.

Sincerely,

Carlos Gonzalez

cc: Lucy Feria, Interim Superintendent of Schools
Jayne Howard, Business Administrator/Board Secretary
Perry Lattiboudere, Esq., Interim General Counsel
Derlys Maria Gutierrez, Esq.
Robert M. Schwartz, Esq.

# RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH Carlos Gonzalez

| | |
|---|---|
| WHEREAS, | the Trenton Board of Education has reviewed the Settlement Agreement between Carlos Gonzalez and the Board of Education in regard to Agency Ref. No. 311-10/15 and |
| WHEREAS, | the Board has voted on this date to accept the Settlement Agreement with Carlos Gonzalez; and |
| WHEREAS, | the Board designates and authorizes the Board President to execute the Settlement Agreement on the Board's behalf; now therefore be it |
| RESOLVED | that the Trenton Board of Education approves the Settlement Agreement between Carlos Gonzalez and the Board of Education |

Jason Redd
Board President

I hereby certify that this is a true and correct copy of the minutes of the meeting held on March 21, 2016

Jayne S. Howard
School Business Administrator/Board Secretary

**March 21, 2016**
**ADOPTED**

304-16

304-16

OAL DKT. NO. EDU 11166-15
AGENCY DKT. NO. 154-6/15

| | | |
|---|---|---|
| ISAIAS FLOWERS, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Consent Order transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement agreement is deemed to be the final decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/22/16

Date of Mailing: 8/22/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 11166-15
AGENCY DKT. NO. 154-6/15

**ISAIAS FLOWERS,**
Petitioner,
v.
**NEW JERSEY**
**STATE BOARD OF EXAMINERS**
Respondent.

---

**Randy E. Lewis,** Esq. for petitioner (Law Office of Randy E. Lewis, attorney)

**Laura Mastriano Console**, Deputy Attorney General, for respondent (Christopher S. Porrino, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: January 22, 2016 Decided: June 30, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 27, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached Consent Order.

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

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

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

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

June 30, 2016
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: July 1, 2016

Mailed to Parties: July 1, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Petitioner,
New Jersey Department of Education,
State Board of Examiners
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
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By: Laura M. Console
Deputy Attorney General
609-777-4861
Laura.Mastriano@dol.lps.state.nj.us

| | |
|---|---|
| ISAIAS FLOWERS,<br><br>Petitioner,<br><br>v.<br><br>STATE BOARD OF EXAMINERS,<br><br>Respondent | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>(Before the Commissioner of Education)<br><br>OAL DOCKET NO. EDU 11166-15<br>COMMISSIONER DOCKET NO. 154-6/15<br>EXAMINERS DOCKET NO. 1415-160<br><br>**CONSENT ORDER** |

WHEREAS, Petitioner, Isaias Flowers ("Petitioner"), and Respondent, New Jersey Department of Education, State Board of Examiners ("Examiners") have mutually agreed to resolve the above-captioned matter, with Randy L. Lewis, Esq., appearing on behalf of Petitioner and John J. Hoffman, Acting Attorney General of New Jersey, by Laura M. Console, Deputy Attorney General, appearing on behalf of the Examiners; and

WHEREAS, this matter arose from a Petition of Appeal of the Examiners' March 12, 2015 vote to block Petitioner's application

for a Teacher of Food Management/Marketing certificate and the Examiners' June 26, 2015 vote to block Petitioner's application for a Teacher of Hospitality and Tourism Management certificate; and

WHEREAS, the resolution of this matter shall not constitute precedent or be considered an admission of guilt in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to the following terms:

1. Petitioner will immediately withdraw his Petition of Appeal, Docket No. 154-6/15.

2. In exchange for the withdraw of the Petition of Appeal, the Examiners agree to remove the block imposed by the June 26, 2015 vote and reconsider Petitioner's Teacher of Hospitality and Tourism Management application on its merits.

3. Petitioner acknowledges that this Consent Order is not a guarantee that his application for the Teacher of Hospitality and Tourism Management certificate will be approved.

4. By consenting to withdraw this matter, Petitioner agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:6-38 , N.J.A.C. 6A:9B-2.1 et seq., and N.J.A.C. 6A:3-1.1 et seq. and Petitioner agrees that he will not oppose the March 12, 2015 block to his Teacher of Food Management/Marketing application in any forum.

5. The Examiners do not concede that the imposition of the

March 12, 2015 and June 26, 2015 blocks were not justified, nor does Petitioner admit or concede the truth of the Examiners' allegations in this matter, and both parties have entered into this agreement for the purposes of settlement only.

6. The parties agree that this Consent Order fully resolves all issues between them arising from the Petition of Appeal.

7. The parties acknowledge that this Consent Order is subject to the approval of the Commissioner of Education.

Randy E. Lewis, Esq.
Attorney for Petitioner, Isaias Flowers

Date: 1/14/16

Laura M. Console, DAG
Attorney for Respondent, State Board of Examiners

Date: 1/21/16

305-16

S.F., ON BEHALF OF MINOR CHILD, S.H., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, : DECISION

RESPONDENT. :

## SYNOPSIS

*Pro se* petitioner filed an appeal of the respondent Board's determination that her child, S.H., was not entitled to a free public education in Piscataway Township schools. Petitioner asserted that she and her children live in Piscataway with S.F.'s father and family, and that S.H. occasionally stays overnight with her biological father in Bound Brook. The Board contended that a residency investigation had shown that S.F. and her children were domiciled in Bound Brook from March 2015 forward. Accordingly, the Board counterclaimed for tuition for the period of S.H.'s ineligible attendance in Piscataway schools.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; in the instant case, the results of the Board's residency investigation show that S.F. and her children were domiciled in Bound Brook during the time period in question; petitioner failed to demonstrate by a preponderance of the credible evidence that her child was entitled to a free public education in Piscataway; pursuant to *N.J.S.A.* 18A:38-1(b), a school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend school in its district; and the respondent Board is entitled to back tuition in the amount of $11,842.71 for the period from March 12, 2015 to April 1, 2016 and, thereafter, an additional $61.19 for each day that S.F. remains in Piscataway schools.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ that petitioner failed to sustain her burden of establishing that she was a domiciliary of Piscataway during the period in question. Accordingly, the Initial Decision was adopted as the final decision in this matter and petitioner was directed to reimburse the Board in the amount of $11,842.71, plus $61.19 for each day beyond April 1, 2016 that S.F. remains enrolled in Piscataway schools. The petition was dismissed.

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

August 22, 2016

OAL DKT. NO. EDU 01221-16
AGENCY DKT. NO. 377-12/15

| | | |
|---|---|---|
| S.F., ON BEHALF OF MINOR CHILD, S.H., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Piscataway from March 12, 2015 to the present. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Piscataway. Therefore, the Board is entitled to tuition reimbursement in the amount of $11,842.71 ($56.05 per day for 65 days and $61.19 per day for 134 days) for the time period from March 12, 2015 to April 1, 2016 – during which petitioner's minor child was ineligible to attend – plus $61.19 for each day beyond April 1, 2016 that the minor child remains in Piscataway's schools.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $11,842.71 – plus $61.19 for each day beyond April 1, 2016 that S.H. remains enrolled in the District's schools – for tuition costs incurred during the time period that S.H. was ineligible to attend school in Piscataway. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/22/16

Date of Mailing: 8/22/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 01221-16
AGENCY DKT. NO. 377-12/15

**S.F. ON BEHALF OF MINOR CHILD S.H.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,**
Respondent.

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**S.F.**, parent, pro se

**David B. Rubin**, Esq., for respondent

Record Closed: June 2, 2016 Decided: July 7, 2016

BEFORE **EVELYN J. MAROSE**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the Board of Education's residency determination. The Residency Appeal was filed on December 31, 2015, and an Answer filled on January 20, 2016. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL), where, on January 22, 2016, it was filed for hearing and determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On March 23, 2016, The Board of Education (BOE) of the Township of Piscataway Township (Piscataway), Middlesex County filed a Motion to Amend its' Answer to include a counterclaim for back tuition. The Motion was granted since the express terms of N.J.S.A. 18A:38-1 provide that the BOE is automatically entitled to back tuition should petitioner not prevail. [1]

A hearing was held on April 1, 2016. In order to allow petitioner to produce a witness to testify on her behalf that she had not brought to the initial hearing, at the request of petitioner, a second hearing was conducted on May 5, 2016. After written summations were received, the record closed on June 2, 2016.

## FACTUAL DISCUSSION AND FINDINGS OF FACT

At the hearings the BOE presented testimony from Assistant Truant Officer Vincent Piano (Investigator Piano), and Truant Officer Kristine Leyra (Truant Officer Leyra). S.F. and H.R. (S.F.'s father) testified on behalf of the minor child, S.H.

### Testimony on Behalf of Piscataway

Investigator Piano has worked as an Assistant Truant Officer with the BOE for some five years. Prior to working for the BOE, he was employed for more than twenty-five years for the Westfield Police Department. As a law enforcement officer, he received instruction and experience in surveillance and trailing of persons. Between March 2015 and March 2016 on more than sixty occasions, Investigator Piano conducted surveillance of S.F. and her minor daughter S.H. Twenty-one of those surveillances occurred between February and March of this year, 2016. On each occasion he detailed in writing what he observed. (R-7.) During the surveillances which occurred on school days, S.F. would leave XXX in Bound Brook with S.H., her minor

[1] It should be noted that petitioner was advised of her exposure to an award of back tuition in a letter to her from the BOE dated December 21, 2015, which was annexed to her petition of appeal. Petitioner was also advised of the potential for an award of back tuition during the Prehearing conference of this matter on February 10, 2016.

daughter, and drive in the early morning hours to XXX Montgomery Street in Piscataway, prior to having the child go to the school she attended in Piscataway.

On one occasion, March 23, 2015, Investigation Piano knocked on the rear door of XXX Bound Brook. When S.F. answered the door, the investigator explained that S.F. needed to withdraw S.H from the Piscataway school district since, in accordance with his observations, she was not residing at the Piscataway address. He handed S.F. a withdrawal form, and gave her an opportunity to read the withdrawal form. After reading the form, S.F. signed it and returned it to Investigator Piano. (R-2, R-2a, R-7 p. 4.) However, after signing the form, S.F. did not stop taking her daughter to school in Piscataway. In fact on March 30, 2015, S.F. and H.F., S.F's father, executed a new Affidavit of Residency of Student, swearing that S.F and S.H. reside with H.F. and his family at XXX in Piscataway. (R-3.)

Officer Piano conducted further surveillance of S.F. and her minor daughter, S.H. On every occasion that he conducted surveillance, the car that S.F. drove was never parked overnight in Piscataway but rather was parked in Bound Brook. On every occasion that he conducted surveillance, even in the summer, S.F. and S.H. would emerge from XXX Bound Brook in the morning. On no occasion of his sixty observations did Investigator Piano observe any evidence that S.F. and S.H. had spent the night in Piscataway and/or did he fail on a school day to see S.F. travel with S.H. from Bound Brook to Piscataway where the child would attend school.

On a second occasion on September 18, 2015, Investigator Piano again went to the rear of XXX Bound Brook. He knocked on the door at about 7:45 a.m. and S.H.'s biological father answered the door. When the investigator explained that he was the Assistant Truant Officer for Piscataway and that he needed to speak with S.F., the biological father told Investigator Piano that S.F. did not live there but lived in Piscataway. Investigator Piano saw the car that S.F. normally drove when traveling from Bound Brook to Piscataway on the mornings of his surveillances parked in the back of the residence. Accordingly, instead of leaving the area of XXX Bound Brook, he drove around the corner, where he had a clear view of the rear of the residence to observe anyone exiting the residence. About twenty minutes later, Investigator Piano

observed S.F. exit XXX Bound Brook with S.H. He followed S.F., who drove to XXX in Piscataway. Upon arrival, he approached S.F. and explained that she needed to withdraw S.H. from the Piscataway school district. S.F. informed Investigator Piano that she did not intend to do so.

Investigator Piano testified at a Piscataway BOE hearing, where he explained what he had observed during the occasions that he surveilled S.F and S.H. He also testified that S.F. had signed the form agreeing to withdraw S.H. from the Piscataway school district on March 23, 2015. (R-2.) However at the hearing, he observed S.F. deny that the signature on the withdrawal letter was hers. Investigator Piano was aware that after reviewing documentation and taking testimony, the BOE concluded that S.H. was not eligible to remain enrolled in the district and so advised S.F. by letter dated December 21, 2015. S.F. filed this appeal. (R-6.)

After the BOE determination and pending the OAL Hearing, Investigator Piano continued to conduct surveillances. He monitored both residences daily. On nineteen of twenty-one days, S.F. exited the Bound Brook residence with S.H. and drove her to Piscataway for school. On two of the twenty-one days, Investigator Piano did not see S.F. or S.H. exit either residence and S.H. was not present in school.

Truant Officer Leyra testified that, in addition to her truant officer duties, she is the head of the Enrollment Center in Piscataway. She stated that the district requires execution of certain forms annually for families who wish to enroll students in the school district but do not own or lease property in their name in Piscataway. Truant Officer Leyra identified the form completed by S.F. and her father H.F. in August 2014 indicating that S.F. resided with her school-age daughter, S.H., at the home her father, H.S., who owns a house in Piscataway. (R-1.) Truant Officer Leyra identified the withdrawal form that she was given by Investigator Piano, signed on March 23, 2015, that indicated that S.F. was withdrawing her daughter from the Piscataway school system since she did not reside in Piscataway. (R-2.) The truant officer stated that, several days after S.F. signed the withdrawal form, S.F. called her stating that she had documentation to support the fact that she was living in Piscataway including a driver's license and paystub. Truant Officer Leyra stated that, after evaluating the

documentation S.F. provided, Piscataway decided, in part based on the lateness of the school year, to allow S.H. to remain in school in Piscataway while surveillance as to where the child truly resided would be continued.

Although surveillance continued to indicate that S.H. resided in Bound Brook, S.F. and her father H.F. again signed an Affidavit of Residency of Student in July 2015 stating that S.F. and her daughter resided in Piscataway. Thereafter, when S.H. again attended school in Piscataway in the fall, the district once again continued surveillance to confirm where S.H. was residing. The continued surveillance reports again indicated that S.F. and S.H. were residing in Bound Brook and not Piscataway. Accordingly, Piscataway advised S.F. by written correspondence that S.H. was not eligible to attend school in Piscataway and regarding her rights to appeal that decision. (R-5.) As a result of S.F.'s appeal, a hearing was held on December 17, 2015, before the Piscataway BOE, that resulted in a determination that S.H. was domiciled in Bound Brook and accordingly was not entitled to attend school in Piscataway. (R-6.) Truant Officer Leyra identified and certified as to the accuracy of a Back Tuition Calculation of monies that Piscataway seeks in its counterclaim should petitioner not prevail on the merits. (R-8 and R-9.)

Testimony on Behalf on S.F. and the minor child S.H.

S.F. testified on her own behalf and on behalf of her daughter. She stated that she resides at XXX in Piscataway. She receives mail at XXX in Piscataway. At the time of the initial surveillances, S.F. was working and her daughter's father would sometimes let her borrow a car of his. The car was registered where he lives at XXX in Bound Brook and she would go to his house to pick up the vehicle. She is no longer working and receives food stamps from the Middlesex Board of Social Services based upon living at XXX in Piscataway.

S.F. said that when she went to court for child support, S.H.'s father and she "made an agreement, not memorialized in writing, with the "court team" that they would split days with the child—that she would reside with him and then with her." S.F. is not on her child's father's lease as residing with him. S.F. testified that she does not stay

overnight at S.H.'s father's residence. She only picks up the child when S.H. stays overnight.

Upon cross-examination, S.F. acknowledged that if it were determined that she did not reside in Middlesex County, she would lose the benefits she was receiving from the Middlesex County Board of Social Services and would have to refund benefits she received during any period in which it was determined that she did not reside in Middlesex County.

When questioned as to why Investigator Piano saw, on approximately sixty occasions from March 2015 to March 2016, S.H. and S.F. leave S.H.'s father home in the early morning, S.F. replied that on those occasions, she had slept in Piscataway and S.H. slept with her father in Bound Brook. She only came to the house early those mornings to pick up S.H. after her overnight visit with her father. She postulated that maybe Investigator Piano did not see her arrival because she came in the front door and he was watching the back door. S.F. insisted that she never stayed overnight in Bound Brook because she "could not" since she was not "on" S.H.'s father lease. She continued to assert that she resides in Piscataway and that S.H. spends the majority of her time residing with S.F. in Piscataway. S.F. did acknowledge that she has another child, non-school age, with S.H.'s father. [2]

S.F. admitted that, at the BOE Hearing, she denied ever signing the letter given to her on March 23, 2015, by Investigation Piano. However, upon questioning during the OAL hearing she acknowledged signing the form but asserted that she put a check in the wrong box since she wanted to indicate that she refused to remove her daughter from the Piscataway school system and not that she would withdraw her daughter from school in Piscataway. S.F. indicated the error was the result of her nervousness "that somebody came to her boyfriend's residence" and her failure to fully read the paper. (R-2.) S.F. argued that she does see the merit in Piscataway's position, since she is not the only person in New Jersey whose child sometimes resides with another parent

[2] S.F. stated that she was on maternity leave with the young boy from November 2014 to March 2015.

some nights. She postulated that, if she enrolled S.H. in Bound Brook, Bound Brook would investigate residency and might claim S.H. should not be attending school there.

A second hearing day was scheduled so that S.F. could bring one or two witnesses to testify on her behalf and on behalf of her daughter. On that second day of hearing, only H.F., S.F.'s father and S.H.'s grandfather testified. H.F. stated that his daughter always resided with him. At the time of his testimony and during the period at issue, his daughter and her two children were residing with him, his wife, his son, and his son's children. When his daughter was working she gave him some money for rent, but presently since she was not working she pays no money toward rent or utilities. H.F. acknowledged that he discussed with his daughter what his testimony would be at the hearing and was aware that his daughter received food stamps as a resident of Middlesex County. H.F. testified that S.F. has never slept at the home of both of her children's biological father, though S.H. has slept there a couple of times on weekends—never on school nights. H.F. testified that, more frequently, the child goes to see her father for a couple of hours during the day.

In this matter, testimony as to the critical issue of whether and how often S.H. sleeps in Bound Brook or Piscataway differs greatly. I **FIND** the testimony of S.F. and her father H.F. not to be credible and the testimony of Investigator Piano to be extremely credible. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

S.F. has strong motivation not to acknowledge that she and her young children are residing overnight with the father of her two youngsters. She enrolled her daughter in the school district from where she testified she graduated in August 2014. She, on at least three occasions, signed affidavits affirming that she and S.H. were residing in Piscataway and therefore that S.H. was entitled to be educated in the Piscataway District. The affidavits expressly state:

> Submission of any knowingly inaccurate information on the affidavit has serious legal implications and may expose you to criminal prosecution. Submission of a fraudulent document to a government agency is punishable by jail and fines in criminal court. In addition a tuition judgment may be imposed by a court, or the Commissioner of Education for any services secured through submission of fraudulent information.

Should there be a determination that S.H. does not reside in Piscataway, where the child is enrolled in school, by statute Piscataway will be entitled to receive reimbursement for the cost of the child's education. S.F.'s liability for the period at issue will exceed $11,842.71. (R-8 to R-9.)

In addition, S.F. applied for and received food stamps based upon an application filed with the Middlesex County Board of Social Services, indicating that she resides in Middlesex County. Should there be a determination that S.F. does not live in Middlesex County she would be subject to reimbursement of the benefits she received in food stamps. (P-6.) As of March 15, 2016, S.F. is receiving a monthly allotment of $489 in food stamps.

Testimony as whether S.H. spends any time residing overnight with her biological father differs greatly. Her grandfather testified that the child visits her father during the day. She may have "a couple of times" spent overnight but "never on school nights." S.F. testified that after going to court she and the father's child agreed to split parenting. Yet, she inconsistently describes what the "split" is. The split varies from never spending overnights in Bound Brook, to sometimes spending overnights in Bound Brook, to spending Wednesdays overnight in Bound Brook.

S.H.'s testimony regarding whether she ever knowingly signed a letter dated March 23, 2015, acknowledging that S.H. did not reside in Piscataway and agreeing to remove her daughter from the school system is inconsistent and lacks credibility. Investigator Piano states that she signed the letter so agreeing after reading it in his presence. S.F. during the BOE Hearing denied ever signing the letter. At the OAL Hearing, after being confronted with her signature on the letter, S.F. said after she had the ability to carefully look at the document, she recognized that she had signed it. However she alleged that she was nervous at the time and checked the wrong box. She had wanted to check the box that indicated she refused to remove her child from attending school in Piscataway.

The documentation produced by petitioner in support of her contention that she lives in Piscataway, is also unpersuasive. In essence, all of the correspondence and documents indicate exacting what S.F. has represented to third parties, such as Motor Vehicle and the Middlesex County Board of Social Services, that she resides at her parents' home in Piscataway. Even if she resided in Bound Brook, she would have no difficulty obtaining her mail at her parent's residence, since her daughter was attending school in Piscataway, the town where he parents lived. (P-1 to P-8.)

In contrast, I observed Investigator Piano testify confidently and credibly that all of his more than sixty surveillances have produced no indication that S.F. resides in Piscataway and substantial evidence that S.F. and her children, in particular S.H., reside with S.H.'s biological father at XXX Bound Brook, where they sleep overnight during the week, on the weekend, and in the summer. Investigator Piano's observations are memorialized by notes that he testified were made contemporaneously with his observations. The notes are factually clear and persuasive evidence made by a professional with no personal stake in the outcome of the residency issue.

Accordingly, based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses, I **FIND** S.F. failed to present any credible evidence that she and her daughter S.H. reside at XXX in Piscataway with her parents.

In contrast, I **FIND** that the Piscataway BOE presented substantial credible evidence that from March 12, 2016, S.F. and S.H. were residing at XXX Bound Brook.

## LEGAL ANALYSIS AND CONCLUSIONS

Public school shall be free to persons over five and under twenty years of age who are domiciled within a school district. N.J.S.A. 18A:38-1. An individual may have several residences, but can have only one domicile. Miller v. U.S. Fid. and Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974). A domicile once established continues until it is superseded by a new one. Bd. of Educ. of Twp. of Middle v. K.K. and P.K., 1992 N.J. AGEN LEXIS 5259. The domicile of an un-emancipated child is the domicile of the parents. P.B.K. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419 (App. Div. 2001).

When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This paragraph shall apply regardless of which parent has legal custody. N.J.A.C. 6A:22-3.1(a)(1)(i). If a resident does not prevail on a claim for residency to attend a district school, back tuition can be assessed for the period of time that the child was not eligible to attend a school. N.J.S.A. 18A:38-1(b).

As noted in detail above, I **FIND** that S.F. states that S.H. resides with her in Piscataway, but may on a rare occasion stay overnight with her biological father who resides in Bound Brook. However, all credible evidence indicates that S.H., and perhaps her mother and her infant brother, have resided with S.H.'s biological father at XXX Bound Brook, as of at least March 2015, and not at XXX Piscataway. I **CONCLUDE** that S.H. was not entitled to a free public education in Piscataway as of March 2015.

## ORDER

It is hereby **ORDERED** that S.F.'s appeal of the Board of Education of the Township of Piscataway's determination that S.H. is not entitled to attend school in Piscataway as of March 12, 2015, is **DENIED**; and

It is hereby further **ORDERED** that the Board of Education of the Township of Piscataway's counterclaim, for an award of back tuition for the period of S.H.'s ineligible attendance in school in Piscataway as of March 12, 2015, is **GRANTED**; and

It is hereby further **ORDERED** that the Board of Education of the Township of Piscataway is entitled to back tuition in the amount of $11,842.71, for back tuition from March 12, 2015, to April 1, 2016, plus additional per diem charges of $61.19 for each school day thereafter.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 7, 2016
DATE

**EVELYN J. MAROSE**, ALJ

Date Received at Agency: July 7, 2016

Date Mailed to Parties: July 12, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

## APPENDIX

## WITNESSES

For Petitioner:

S.F.

H.R., S.F.'s father

For Respondent:

Vincent Piano, Assistant Truant Officer

Kristen Leyra, Truant Officer

## EXHIBITS

For Petitioner:

P-1 Correspondence from United Healthcare to S.H. at Piscataway address

P-2 Correspondence from United Healthcare to Z.H. at Piscataway address

P-3 Correspondence from PNC Bank to S.F. at Piscataway address

P-4 Correspondence from NJ FamilyCare to S.F. at Piscataway address

P-5 Civil Action Complaint, dated May 2013, indicating a Piscataway address for F.S.

P-6 Notification of approval of food stamps for S.F., indicating a Piscataway address

P-7 Automobile Insurance Card for Toyota Camry, insured in the name of E.H., father of S.H., indicating a Bound Brook address

P-8 Identification Folder Card for Plainfield Women, Infants & Children's Program (WIG), effective January 2015

For Respondent:

R-1 Affidavit of Residency of Student (for parents who do not rent or own property in Piscataway and are living with another resident), dated 8/14

R-2 and R-2(a) Letter requesting withdrawal from school, signed by S.F., with a checked box indicating agreement to remove S.H. from Piscataway district school, waiving right to a hearing and understanding that tuition owed will be billed; dated 3/23/15

R-3 Affidavit of Residency of Student (for parents who do not rent or own property in Piscataway and are living with another resident), dated 3/15

R-4 Affidavit of Residency of Student (for parents who do not rent or own property in Piscataway and are living with another resident), dated 7/15

R-5 Letter from BOE counsel to S.F., subsequent to an investigation of S.H.'s residency and after a preliminary determination that S.H. is domiciled in Bound Brook, dated 11/23/15

R-6 Letter from BOE counsel to S.F., subsequent to Hearing before BOE, dated 12/21/15

R-7 Investigation reports of V. Piano, dated 3/15-3/16

R-8 Chart of Annual Tuition Rates, 2014-15 and 2015-16

R-9 Chart of Back Tuition, as of April 1, 2016, $11; 842.71

R-10 Two letters—one letter from BOE counsel to S.F. requesting names, addresses and telephone numbers of all proposed witnesses and copies of documents, dated 2/11/16; and one letter from BOE counsel to S.F., indicating that it was a second request for foregoing information, dated 3/14/16

306-16

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|---|---|---|
| IN THE MATTER OF JAMES BRIDGE, CHARGING PARTY, and NORTH WARREN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, RESPONDENT, AND JAMES BRIDGE, PETITIONER, V. BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY, RESPONDENT. | : | COMMISSIONER OF EDUCATION DECISION |

## SYNOPSIS

This consolidated matter involves two appeals filed by the petitioner with the Department of Education, and three unfair practice complaints filed with the Public Employment Relations Commission (PERC). PERC was determined to have predominant interest. The first education matter challenged the Board's withholding of petitioner's salary increment following findings by the Affirmative Action Office (AAO) that petitioner acted in a discriminatory manner when he disseminated an anti-Semitic email to members of the North Warren Regional Education Association. The second matter involved petitioner's challenges to a second AAO investigation into claims by fellow staff members that petitioner engaged in conduct – such as making sexist comments about female co-workers – that amounted to acts of bullying, intimidation and harassment.

With respect to the education matters, the ALJ dismissed both petitions, finding that the Commissioner did not have jurisdiction over the increment withholding because it was done for predominantly disciplinary reasons. Further, the ALJ found that petitioner failed to meet his burden of proof with regard to his challenges of the second AAO investigation.

The Commissioner reviewed the record – which includes the ALJ's Report and Recommended Decision on the Board's Motion to Dismiss, the ALJ's Report and Recommended Decision, the parties' exceptions and replies, and the final decision of PERC – and subsequently determined that there are no remaining issues under the jurisdictional purview of the Commissioner with respect to the first education matter. To the extent that any issues remain with respect to the second matter, the Commissioner concurred with the ALJ for the reasons thoroughly set forth in her written opinions. Accordingly, the Report and Recommended Decision – as it relates to issues within the Commissioner's jurisdiction – was adopted as the final decision in this matter.

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

August 22, 2016

306-16

OAL DKT. NOS. EDU 14001-13 and EDU 16637-13 (consolidated)
PERC DKT NOS. CI-2013-059, CI-2013-060 and CI-2013-061
AGENCY DKT. NOS. 215-9/13 and 257-10/13

| | | |
|---|---|---|
| IN THE MATTER OF JAMES BRIDGE, | : | |
| CHARGING PARTY, | : | |
| and | : | |
| NORTH WARREN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, | : | COMMISSIONER OF EDUCATION |
| RESPONDENT, | : | DECISION |
| AND | : | |
| JAMES BRIDGE, | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY, | : | |
| RESPONDENT. | : | |

This matter involves a consolidated action that stems from two petitions of appeal filed by James Bridge (petitioner) with the Department of Education, and three unfair practice complaints filed with the Public Employment Relations Commission (PERC). In those filings, the petitioner challenged the withholding of his salary increment by the North Warren Regional School District Board of Education (Board) and the findings of an Affirmative Action Office (AAO) investigation. On or about April 10, 2014, pursuant to a Joint Order by PERC and the Commissioner, the matters were consolidated for hearing before a PERC Hearing Examiner as a Special Administrative Law Judge (ALJ); PERC was determined to have the predominant

interest as to the issues within its jurisdiction, and the Commissioner was determined to have jurisdiction to determine any remaining education issues.[1]

Following petitioner's case in chief, the Board made a motion to dismiss. With respect to the education matters, the ALJ dismissed both petitions in a Report and Recommended Decision dated June 25, 2015. Specifically, the ALJ found that, with respect to EDU 14001-13, the Commissioner did not have jurisdiction over the increment withholding – pursuant to *N.J.S.A.* 34:13A-26 – because it was done for predominantly disciplinary reasons. Additionally, the ALJ found that EDU 16637-13 should also be dismissed because the petitioner did not meet his burden of proving his allegations that the AAO investigator's findings were flawed and ought to be reversed because the witnesses lied, and the AAO, Superintendent, and the North Warren Educational Association conspired against him to encourage witnesses to lie. Further, the ALJ found that the petitioner did not provide any evidence to support his additional allegations, such as that he made a complaint to the AAO about a reverse discrimination matter which the AAO failed to investigate and that he was informed that he would not be teaching German V after the AAO complaint was filed as a form of punishment. The ALJ also dismissed two of the three unfair practice complaints, and the hearing continued on the third unfair practice complaint. In a Report and Recommended Decision dated April 8, 2016, the ALJ found that petitioner's salary increment should be restored.

The record of this matter – which includes the ALJ's Report and Recommended Decision on the Board's Motion to Dismiss, the ALJ's Report and Recommended Decision, the parties' exceptions and replies, and the final decision of PERC – has been reviewed. Upon such review, the Commissioner has determined that there are no remaining issues under the

[1] The procedural history and factual background of these consolidated matters is outlined in the ALJ's Report and Recommended Decision on the Board's Motion to Dismiss, the ALJ's Report and Recommended Decision, and the final decision issued by PERC, and will not be repeated here.

jurisdictional purview of the Commissioner of Education with respect to EDU 14001-13, all issues having been resolved by the final decision of PERC. To the extent that any issues remain with respect to EDU 16637-13 – such as petitioner's additional allegations – the Commissioner concurs with the ALJ for the reasons thoroughly set forth in her written opinions. Accordingly, the Report and Recommended Decision – as it relates to issues within the Commissioner's jurisdiction – is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/22/16

Date of Mailing: 8/22/16

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

WENDY L. YOUNG
Administrative Law Judge T/A
c/o Public Employment Relations Commission
PO Box 429
Trenton, NJ 08625-0429
(609) 292-6780

*For Courier Delivery*
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089

In the Matter of

NORTH WARREN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CI-2013-059
CI-2013-060 & CI-2013-061

JAMES BRIDGE,

Charging Party.

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NORTH WARREN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

V.

OAL Dkt Nos. EDU 14001-2013N & 16637-2013N
Agency Dkt Nos. 215-9/13
257-10/13

JAMES BRIDGE,

Petitioner.

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Appearances:

For the RESPONDENT,
Fogarty and Hara, attorney's
(Stephen R. Fogarty, of counsel)

For the Charging Party-Petitioner,
James Bridge (pro se)

## ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDED DECISION ON MOTION TO DISMISS

### PROCEDURAL HISTORY

On June 14, 2013, James A. Bridge (Charging Party/ Petitioner) filed three unfair practice charges with the Public Employment Relations Commission (PERC) against the North Warren Regional School District Board of Education (Respondent or Board). All of the charges allege violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1).[1/] The first charge under CI-2013-59 (A-1b)[2/] alleges the Board violated the Act when Superintendent Fogelson issued a verbal and written warning to Bridge regarding a flyer he distributed in school at the start of the school day to Association members protesting his ouster as Association president and threatening legal action. The second charge, CI-2013-60 (A-1c), alleges the Board violated the Act when Affirmative Action Officer/Principal Melchor informed Bridge he was being investigated for violating the Board's affirmative action policy (AA). Specifically, Bridge was charged with republishing hate speech when he distributed an email he received to Association members at an Association meeting in an effort to deflect an attempt to oust him as

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

2/ Exhibits admitted into evidence at the hearing are marked "A" for agency, "CP" for Charging Party/Petitioner Bridge and "R" for Respondent Board. Transcript cites are, respectively, "1T" and "2T" for the February 25 and 26, 2015 hearing dates.

Association president. The email was from the then Association vice-president and rival for the presidency. It contained an anti-Semitic reference to the Superintendent. The result of the AA investigation was that Bridge's 2013-2014 increment was withheld. The third charge, CI-2013-61 (A-1d), alleges the Board violated the Act when it processed a second AA complaint against Bridge related to his Association activities, thus interfering with his free speech right to politic about union-related matters. It is further alleged that by processing the second AA complaint, the Board was currying favor with a faction of the Association sympathetic to the Superintendent.

On August 26, 2013, Bridge filed a petition (A-3) under EDU 14001-2013N with the Commissioner of Education asserting similar allegations set forth in the unfair practice charges under CI-2013-59 and CI-2013-60, respectively, related to the Superintendent's verbal and written warning to Bridge to cease conduct his colleagues complained was intimidating, harassing and bullying and regarding Bridge's appeal of his 2013-2014 salary increment withholding for disciplinary reasons growing out of the AA complaint filed by Superintendent Fogelson.

The Board in response to A-3 filed a Notice of Motion to Dismiss in lieu of Answer (A-4). The Board urges that the petition be dismissed on legal grounds because: (a) facts alleging violations of the PERC Act belong before that agency and are pending there; (b) any allegation of a violation of Title VII is already the subject of an Equal Employment Opportunity

Commission (EEOC) complaint by petitioner; and the Commissioner of Education has no jurisdiction to entertain appeals of increment withholdings for predominantly disciplinary reasons which are to be processed through the parties' grievance procedure and heard by an arbitrator. The Commissioner, the Board contends, has jurisdiction only for withholdings based predominantly on evaluation of performance.

On October 15, 2013, Bridge filed a second petition (A-5) under EDU-16637-2013 asserting similar allegations set forth in the unfair practice charge under CI-2013-61. That charge grew out of the second AA investigation and finding that Bridge violated the Board's AA policy and healthy workplace environment policy. The two petitions were consolidated and transferred to the Office of Administrative Law (OAL) on November 18, 2013.

The Board filed a Notice of Motion to Dismiss in lieu of Answer (A-6) in response to the second petition. It asserts that the petition must be dismissed on procedural grounds since Bridge never filed an appeal to the Board from the AAO's second AA investigation and recommendations for disciplinary action. Bridge is appealing the AAO's recommendations, not a final action of the Board. The Board, therefore, contends that the Commissioner's jurisdiction to review matters arising under the school laws (N.J.S.A. 18A:6-9) does not extend to a local affirmative action officer's recommended disciplinary consequences. Jurisdiction, it argues, is limited to the review of board action only. The Board, therefore, urges dismissal

because there is not final Board action for the Commissioner to review.

On January 30, 2014, the PERC Director of Unfair Practices consolidated the three unfair practice charges against the Board and issued a Complaint (A-1). The matter was assigned to Hearing Examiner Wendy L. Young for hearing.

On February 3, 2013, Respondent Board submitted its statement of position as its Answer to the three charges (A-2). As to CI-2013-60, it admits that Superintendent Fogelson filed a complaint against Bridge and Association Vice-President Jarvis charging that Jarvis wrote an email to Bridge containing an a offensive comment about him (Fogelson) and Bridge distributed that email at an Association meeting which was subsequently shared among the staff, causing a lot of negativity in the work place. The Board further admits that an affirmative action investigation triggered by Fogelson's complaint resulted in a finding that Bridge republished the discriminatory statement and, in doing so, caused unnecessary emotional distress to the Superintendent in violation of Title VII of the Civil Rights Act of 1964 and the Board's Affirmative Action Policy 1140. The Board further admits that the Affirmative Action Officer (AAO) determined that Bridge's actions were not as he professed, to expose the flawed moral character of Jarvis (a rival for Association president), but were motivated solely by Bridge's political ambition, namely to retain his union office as association president at the expense of Fogelson's right to a

healthy work environment. The AAO recommended to the Board that Bridge's 2013-2014 salary increment be withheld. After conducting an affirmative action hearing, the Board admits it sustained the AAO's recommendation. Bridge's 2013-2014 salary increment was withheld.

As to CI-2013-059 and CI-2013-061, the Board acknowledges that Bridge wrote a letter to the Association executive committee protesting his removal from union office as an unlawful act, demanding to be reinstated and giving them a two-week deadline to do so or risk legal action. The Board maintains that Bridge subsequently distributed a letter to Association members in public places, such as on colleague's school desks and under classroom doorways, the contents of which could be seen by students as well as staff. The letter essentially reiterated what he wrote to the executive council, including the two-week deadline threat before commencing legal action. The Board explains that staff complaints began coming in to the Superintendent to complain about Bridge's confrontational behavior. The Superintendent then convened a meeting with Bridge to notify him of staff concerns and warned him of possible discipline if Bridge's inappropriate behavior continued.

Finally, the Board admits that after this meeting, a second affirmative action investigation was commenced as a result of three staff members who complained about many incidents of bullying, intimidation and harassment by Bridge during his tenure as association president which resulted in a change in the

culture of the school. Complainants asserted that Bridge's conduct caused a hostile work environment. As a result of these three complaints and an additional three complaints, the AAO commenced a second AA investigation under the Board Healthy Workplace Environment Policy. After numerous interviews with the complainants, Bridge and others recommended by Bridge to be interviewed, the AAO determined that Bridge's conduct created a hostile work environment and recommended he attend a Board approved workshop dealing with healthy workplace environment.

On March 20, 2014, Administrative Law Judge (ALJ) Irene Jones granted the Board's motion to consolidate the PERC and Commissioner of Education matters and issued an Order for Consolidation and Determination for Predominant Interest finding the matters should be consolidated and that PERC has the predominant interest (A-7). ALJ Jones did not rule on the board's two previously filed motions to dismiss in lieu of answer (A-4 and A-6). On April 14, 2014, the PERC Chair and the Commissioner of Education issued a Joint Order consolidating these matters before PERC Hearing Examiner, Wendy L. Young as a Special Administrative Law Judge pursuant to N.J.S.A. 52:14F-6(b) (A-8).

A hearing was conducted on February 25 and 26, 2014. The parties examined witnesses and produced exhibits. At the conclusion of Charging Party's/Petitioner's case in chief on the second day of hearing, Respondent made a motion to dismiss on the

record. After hearing oral argument and reviewing the hearing transcripts, I make the following:

**FINDINGS OF FACT**

1. The North Warren Regional School District Board of Education (Board), the North Warren Regional Education Association (Association) and James A. Bridge are, respectively, public employer, public employee representative and public employee within the meaning of the PERC statute (1T11-1T12).

2. Bridge is a certified and tenured social studies and German language instructor employed by the Board since the 2004-2005 school year (1T36). He holds an advanced rating with the American Council on the Teaching of Foreign Languages (1T39).

3. In 2012, Bridge was elected as president of the Association. According to Bridge, there was great dissatisfaction with union leadership at that time, in particular with a clique of individuals who "did nothing for their dues paying membership" (1T39).

4. On April 15, 2013 during a regularly scheduled Association meeting, Association Member and District Substance Abuse Counselor/Anti-Bullying Coordinator Tina Ritchie (a non-tenured staff member) made a claim that Bridge caused her job to be threatened, when, at a Board meeting, he suggested to the Board that a heightened drug intervention policy was necessary (1T40).[3/] Specifically, she charged that at the March 14, 2013

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3/ Bridge was particularly concerned about the drug policy because of his experience in 2008-2009 uncovering an illicit drug operation in the school lunch room (1T45-1T46). Also,

Board meeting, Bridge addressed the Board about suspected drug use in the school and recommended enhanced inspection of lockers and backpacks. He also described to the Board what he viewed as inconsistent enforcement of discipline in the building (R-4). Although neither Superintendent Fogelson nor Board President Hanelt threatened to terminate Ritchie because of Bridge's remarks to the Board, she viewed Bridge's comments at the meeting as a threat to her job (1T214-1T215).4/

During the April 15 Association meeting, even though Bridge contended that Ritchie's claims against him were baseless, Ritchie convinced a majority of those present at the meeting to process her motion for his removal as president for gross negligence (1T40).

5. At a subsequent association meeting on April 24, 2015, Ritchie's motion was considered by the approximately 50 members in attendance which was less than half the membership (1T41). During the meeting, Bridge argued that then Association Vice-President Patty Jarvis who was being considered as his replacement was not fit to lead the Association due to an April 13, 2013 email exchange with Bridge in which Jarvis made anti-Semitic remarks in reference to Superintendent Dr. Brian

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in 2013, Bridge learned through the "rumor mill" that there was again illicit drug activity because several of his students were suspended (1T46-1T47, 2T16).

4/ The parties stipulated at the hearing that neither Dr. Fogelson nor Board President Hanelt ever threatened Ritchie's job as a result of statements made by Bridge at the Board meeting (1T213-1T215).

Fogelson. Specifically, Jarvis referred to him as "a real kike through and through" (A-2; 1T41).[5/] Bridge passed out a copy of the email to the meeting attendees (A-2 at page 3). Bridge did not produce a copy of the email before or after the meeting to the administration or speak to Jarvis protesting her discriminatory epithet (A-2 at page 3).

6. Despite his efforts to defend his union office and upon recommendation of the Association's Executive Council, Bridge was removed as president on April 24, and Jarvis was appointed as acting president of the Association (A-2 at page 3).

**The First Affirmative Action Investigation**

7. Even though Bridge only distributed the Jarvis email to attendees at the April 24 meeting, the following day word about the Jarvis email spread throughout the school community (A-2). Fogelson was informed about the email and filed an affirmative action (AA) complaint on April 25, 2013 against Jarvis for making the anti-Semitic statement and Bridge for distributing it the Association meeting (A-2 at pages 3 and 4).

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5/ I have provided cites not only from the testimony, but also from Respondent's Answer (A-2) filed in response to the Complaint (A-1a through A-1d). Respondent filed its previously submitted statement of position as its Answer to the unfair practice charges (A-2). Our rules provide that any allegation not specifically denied or explained shall be deemed to be admitted by the Hearing Examiner to be true. N.J.A.C. 19:14-3.1. Accordingly, I have drawn from testimony as well as Respondent's position statement to the extent it does not deny an allegation (s) in the charges and to the extent its explanation admits Charging Party's allegations..

8. In accordance with the Board's affirmative action complaint procedure, AAO/Principal Louis Melchor initiated an investigation (A-2 at page 4). Melchor interviewed Fogelson who expressed deep offense at the use of the term "kike" in reference to him and opined that the making the email public caused a hostile work environment - e.g. making it difficult for him to perform his job duties in the workplace (A-2 at page 4). Melchor also interviewed Bridge because he republished the discriminatory statement (A-2 at page 4). Bridge explained to Melchor that he too was personally offended by the Jarvis statement and had only brought it to the association's attention as a defense to their attempt to remove him as association president and to expose Jarvis as totally inappropriate to be Association president (A-2 at page 4).

9. Finally, Melchor interviewed Ritchie who indicated that staff members approached her on April 25 to complain about Jarvis' statement and Bridge's production of it at the Association meeting (A-2 at page 4). Ritchie felt that the publication of the Jarvis statement caused a lot of negativity within the workplace (A-2 at page 4).[6/]

10. After interviewing two other witnesses, Melchor concluded that Bridge "had perpetuated the discriminatory nature of the original email exchange and, by the statement to Association members, had caused unnecessary emotional distress to

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6/ There is no evidence in the record as to whether Jarvis was interviewed and/or disciplined as a result of this AA investigation.

the Superintendent in violation of Title VII of the Civil Rights Act of 1964 and in violation of Board Policy 1140, entitled "Affirmative Action Program" (A-2 at page 5). Melchor rejected Bridge's defense of only distributing the email to expose Jarvis' flawed character and concluded that Bridge only did it for his own political gain at the expense of the Superintendent's right to a healthy work environment (A-2 at page 5). Pursuant to the investigation's findings, Melchor recommended that Bridge's 2013-2014 salary increment be withheld (A-2 at page 5).

11. The Board conducted an affirmative action hearing and determined to sustain the AAO's decision and to withhold Bridge's employment and adjustment increments for the 2013-2014 school year (A-2 at page 5).

**May 6, 2013 Meeting and Second Affirmative Action Investigation**

12. On April 26, 2013, a couple of days after the Association acted to remove him from the presidency, Bridge put a a letter to the Association's executive council and Ritchie in their school mail boxes as well as sending it by certified mail urging the council to rescind their actions (1T169). He included Ritchie who was not on the executive committee, because, he felt, she had made a false claim of negligence against him to the Association, resulting in his removal as president (1T171-1T172).

In the letter, Bridge contended specifically that the council's actions were inappropriate because: (a) there was no evidence of gross negligence as charged by Ritchie; (b) there was no proof of harm by Bridge's actions to the general membership;

(c) there was new evidence presented and considered at the April 24 meeting not part of Ritchie's original complaint, (d) the executive council took the position at the April 24 meeting that Bridge should not have made statements to the Board criticizing the drug policy, thus, violating his free speech rights and exposing the membership to the possibility of legal action; and (e) Bridge's April 15 conversation with Association Treasurer Don Biery who urged him to just step aside, since Bridge was aware that the membership didn't want him as president, demonstrated evidence of the council's malice and conspiracy, as well as a wilful intent to by-pass the Association's democratic process.

Bridge concluded the letter by giving the Board a two-week deadline to return him to the presidency, or he would pursue justice in recovering his position and seeking damages (CP-5; 1T56-1T57).

13. Several days after CP-5 was sent, Bridge and Association Treasurer Don Biery had a conversation in the faculty room (1T58). When he was recruited by Bridge to be treasurer, Biery was a non-tenured math teacher. At the time, Biery was reluctant to take on the treasurer position, but, at Bridge's urging, agreed to do so (1T58).

In the faculty room, Biery queried Bridge about CP-5 wanting to know what the possible legal suit entailed. He informed Bridge that "we are your friends" but pondered what if these same friends did not want Bridge to serve any longer as president. Bridge rejected this suggestion and urged Biery and the executive

council to do the right thing by the two-week deadline (1T58-1T59).

14. On May 3, 2013, before the beginning of school and as students were arriving, Bridge distributed a letter/flyer by handing it personally to teachers as well as placing several on teacher's desks and under classroom doors (CP-4; 1T146-1T147, 1T149). Although the flyer was intended for teachers and was passed out to teachers, he did consider that it might be seen by students (1T147).

The purpose of the letter/flyer, Bridge wrote, was "to update you on where your association leadership has taken us all (CP-4)." Bridge asserted that he was removed from the presidency without proof of wrongdoing - e.g. his statements to the Board about illicit drug traffic was an expression of his legitimate concerns.

Bridge then warned in the flyer that his removal from office "may unfortunately lead to legal action. I will take this legal action if the executive council does not right the wrong they have committed against me, against you, and against our constitution and by-laws. I have given [them] two weeks to do this, and that will lapse one week from today (CP-4)." Bridge concluded the letter/flyer by describing the current leadership as based on personal vendettas and bigotry (CP-4; 1T54-1T55).

Bridge did not think CP-4 was intimidating (1T149). Having communicated by letter to the executive committee (CP-5), verbally with individual members of the Association executive

committee (CP-5) and by flyer to the membership that he fully intended to sue them, Bridge considered the advanced warning of possible legal action in CP-4 and CP-5 as well as the discussions with individuals not threatening but fair and friendly, because he was asking for a resolution before filing suit (1T55, 2T29, 2T31-2T32). Bridge, however, understood why many of his colleagues who read CP-4 and CP-5 and who spoke to him were concerned and even stressed upon learning that they might be sued (1T150).

15. On May 6, 2013, having been approached by several staff members raising concerns about Bridge's verbal and written statements as well as actions since his removal from union office, Superintendent Fogelson met with Bridge, Association Representative Chris Jones, Melchor, and Business Administrator/Board Secretary Christina Sharkey. Fogelson memorialized the meeting in a memo of same date, which Bridge confirmed in testimony was accurate (CP-6; 1T60, 2T5-2T6).

At the meeting, Fogelson explained about the staff concerns regarding Bridge's recent actions in school, including the May 3 flyer which staff described as intimidating and harassing and going beyond advocacy for his reinstatement as president (CP-5, CP-6; 1T175). He then directed Bridge to stop these activities.

Bridge denied the staff's allegations and responded to Fogelson that he loved working at the school, that he "only had inner sunshine" and that he would never intentionally intimidate staff (CP-6; 1T176). Fogelson explained that although he

understood Bridge's position, his behavior had to stop and, if not, Bridge would be suspended with pay and required to undergo a psychiatric examination (CP-6).

Bridge took away from the meeting that Fogelson was voicing concerns raised to him by some of Bridge's colleagues who felt that Bridge's actions were intimidating, harassing and, in their opinions, had gone well beyond his advocacy for reinstatement to union office. In essence, Bridge understood that some of his colleagues felt he had created a hostile work environment in the workplace through emails, in person and in public places such as the faculty room and hallway (1T179-1T180, 1T182). In particular, as a result of the Fogelson meeting, Bridge understood that his colleagues were concerned about the threat of legal action raised in CP-4 and CP-5 (2T12-2T13). He also took away from this meeting that it was not Fogelson or Melchor who were complaining about CP-4 and CP-5, but it was his colleagues' complaints that prompted the May 6 meeting and admonition from Fogelson to stop his conduct in the school (1T180-1T181). After the meeting, Chris Jones told Bridge that he needed to pay attention and be concerned about what Fogelson had told him during the meeting (2T10).

As a result, Bridge sent out no further communications to staff after the meeting (2T14).

16. On May 8, 2013, following up on a discussion with AAO Melchor, three staff members (Ritchie, Karen Black and Biery) sent him a memo entitled "Hostile Work Environment". These

complaints triggered an affirmative action investigation pursuant to the district's Healthy Workplace Environment Policy which requires employees to interact with each other with dignity and respect. The policy prohibits among other things conduct that a reasonable person would find hostile or offensive, including use of derogatory remarks or insults that a reasonable person would find threatening, intimidating or humiliating. The policy directs that an investigation be conducted once a complaint is filed (R-1; 1T185). The investigation was conducted by Melchor in response to the complaints filed by Ritchie, Black and Biery.

Basically, all three complained about Bridge's behavior which they described as many incidents of bullying, intimidation and harassment of faculty members. According to them, the incidents occurred in person, via email and in public locations, such as the faculty room. Specifically, they stated that the incidents included "threats of legal action, sexist comments, slander of fellow colleagues, and intimidation of executive council members and others." (CP-1). The three described an escalation in hostile behavior since Bridge was removed from the Association presidency (CP-1).

In the complaint memo, Ritchie, in her role as SAC, suggested that Bridge's statement - "justice will be served" - and actions warranted risk assessment to ensure the safety of staff, students and Bridge himself (CP-1). In addition to the complaint, on May 20, 2013, Ritchie gave Melchor a statement in which she accused Bridge of fabricating a gang rape incident that

he claimed to have heard about in the faculty room. Ritchie asserted that no teachers discussed a rape, and that reporting an incident that never occurred put her, as a non-tenured employee, in an uncomfortable position. Ritchie wrote that she avoids Bridge because he is loud and confrontational (CP-25).[7/]

17. Biery was also interviewed by Melchor and gave a statement in which he expressed concerns about Bridge's threat to file lawsuits, naming him personally (CP-12). He observed that the staff was particularly troubled and questioning what Bridge would do next, namely whether it would impact his classroom performance. Biery described safety concerns among the staff, based on Bridge's comment in a letter to the executive committee that "justice will be served."

Biery further wrote that there was a lot of emotion attached to Bridge's removal as president with some staff supporting Bridge but many others not, and that the situation was splitting the building in two, because Bridge insisted on airing his gripes publically and calling people names. Biery recommended to Melchor that Bridge get counseling (CP-12, CP-13).[8/]

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7/ Ritchie also wrote in her statement to Melchor, without attribution, that someone poured urine in her cars ventilation system (CP-25). Bridge denies that he was responsible (1T112). I credit his testimony in this regard. Ritchie's statement appears to be unsupported and gratuitous.

8/ Bridge contends that Biery's individual statement in CP-12 as well as Black's statement in CP-13 and the complaint they filed with Ritchie (CP-1) contradict each other regarding whether the staff feared for their safety as a result of Bridge's conduct. I do not find such a contradiction. In CP-12 and CP-13, Biery and Black are speaking for

Bridge testified that he understood why Biery felt threatened by the prospect of a lawsuit naming him personally (1T164).

18. Karen Black was a past association president and on the negotiating committee for the latest collective negotiations agreement. She gave a statement in support of her complaint to Melchor. Black wrote that she was offended by the comments Bridge made in the faculty room about the deficiencies of the past association leadership as well as comments about Teacher/Executive Committee Member Cali Roberts. She was also offended about Bridge's comments regarding females generally made both in the faculty room and in emails. According to Black, she and others stopped going to the faculty room whenever Bridge was present because Bridge used psychological and emotional intimidation. Her perception was that Bridge sat in a particular chair and glared at her when she entered the room. Black told Melchor she wanted Bridge to stop making her feel uncomfortable (CP-13).[9/]

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themselves, whereas in CP-1 Ritchie as SAC requests a risk assessment to ensure the safety of staff. These comments are not mutually exclusive.

9/ Bridge read Black's statement and concluded that it was contradicted by another teacher who was interviewed by Melchor, Jessica Koppinger. Black's statement referenced Koppinger, stating she came to Black reporting that Bridge made inappropriate comments to her and made her feel uneasy (CP-13; 1T83). Koppinger was interviewed and told Melchor that Bridge did make derogatory comments about Jarvis at an Association meeting and confirmed that Bridge made a derogatory comment about Cali Roberts although "[Bridge] never acted inappropriately to her (Koppinger) (CP-14)." I do not find that Koppinger's statement contradicts Black's.

19. In addition to Ritchie, Black and Biery, Melchor interviewed and took statements from three more individuals who also filed complaints of hostile work environment pertaining to Bridge, namely teachers Cali Roberts, Sandy Toronzi and Colleen DellaBella (CP-7, CP-9 through CP-28; R-2, R-3). They generally complained of incidents with Bridge during the 2011-2012 and 2012-2013 school years that caused them to feel uncomfortable, concerned and sometimes fearful.

20. During the investigation, Melchor learned about an incident involving an email exchange between Roberts and Bridge that later led to a loud confrontation in the faculty room between DellaBella and Bridge. This confrontation was the basis for one of the complaints against Bridge.

Specifically, on December 9, 2012, Roberts emailed Bridge about recent negotiations, criticizing his "jabs about past leadership and the negotiations team," who she characterized as "not the enemy" (CP-9). She urged him to stop attacking the membership and to start taking on the superintendent. She requested to speak to him the next day (CP-9).

Bridge viewed Roberts email as snarky, incredibly hostile, incorrect and cowardly in its assessment of his actions, since he viewed the negotiations team as causing the problem. He did not understand where Roberts' hostility was coming from since he

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Inappropriate "comments" and "actions" are not mutually exclusive.

liked "to put a smiley face on things however forceful my opinions might be." (1T72-1T73, 1T75, 1T137, 1T146)

Instead of contacting Roberts directly as she requested, Bridge replied the next day in an email copying the entire membership. He emailed the membership because he wanted to expose Roberts' "cattiness" and because he felt the concerns raised by Roberts involved a union matter, namely contract issue regarding advisors (CP-8, CP-10; 1T135, 1T189).

In his email response to Roberts and the general membership, Bridge blamed the negotiating team for the mishandling of a stipend pay issue and accused Roberts of being uninformed about executive council business. Bridge wrote that Roberts was entitled to her opinion but "opinions are like navels, everyone has one!" (CP-10).

On December 11, 2012, the day after Bridge sent this email to the membership about Roberts, DellaBella walked into the crowded faculty room before the start of school and overheard Bridge speaking to another teacher about the email and about Roberts. Since eighty (80) percent of the staff are women, Bridge admits that there were other women present, but Roberts was not there (1T139).

In the discussion overheard by DellaBella and others, Bridge called Roberts a coward for not sending her email complaints to the entire staff, choosing instead to email him directly (CP-9; 1T125). DellaBella objected to Bridge's comments about Roberts and confronted him. She criticized Bridge for speaking to a

colleague about another colleague in that manner; in her opinion, it was unprofessional. Their argument became loud and heated (1T145).

Bridge retorted to DellaBella that he was Association president, and that he wanted to bring Roberts up on charges of insubordination to him (1T144-1T145). He again referred to Roberts as a coward and then stated that her email to him was a typical woman's response, something a man would never do (CP-8). Bridge admits to making the statement to DellaBella about Roberts, but does not believe the statement was gender-biased (1T120-1T123, 1T125). According to Bridge, the statement about Roberts, that her email was "typical woman's response," was behavior descriptive of an immature girl; the typical woman in this context, Bridge contended, was not direct, forthright or personable (1T124, 1T142-1T143). He was surprised that DellaBella was offended by his comments regarding Roberts (1T123).

These statements, however, did upset DellaBella who felt belittled as a woman and concluded Bridge did not value her or female staff generally as equals (CP-24). In the past, on several occasions, DellaBella heard Bridge refer to women as "broads" in front of colleagues in the faculty room (R-2). Bridge testified that he did refer on occasion to women as "broads", thus, corroborating DellaBella's complaint in this regard, but explained that he is a fan of film and that this is a

commonly used comical phrase, not in his opinion derogatory (1T159). DellaBella clearly disagreed (R-2).

21. Roberts agreed with DellaBella's conclusion, namely that Bridge's remarks were derogatory towards women. She considered Bridge's actions towards her as disrespectful and a deliberate attempt to publically humiliate and embarrass her, particularly after she heard about the confrontation in the faculty room between DellaBella and Bridge (CP-11, CP-26; 1T127).

In her follow-up interview with Melchor, Roberts conceded that she did not feel physically threatened by Bridge, but she avoided him and would be very uncomfortable if she was assigned to co-teach with him. Her discomfort arose not only from what Bridge said about her in the faculty room, but also from his inability to control his temper as well as his extreme lack of respect towards young women, citing herself and several others. Bridge, in her opinion, was not receptive to young female staff when they disagreed with him (CP-27).

22. In a memo to Melchor dated June 27, 2012, Complainant Toronzi expanded on her complaint against Bridge. She agreed with Black's assessment that Bridge caused a division among staff in his attempts to control them (CP-15). In support of her assertions, Toronzi detailed an incident between herself and Bridge while she was acting as hall monitor at the beginning of school. She related that while Bridge was walking down the hall toward her and speaking to Teacher Michael Knapp, Toronzi heard Bridge "shhh" him, explaining that Toronzi was on the negotiating

team, and that she was sensitive. Toronzi was offended by these comments and confronted Bridge in the hall telling him it was rude and unprofessional to speak her name when she was clearly in the vicinity. Bridge told her she should get used to hearing her name as she was in a leadership position. At this point there were other teachers and students in the hall (CP-7; R-3).

Bridge admits to the conversation overheard by Toronzi. Bridge testified that he was speaking quietly to Knapp about the negotiations but was approximately 45 to 50 feet from Toronzi, when she overheard him telling Knapp "there is Sandy, she is on the negotiation team. She is very sensitive. I don't want to get her upset" (1T88-1T89, 1T209, 1T211). I infer that Bridge was not speaking quietly, but was speaking loudly enough for Toronzi to hear him from what he describes as a distance of 40 to 50 feet (2T54). Bridge contends he told Knapp to "shhh" because he did not want to hurt Toronzi's feeling, because she was on the negotiations team, and he did not agree with the team's actions. Contract negotiations were hotly contested and caused a rift among the staff (1T153, 1T157).

Knapp, the only witness called by Bridge at the hearing, generally confirmed the description of the hallway incident, namely what was said by Bridge and Toronzi, which he described as a loud exchange (CP-16, CP-28; 2T44-2T49). He had never witnessed two teachers verbally behaving in this manner. He walked away as the argument escalated because he did not want to be involved (CP-16). In a statement to Melchor as part of the AA

investigation, Knapp described the Toronzi incident and added that Bridge's verbal and email communications were perceived by staff as intimidating and demeaning and that Bridge's leadership had been contentious on almost every issue. Because of this, Knapp generally avoided the faculty room (CP-16).[10/]

23. Melchor interviewed Bridge as part of his investigation into the AA complaints, quizzing him specifically about this incident and others detailed by the complainants in their statements to him. Bridge admitted the confrontation with DellaBella in the crowded faculty room, namely, calling Roberts a coward and stating that her email was a girl-thing because she did not confront him face-to-face (CP-8; 1T125). As to the Toronzi incident in the hallway, Bridge asserted to Melchor that he (Melchor) should not be involved because the discussion was in the context of association business. Concerning Biery, Ritchie, Toronzi and Black, Bridge contended that they simply lied to Melchor (CP-8).

Bridge then told Melchor about an incident when some female staff were cold. Bridge told them "that it's a medical fact that women are more cold than men, it is a physiological difference, you can Google it" (CP-8). Melchor documented this statement for his investigation. It is unclear from evidence in the record why Bridge would describe this conversation to Melchor because, other

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10/ A couple of days after the hall confrontation, Toronzi emailed Bridge asking him to remove her from his Association email list regarding union business. Despite this request, Bridge inadvertently sent several more emails (CP-7, R-3).

than CP-8 which documents Bridge's statement to Melchor, there is no context from which to draw an inference. For instance, I cannot determine whether Bridge was giving an example of a comments about women which was not derogatory or whether Bridge was relating a specific conversation to which some female colleagues objected.[11/]

Finally, Melchor asked Bridge if there are any witnesses on his (Bridge's) behalf that he should interview. Bridge replied that although there was a group conspiring against him, six staff members (Mike Farrell, Chris Jones, Jackie Chaplin, Sarah Bonney and Jason Davis), he felt, would corroborate that he was not guilty of the acts asserted by complainants (CP-8).

24. Melchor then interviewed and took statements from the individuals suggested by Bridge who would support him in opposition to the complaints of hostile work environment lodged by Ritchie, Black, Biery, Roberts, DellaBella and Toronzi. None of these witnesses testified at this hearing, but their statements submitted to Melchor in the course of the AA investigation were introduced into evidence (CP-14, CP-16, CP-17 through CP-23). They are summarized below:

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11/ In Bridge's second petition to the Commissioner (A-5), Bridge describes this reference in detail. He explains that he remarked on the 60 degree temperature in the faculty room which, according to Bridge, was being adjusted by the building super to a temperature more normal for women. A colleague, Christine Serzan, told Bridge that his comment was extremely sexist and complained to the AAO. Bridge comments in this petition that many sources confirm that women are more sensitive to cold than men. I cannot incorporate this commentary in A-5 into the facts because no evidence was offered at the hearing about this incident.

A. Patty Tynan, who Bridge described as friendly to him, gave a statement to Melchor explaining that she had never had any hostile communication with Bridge nor had she witnessed any hostile or intimidating behavior between Bridge and the staff. However, she viewed his expressed intention to take legal action as a threat and felt that Bridge got into trouble by overstepping his bounds with teachers. Tynan also observed that after Bridge was removed from the Association presidency, the tone of his communication was bitter (CP-17).

B. Another interviewee, Mike Farrell, who Bridge describes as a friend and supportive of him, stated to Melchor that Bridge never exhibited hostile conduct toward himself or others, but explained that he (Farrell) generally did not associate with people who did not get along with Bridge, so he would not know about people who felt threatened by Bridge. Farrell heard Bridge talk about legal action but paid no attention. Nevertheless, Farrell confirmed that he heard Bridge make sexist comments in the faculty room directed at women in general. He assumed the comments were in jest, but understood how someone could take them the wrong way (CP-18; 1T128-1T129).

In reviewing Farrell's statement to Melchor, Bridge concurred that he may have made comments in jest but felt he had a right to have a private conversation in the faulty room or anywhere as long as the conversation was humorous (1T130-1T132, 1T159).

C. Sean Wilson also stated to Melchor that he never experienced or witnessed any hostile or intimidating conduct by Bridge towards others and added that Bridge's communications as Association president were business-like. He described the culture at the school both during and after Bridge's presidency as antagonistic between staff with a sense of disunity among many factions (CP-19).

D. Jason Davis stated that he had no knowledge of what went on in the faculty room, but acknowledged that Bridge's strong feelings rubbed staff the wrong way. Davis characterized the tone of the flyer (CP-4) sent to staff after Bridge was removed as president as "defending his positions." He then described two factions in the school - those who supported Bridge and those who did not. Davis denied ever hearing hostile comments from Bridge or negative comments about women (CP-20).

E. Chris Jones described Bridge as passionate if he believed in something, but the passion was not hostile. Jones had never heard Bridge make negative comments about women, just the opposite. He observed Bridge holding the door open for women. Nevertheless, Jones characterized the school culture as declining before Bridge's presidency. Jones felt, perhaps, if someone else had been president, he/she would have been able to galvanize the Association. Therefore, Jones commented that he would not vote for Bridge again if given the chance (CP-21).

F. Jackie Chaplin, a longtime faculty member, described Bridge as follows: "his intentions were good but the result was

bad" (CP-22). Although Bridge was always a gentleman to her and she had not personally heard Bridge's negative comments about women, she was aware that at an Association meeting several female staff charged that Bridge's communications to them were condescending and sexist. Although Chaplin had not personally experienced hostile conduct towards her by Bridge, she acknowledged that he was very forceful and his recent statement of legal action stressed her. After Bridge was removed from the presidency, Chaplin observed that the Association seemed to be deteriorating, causing her more stress. In summary, Chaplin concluded that Bridge took his Association leadership seriously, but his strong opinions got in the way (CP-22).

G. Sarah Bonney characterized her communication with Bridge as "fine." She never personally, only through hearsay, heard about Bridge making negative comments about women. She admitted hearing the exchange with DellaBella in the faculty room, which she described as heated and hostile on both Bridge's and DellaBella's part. Bonney received the flyer (CP-4) from Bridge on her classroom desk, but did not feel threatened by the letter (CP-23).

25. In all, Melchor interviewed 17 individuals out of a staff of approximately 117 which, according to Bridge, was "not a bad sampling" (1T186).

By letter dated August 12, 2013, Bridge was notified by Melchor of the results of the AA investigation into the charges lodged by Ritchie, Black and Biery and the others. Melchor

determined that Bridge's conduct towards staff members was severe and persuasive enough under the Board's Healthy Workplace Environment policy to create a hostile work environment (CP-2, R-1).

In particular, Melchor's investigation determined that:

> The grievance alleged that there have been incidents of bullying, intimidation and harassment of staff members by you. There is conclusive evidence to substantiate that your conduct in person, via email, and in public locations such as the faculty room and hallway has resulted in incidents of bullying, intimidation, and harassment towards staff members. The evidence substantiates the fact that staff members, who were recipients of your actions, found your conduct and demeanor to be threatening, causing unnecessary stress in the workplace. Female staff members report that you have made comments that are sexist in nature towards women and offensive to them personally. The evidence substantiates that you did make comments about women, which were construed by both female and male staff as being sexist in nature [CP-2].

Melchor recommended that the Board place the AA investigation in Bridge's personnel file and order Bridge to attend a Board approved workshop dealing specifically with healthy workplace environment. Melchor also notified Bridge that he could appeal the decision in writing within seven (7) working days after receipt. The appeal was to include specific enumerated papers. Bridge was informed that the Board would review all papers submitted to it on appeal and render a decision unless Bridge requested a hearing at which all parties could be represented by counsel and could present and examine witnesses who would testify under oath (CP-2).

26. Previously, Bridge had training in the district's affirmative action policies, specifically, in the areas of harassment, intimidation and bullying (1T125). He believed, however, that Melchor's investigation was not a careful review of the evidence because his report did not mention or include several discussions that he considered critical to the investigation that led to his discipline, namely the original meeting with Ritchie, Biery and Black referenced in CP-1, the May 6 meeting with Fogelson memorialized in CP-6 as well as a meeting or conversation Melchor had with Toronzi about a June 2012 hallway incident with Bridge and Knapp (CP-7; 1T62-1T65). Bridge also believed that Melchor's investigation was unfair and flawed because 77 percent of those interviewed claimed to feel no hostility from him and did not feel unsafe (1T107).

27. On September 19, 2013, Board Secretary Sharkey wrote Bridge. She acknowledged that AAO Melchor had received a letter from Bridge on August 20, 2013 setting forth Bridge's intent to appeal, that on September 5, 2013, Bridge sent an email to Melchor requesting copies of the documents necessary to appeal Melchor's decision and that Melchor provided the documents on September 6, 2013.

Sharkey then pointed out to Bridge that he had not requested a hearing before the Board as enumerated in the Board's AA complaint procedure. She requested that Bridge advise the Board in writing whether he wanted a hearing to present his appeal. In the event a hearing was requested, Sharkey explained, the Board

would schedule one which would be held in closed session unless Bridge waived his privacy rights in which case the hearing would be held in public (R-5).

28. Although Bridge acknowledges that he was informed of his right to appeal Melchor's decision to the Board and concedes that he requested and received copies of the documents that formed the basis of Melchor's decision, he never filed a written appeal or requested a hearing before the Board (2T20-2T21). He instead filed unfair practice charges with PERC and petitions with the Commissioner of Education (2T21).

29. Bridge concedes that other than the complaints of his colleagues filed with AAO Melchor, neither Superintendent Fogelson nor Melchor ever questioned Bridge about his union activities or imposed sanctions or disciplined him for those activities (2T22-2T23). Bridge contends that it was his speech concerning union matters that caused colleagues to complain about him to Melchor and Fogelson which resulted in the adverse AA findings (2T26, 2T28).

**ANALYSIS**

In New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979), the Commission set forth the standards for determining whether to grant a motion to dismiss at the conclusion of charging party's case as follows:

> . . . the Commission utilizes the standards set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). Therein, the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth,

> nature or extent . . . of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Id at 198.

See also, Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520, 535-542 (1995) and Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999).

The Dolson Court set forth the following test:

> . . .whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. Id. At 5.

These same legal standards in deciding a motion for involuntary dismissal at the end of petitioner's case apply as well to a proceeding before the Commissioner of Education. Belinda Love v. Board of Education of the City of Trenton, OAL DKT. No. EDU 60-01, Agency DKT. No. 408-11/00. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the legally competent credible evidence. Jackson v. D.L. and W.R.R., 111 N.J.L. 487, 490 (E.& A. 1933).

Applying these standards and based on the facts adduced by Charging Party/Petitioner in its case in chief, I recommend that the Respondent's motion to dismiss the Complaint as to the unfair practice charge under CI-2013-060 be denied. I also recommend that the Respondent's motion to dismiss the Complaint as to

charges under CI-2013-059 and CI-2013-061 be granted. I further recommend that the Respondent's motion to dismiss the petitions under EDU 14001-2013N and EDU 16637-2013N be granted.

CI-2013-060

Charging Party Bridge alleges that Respondent violated 5.4a(1) of the Act when the Board initiated an affirmative action investigation against him for distributing an email from another teacher that he distributed at an Association meeting. The email referred to the Superintendent as a "kike." Bridge was charged with republishing the offensive epithet. He asserts, that the AA investigation and its aftermath (the withholding of his 2013-2014 salary increment) impermissibly interfered with his protected activity during the course of an Association meeting.

An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp. The test for determining whether 5.4a(1) has been violated is an objective one based on whether an employer's action tends to interfere with employee rights, not a subjective one based on the employer's state of

mind. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982, aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

Here, Bridge testified about the Association meeting at which he passed out the email from another teacher containing the anti-Semitic reference. He did so to counter her challenge to his presidency. His testimony contained no other reference to the dissemination of the email or the affirmative action investigation that was launched charging him with republishing the offensive comment. Nor did he introduce any exhibits in support of the allegations in this charge. Ordinarily, I would recommend that this charge be dismissed, because Charging Party failed to meet its burden of proof.

In this instance, however, Respondent submitted a position statement as its Answer. Pursuant to N.J.A.C. 19:14-3.1, any allegation in the Complaint not specifically denied or explained shall be deemed to be admitted to be true. Accordingly, the position statement contained several admissions which I incorporated as fact. For example, in its position statement, Respondent admitted that Superintendent Fogelson filed an affirmative action complaint against Bridge for distributing the anti-Semitic email at the Association meeting as well as against the other teacher for writing it. The Board further admitted that its Affirmative Action Officer concluded that Bridge distributed the email for political gain at the expense of the

Superintendent's right to a healthy work environment in violation of the Board's affirmative action policy. Finally, the Board confirmed in its Answer that the Board sustained the Affirmative Action Officer's investigation and recommendations and, thereafter, withheld Bridge's employment and adjustment increments for the 2013-2014 school year.

Public employees and their labor organizations have a free speech right of communication. New Jersey Department of Corrections, P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997); Jackson Tp., P.E.R.C. No. 88-14, 14 NJPER 405 (¶19160 1988); Township of Hillsborough, H.E. 2000-2, 26 NJPER 1 (¶31000 1999). Here, Bridge was disciplined for an email he distributed at an Association meeting. He had a right to communicate to Association members in this manner. Accordingly, the facts presented by Charging Party together with the admissions of the Board are sufficient to establish a prima facie case, namely that the action taken by the Board to withhold his increment had a tendency to interfere with Bridge's protected activity, namely his right to address the membership at an Association meeting and present the qualifications or lack thereof of the individual challenging his presidency. This right is protected by 5.3 of our Act.

Based on the foregoing, I recommend that Respondent's motion to dismiss the unfair practice charge under CI-2013-060 be denied.

CI-2013-059

Bridge alleges in this charge that the Board interfered with his rights to engage in political activity within the Association. Specifically, Bridge asserts that on May 6, 2013, Superintendent Fogelson called Bridge into his office and in front of witnesses observed that Bridge was "over the line" in exercising his political speech, namely in passing out a flyer to colleagues in the hallways and on desks at the beginning of school. The flyer protested his removal as association president, contending his removal was taken against the association constitution and by-laws and threatening legal action unless he was reinstated within two weeks.

At the May 6 meeting, Fogelson informed Bridge that he had received complaints from staff about his (Bridge's) verbal and written statements and actions in the school since he was removed from office. Fogelson directed him to cease this activity or he would be suspended with pay and required to undergo psychiatric evaluations. Fogelson memorialized the meeting in a memo to Bridge.

The first issue to be addressed is whether the conduct for which Bridge was given a verbal and written warning was conduct

protected by the Act. If the answer to the first question is in the affirmative, did Fogelson's meeting and written warning tend to interfere with that protected activity? Clearly, if the conduct for which Bridge was admonished was not protected, there would be no 5.4a(1) violation.

5.3 states that:

> . . . public employees shall have and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. . .

Protected activity has been defined as conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual. North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978). Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986) (assistance to labor organization includes participation in negotiations and grievance processing). See generally, State of New Jersey (Stockton College), P.E.R.C. No. 2011-78, 37 NJPER 200 (¶63 2011) (IFPTE president engaged in protected activity when he approached Assistant Superintendent about hiring temporary workers and the Superintendent's future son-in-law); City of Somers Point, P.E.R.C. No. 2003-40, 28 NJPER 586 (¶33182 2002)

(addressing employer over terms and condition of employment protected even if underlying "grievance" not properly filed).

The Commission has declined, however, to exercise jurisdiction over internal union matters, since courts have exclusive jurisdiction to enforce union constitutions and by-laws. The Commission has determined that employee organizations are private organizations and litigation over internal disputes such as the right to hold office should be litigated in the courts and do not constitute unfair practices. City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982). See also, County of Hudson and Dist. 1199J and Patrick Desmond, P.E.R.C. No. 2008-32, 33 NJPER 315 (¶118 2007) (factional dispute over who can or should represent interests of majority representative can be decided by a court of competent jurisdiction); State of New Jersey, D.U.P. No. 2000-3, 25 NJPER 390 (¶30167 1999) (allegations of one union member against another over who should be shop steward internal union matter, not unfair practice).

The Commission will only exercise jurisdiction over internal union matters where rights protected by N.J.S.A. 34:13A-5.3 are implicated. For instance, in West New York Police Supervisors Association and John Santa Maria, P.E.R.C. No. 89-60, 15 NJPER 21 (¶20007 1988), aff'd 235 N.J. Super. 123 (App. Div. 1989), the Commission considered whether a union rule, requiring that as a

condition of membership charging party pay penalty charges assessed for the period he was eligible for membership but chose not to join, violated the Act. There, the Commission rejected the argument that the penalty rule was merely an internal union matter finding that the rule interfered with charging party's right to refrain from joining the Association by penalizing him the equivalent of union dues for the period of time he chose not to join. This, the Commission determined, violated 5.3 guarantees of the right to freely join without penalty any employee organization or to refrain from doing so.

Here, Bridge has not been refused membership in the Association nor has he been the subject of a penalty rule. Rather, the Association removed him from office. His complaint is that, in doing so, the Association violated its own by-laws and constitution. Bridge's dispute with the Association is an internal union matter, not subject to the Commission's unfair practice jurisdiction.

Bridge maintains, nevertheless, that he was entitled to remark verbally and in writing on his removal as Association president and his intention to bring legal action. His free speech in this context, he believes, was protected whether on or off school premises.

In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission, addressing issues of

free speech, determined that in criticizing an employee representative, an employer must be careful to differentiate between the employee's status as a union representative and his status as an employee of the employer. When an employee is engaged in protected activity the employee and employer are equals.

However, unlike Black Horse, Bridge was not acting as an employee representative. Nor was he acting on behalf of other employees in a concerted activity or on behalf of himself in discussing terms and conditions of employment. His verbal and written communications to the staff occurring on school time were solely to benefit his own agenda of getting himself reinstated to union office. Union office holding is not a term and condition of employment. City of Jersey City.

Even assuming Bridge was correct that his ouster was illegal under the Association by-laws and constitution, his right to bring this private dispute onto school premises was not unfettered, especially where his actions threatened workplace discipline, order and respect.[12/] Public employee's right of free

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12/ Employee representatives engaged with employers in protected activities are equals, but not all speech or conduct by an employee representative acting on behalf of the union is speech entitled to the Act's protection. Courts have drawn a line between giving leeway for adversarial/impulsive behavior in negotiations or grievance meetings and conduct which threatens workplace discipline, order and respect. See generally, State of New Jersey, Dept. of Treasury

speech communication with co-workers is not unfettered. That right, in labor-management cases, is balanced against the obligation of the public employer to deliver its governmental responsibilities. In a school setting, those responsibilities encompass first and foremost the delivery of education to students.

In Tinker et al. v. Des Moines Independent Community School District et al., 393 U.S. 503 (1969), the Supreme Court addressed First Amendment free speech rights of students protesting the Vietnam War by wearing arm bands to school. A school policy prohibited the wearing of an arm band in school and threatened suspension of any student refusing to remove such an armband. The policy sought to prevent a disturbance at school. The Supreme Court reversed lower court rulings upholding the school's regulation. The Court determined that the school's policy violated the students' rights of free speech where there was no evidence that the school administration had reason to anticipate that the wearing of the arm bands would impede the work of the school or impinge upon the rights of other students. The policy, the Court found, was based on the school administration's wish to

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(Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (para.32056 2001) and State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C. No. 2001-52, 27 NJPER 167 (para.32057 2001).

avoid controversy which might flow from the symbolic expression of wearing the arm bands.

Unlike Tinker, Fogelson sought to restrict Bridge's actions and speech on school premises and interactions with his colleagues which were actually causing complaints of intimidation and stress. His admonition to Bridge to cease these activities in the school were not to avoid future disturbance but to quell what had already caused concern among staff. Moreover, Bridge's actions did not implicate a broader societal message as in Tinker but concerned a private dispute which spilled over into the public workplace. In these circumstances, Fogelson's warning to Bridge did not infringe on Bridge's First Amendment free speech rights.

Specifically, Fogelson was within his rights to reign in Bridge's conduct as an employee toward other employees which conduct occurred on school premises and was causing stress in the workplace. The wide latitude afforded employee representatives was not extended to Bridge in these circumstances. Contrast, State of New Jersey and Patrolman's Benevolent Ass'n, Local 105 and New Jersey State Corrections Ass'n, FOP Lodge 200, D.R. 2006-18, 32 NJPER 145 (¶66 2006), review denied P.E.R.C. No. 2006-92, 32 NJPER (¶92 2006), aff'd ___ NJPER ___ (¶__ App. Div. 2007) (employer must remain neutral during representation election giving both sides equal access to premises for

campaigning). See also, City of Newark, D.R. 95-2, 20 NJPER 342 (¶25176 1994); County of Monmouth, D.R. 92-24, 18 NJPER 201 (¶23090 1992); Ocean Cty. Judiciary, D.R. 86-25, 12 NJPER 511 (¶17191 1986).

Accordingly, I do not find that Bridge's activity in passing out the flyer on school premises and during the beginning of school as well as verbal statements to staff on school premises during school hours about his removal as president and possible legal action were protected conduct under the Act. Therefore, Superintendent Fogelson's action in the May 6 meeting and subsequent verbal and written warnings by Superintendent Fogelson admonishing Bridge to stop these activities at the school did not independently violate 5.4a(1).

Based on the foregoing, I recommend that the Respondent's motion to dismiss the Complaint as to the charge under CI-2013-59 be granted.

**CI-2013-061**

In this charge, Bridge contends that a second affirmative action investigation instigated by complaints of staff regarding his conduct, namely that Bridge made demeaning remarks to and about women in the work place as well as remarks that were intimidating, bullying and harassing to co-workers causing a hostile work environment, interfered with his right to engage in Association political matters. Bridge contends that the

complainants represent a faction in the Association sympathetic to the administration, and that one or more of the complainants lied during the investigation in order to impugn his (Bridge's) reputation. The administration, he asserts, in pursuing the affirmative action investigation demonstrated its hostility to him.

The facts adduced by Bridge were that six individuals filed complaints of hostile work environment with AAO/Principal Melchor. Melchor then instigated an investigation required by the District's Healthy Workplace Environment policy. The investigation included interviews with Bridge and the six complainants. Also, at Bridge's suggestion, Melchor interviewed six staff members, who Bridge felt, would support him in challenging the complainants' allegations of inappropriate behavior.

The complainants related various incidents, including the passing out of the flyer at school as well as discussions in school with Executive Council Member/Association Treasurer Don Biery, all involving Bridge's removal from Association office and his threat to bring legal action against the Association and individual members. These threats, the complainants asserted, represented intimidation and bullying in the work place. There were also concerns of safety raised because in one of the communications, Bridge stated that "justice will be served."

As to the sexist comments, one incident in particular stood out. In the faculty room, Bridge was heard to criticize a female colleague - Cali Roberts - who had sent him an email about how he handled Association business, calling her a coward. When confronted by another colleague who objected to his criticism of Roberts, Bridge referred to the Roberts' email as a typical woman's response - a "girl thing to do", something a man would never do. In his testimony, Bridge admitted making the faculty room conversation and further explained that his reference to a typical woman, in that instance, was behavior descriptive of an immature girl, someone who was not direct, forthright or personable. He was surprised that anyone took offense to his statement. Bridge also admitted that he referred to female colleagues as "broads" on occasion.

Roberts told Melchor that although she did not feel threatened by Bridge she avoided him and would be uncomfortable if assigned to co-teach with him. She explained that Bridge was not respectful or receptive to young female staff especially when they disagreed with him. Melchor's interviews with the complainants confirmed that Bridge's remarks about females resulted in some avoiding the faculty room in order to avoid Bridge.

As to the remaining interviewees, individuals recommended by Bridge to be interviewed during the investigation, some directly

supported that inappropriate comments were made about female staff, while others confirmed that Bridge was either directly or indirectly responsible for the disharmony among staff. For instance, Farrell heard sexist comments about women; Chaplin heard several female colleagues comment about Bridge's inappropriate attitude toward them and Bridge's conduct stressed her; Jones felt if Bridge had behaved differently the Association would be in better shape and confirmed he would not vote for him again given the chance; Wilson characterized the culture in the school both during and after Bridge's presidency as antagonistic and disharmonious among the various staff factions; Tynan stated Bridge overstepped his bounds with teachers and that since his removal as president, his tone has been bitter. Even Davis who denied hearing Bridge make hostile comments or negative comments about women admitted that Bridge's strong feelings rubbed staff the wrong way. Finally Knapp, the only witness called by Bridge, testified that as a result of Bridge's behavior in the school, he avoided going to the faculty room.

Melchor concluded from his investigation that Bridge had violated the district's policy by creating a hostile work environment, namely by conduct that was bullying, intimidating and harassing. The conduct was in person, in emails and in public places such as the faculty room and hallway. His actions toward female staff, in particular, was found to be sexist in

nature and offensive to them as well as to male colleagues. Melchor recommended that Bridge attend healthy work environment work shops and that the AA report be placed in his file. Bridge did not appeal these findings or recommendations to the Board.

Bridge asserts that Melchor's investigation was unfair and flawed, because 77% of those interviewed claimed to feel no hostility from him and did not feel unsafe. Assuming Bridge was correct in his mathematical calculations that 77% of the interviewees felt no hostility from him, the percentage was skewed because half of those interviewed were individuals interviewed at Bridge's request and presumably supported his position that he did not create a hostile work environment as charged.

However, not withstanding Bridge's claim that these individuals were not offended, Bridge's belief in this regard is irrelevant. Of the six original complainants, all expressed that their work environment was hostile due to Bridge's conduct towards them and others. It caused them to avoid him and the faculty room.

Moreover, contrary to Bridge's claim that the interviewees recommended by him did not feel he created a hostile environment, a review of the statements given by these individuals demonstrate mixed feelings as to his conduct. Most expressed reservations about him. For instance, some confirmed hearing Bridge make

sexist comments and others remarked on the disharmony among staff as a result of Bridge's conduct. Clearly, together with the complainants, a majority of those interviewed corroborated some of the charges in the complaints.

In any event, Melchor interviewed all of the individuals recommended by Bridge. There is no evidence that Bridge was limited in the number of individuals he could have requested Melchor to interview on his behalf. Additionally, Bridge was given an opportunity to challenge Melchor's allegedly "unfair" and "flawed" conclusions by requesting a hearing before the Board on appeal. He did not do so.

There is no dispute that Bridge was upset by his removal from office and that emotion triggered actions and conduct by Bridge in the school, while he was seeking to garner support for his reinstatement, which some colleagues found to be stressful and intimidating. There is also no dispute that Bridge made remarks to and about female colleagues in school which were offensive to female staff as well as male staff. The question then is whether the instigation of an affirmative action investigation at the behest of complainants alleging hostile work environment constitutes a violation of the Act.

Anti-discrimination statutes, particularly Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. §20003 et seq. and the New Jersey Law Against Discrimination (LAD), N.J.S.A.

10:5-1 et seq., as well as case law interpreting those statutes, such as Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993) and Blakey v. Continental Airlines, 164 N.J. 38 (2000) require an employer to act to prevent and stop harassment in the workplace. In Blakey, the Court determined that employers have a duty to take measures to stop co-worker harassment, when the employer knows or should have known that the harassment is taking place. Id. at 62. See also, Cerdeira v. Martindale-Hubbell, 402 N.J. Super. 486, 493-493 (App. Div. 2008) (employer can be liable for co-worker harassment if employer did not have effective anti-harassment policy and complaint mechanism and harm ensued to plaintiff). In Knabe v. The Boury Corp., 114 F. 3d 407 (3rd Cir. 1997), the Court opined that once an employer has actual or constructive knowledge of the existence of a hostile work environment and fails to take prompt and adequate remedial action, it can be held liable for the discriminatory conduct of its employee.

Finally, the Commission has held that an employer has a managerial prerogative as well as a legal obligation to implement an affirmative action plan and to investigate complaints of discrimination and hostile work environment in administering and enforcing its plan. Holding union office or being on the negotiations team does not, standing alone, insulate an employee from an affirmative action investigation. State of New Jersey

(Trenton State Coll.), H.E. No. 90-48 at 16 NJPER 337, 339 (¶21139 1990) adopted P.E.R.C. No. 91-1, 16 NJPER 419 (¶21175 1990). See also, Jersey City Educ. Ass'n v. Jersey City Bd. of Ed., 218 N.J. Super. 177, 187-188 (App. Div. 1987).

Applying these standards to the matter before me, the facts support that the AA investigation was the result of complaints to AAO Melchor by co-workers against Bridge. The Board's affirmative action policy mandated that the AAO investigate the complaints and, where necessary, remediate the discriminatory conduct. There is no evidence that the complaints were encouraged or promoted by any action of the employer. There is also no evidence, as alleged by Bridge in his charge, that the employer manipulated the complainants because of any alleged agenda to encourage a faction in the Association friendly to the administration, or that the investigation was prompted by hostility to Bridge's former presidency or reinstatement to Association office. Bridge admitted at this hearing that neither Superintendent Fogelson nor AAO Melchor ever questioned him about his union activities or imposed sanctions or disciplined him for those activities. The affirmative action investigation was triggered solely in response to staff complaints of hostile work environment and in compliance with existing Board policy.

That some complaints grew out of or touched upon Association internal disputes was of no moment, where the conduct complained

of occurred in the work place and was offensive to his co-workers. For instance, the Roberts/Bridge email exchange concerned union matters - e.g. critical of how negotiations were handled, but Bridge's sexist comments in the faculty room about Roberts email specifically and females generally were offensive to female and male colleagues alike. These sexist comments are prohibited by discrimination policies, statutes and case law cited above and are not, therefore, rights protected by our Act or First Amendment free speech rights.

Next, it is irrelevant that Bridge believes that his comments about women were not offensive and were even humorous. The test in a gender discrimination claim is whether the reasonable person of complainant's gender would consider workplace acts and comments sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment. Cutler v. Dorn, 196 N.J. 419, 430 (2008). Thus, it is of no moment that Bridge thought his comments inoffensive, it is whether a reasonable female colleague would find them harmless or sufficiently offensive and pervasive to create a hostile environment - e.g. Roberts, DellaBella, Black, and others found his comments about women offensive and avoided the faculty room so as not to encounter Bridge.

It is also irrelevant that Bridge thought he was doing his colleagues a favor by giving them fair warning that he was going

to bring legal action against them, when the complainants expressed that they were intimidated and stressed in the work place by these verbal and written actions. Those actions caused them to avoid him and the faculty room. One complainant expressed reservations about working with him in a classroom if assigned to co-teach.

Melchor concluded, based on his investigation, that Bridge's statements to co-workers and actions violated the Board's Healthy Workplace Environment Policy, and that corrective action was necessary.

Based on the evidence in the record before me, the Board's actions do not demonstrate a tendency to interfere with Bridge's exercise of any rights guaranteed by our Act regarding the affirmative action investigation. Specifically, Bridge has no right under our Act to create a hostile work environment for female colleagues by sexist comments or to intimidate co-workers in the workplace with threats of legal action. The only actions that the Board interfered with were halting offensive gender discriminatory speech and intimidating behavior in the workplace.

Based on the foregoing, I recommend that Respondent's motion to dismiss the Complaint as to charge CI-2013-61 be granted.

In this petition, Bridge appeals a disciplinary action of the Board in withholding his 2013-2014 salary increment[13/] This action, Bridge asserts, falls under N.J.S.A. 18A:6-9 because the Board's actions violated (1) the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2, et seq. (the HIB statute) by applying it to Bridge's actions; (2) the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq. (the PERC statute) by interfering with union activities, in particular his free speech rights; (3) Article 1, Paragraph 6 of the New Jersey Constitution free speech rights as well as the United States Constitution's First Amendment free speech rights in addressing a Board meeting about his concerns regarding use of drugs in the schools; and (4) Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, et seq. (Title VII) by disciplining Bridge for revealing the discriminatory behavior of a colleague, namely the anti-Semitic email.

The facts as adduced by Bridge at the hearing in this matter together with the admissions of the Board in its Answer to the

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13/ Bridge also states that, as part of the discipline, the Board required him to attend a "sensitivity to discrimination in the workplace" seminar and placed a letter of reprimand in his file. In this instance, Bridge's petition confuses the recommendations of a subsequent affirmative action investigation which was the subject of Bridge's second petition under EDU 16637-2013N. For purposes of this analysis, as to the petition under EDU 14001-2013N, I only consider Bridge's appeal of the Board's decision to withhold his 2013-2014 salary increment for disciplinary reasons.

unfair practice charges were that Bridge's 2013-2014 increment withholding was the result of an affirmative action complaint filed by Superintendent Fogelson against both Bridge as well as then Association Vice-President Jarvis. Bridge in particular was charged with republishing hateful or discriminatory speech, when at an Association meeting he distributed an email written by Jarvis to him in which Jarvis referred to the Superintendent as a "kike." Subsequently, the email became widely disseminated among the staff. Fogelson complained that the wide dissemination of the email caused a hostile work environment, making it difficult for him to come into the school building and perform his duties. After an investigation by the Board's Affirmative Action Officer (AAO) and a hearing before the Board, Bridge was found guilty of violating the Board's affirmative action policy and Title VII of the Civil Rights Act of 1964. The Board upheld the AAO's recommendation to withhold his 2013-2014 salary increment.

In its Notice to Dismiss in Lieu of Answer (A-4), the Board urges dismissal of this petition on procedural grounds, because (a) the Commissioner lacks jurisdiction to adjudicate the withholding of increments for disciplinary reasons, (b) the Commissioner lacks jurisdiction to adjudicate claims of violations under the PERC statute which are being adjudicated separately in this consolidated proceeding under the unfair practice charges, the disciplinary withholding was not based on

the HIB statute as alleged in Bridge's petition, and Bridge has filed a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC) which has primary jurisdiction to resolve Title VII complaints, and, in any event, Title VII does not arise under the New Jersey School laws and does not therefore confer jurisdiction on the Commissioner (A-4).

Jurisdictional issues are threshold issues, separate and apart from the merits of the case. Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education, OAL Dkt. No. EDU 735-0, Agency Dkt. No. 27-1/034; North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, and Eileen Wende, OAL Dkt. No. EDU 9838-97, Agency Dkt. No. 290-8/97. Under N.J.S.A. 34:13A-26 et seq. as well as pertinent case law, all disputes involving increment withholdings by an employer for predominantly disciplinary reasons shall be subject to the parties' grievance procedure. This statute speaks in the imperative and is, thus controlling in the matter before me. Contrast, N.J.S.A. 34:13A-27d (if reason for withholding predominantly relates to teaching performance, appeal shall be filed with the Commissioner of Education).; Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144, 146 (¶22057 1991)(only withholding of teaching staff increment based on actual teaching performance appealable to the Commissioner of Education). See generally,

Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. 97-40, 22 NJPER 390 (¶27211 1996).

Here, there is no dispute that the increment withholding was disciplinary and done as a result of the dissemination of the anti-Semitic email at the Association meeting. The Board admits these facts in its Notice of Motion to Dismiss in lieu of Answer (A-4) and in its Answer to the unfair practice charge (A-2). Thus, any appeal of the increment withholding in this instance must go to binding arbitration; the Commissioner lacks jurisdiction to adjudicate this claim. Any challenge to the Board's actions in withholding the increment under these circumstances can be presented to an arbitrator and the appropriate remedy applied if the discipline is determined to be unwarranted.

Next, Bridge's claims that the Board's actions in withholding his increment due to his dissemination of an email at an Association meeting interfered with rights protected by the Act are within PERC's jurisdiction not the Commissioner's. In Board of Educ. of Hamilton v. Fraleigh, 93 N.J.A.R. 2d (EDU) 538, the Court determined that where the subject of a dispute does not call for any particular administrative expertise, the Commissioner of Education cannot invoke jurisdiction. Here, Bridge contends that the increment withholding violates his

constitutional right to free speech. However, that claim is only tangentially related to school law in that Bridge is a teacher. Nevertheless, the speech at the heart of Bridge's petition is political in nature within the context of union activity at an Association meetings and invokes PERC's particular expertise not the Commissioner's. These claims are appropriately considered under the unfair practice charge (CI-2013-60) still pending before me.

As to Bridge's allegations regarding violations under Title VII of the Civil Rights Act, these implicate federal claims which he is pursuing separately in an EEOC complaint. Specifically, Bridge's claim asserts that by disciplining him for disseminating the anti-Semitic email and revealing a co-workers hate speech, the Board punished him in violation of Title VII's prohibition against discriminating against an employee for that employee's charge, testimony, assistance or participation in an investigation, proceeding or hearing related to allegations of discrimination under Title VII.

The Commissioner and the New Jersey Division on Civil Rights (DCR) have concurrent jurisdiction in discrimination cases concerning education, and, under principals of administrative comity, the Commissioner has the predominant interest where the discrimination occurs in a public education setting. Balsey v. North Hunterdon Regional School District Board of Education and

Hopek, 117 N.J. 434, 447 (1990). This concurrent jurisdiction does not, however, extend to federal claims, and there is no claim in the petition that New Jersey's Law Against Discrimination was violated (LAD).[14/] Accordingly, the Commissioner lacks jurisdiction to consider Bridge's Title VII claims.

Bridge, also, asserts that the Board violated the HIB statute by applying it to Bridge's actions at the Association meeting. The HIB statute applies to bullying against students. The facts in this matter do not support that the affirmative action complaint, investigation or recommendation to withhold Bridge's 2013-2014 salary increment or the action of the Board in withholding the increment implicated the HIB statute. Therefore, there is nothing in this record which would support that a violation under HIB occurred.

Finally, Bridge asserts violations of his free speech rights under both the New Jersey Constitution and the United States

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14/ I am marking Bridge's response to A-4 and A-6 (the Board's Notice of Motions to Dismiss in lieu of Answer) as A-10. In A-10, Bridge contends for the first time that his petition is not alleging a violation of Title VII, but is asserting a violation of LAD. I do not consider this argument raised after the filing of the petitions and without a request to amend. The Board contends, in any event, that it would be highly prejudicial to grant an amendment at this juncture. I agree.

I am also marking as A-11, the Board's replay brief to A-10.

Constitution. Specifically, he alleges that his speech to the Association at an Association meeting is protected as a matter of public concern. There is a two-pronged balancing test when determining whether a public employee's speech should be afforded First Amendment protection. The first prong implicates whether the speech is on a matter of public concern. If the answer to the first prong is in the affirmative, then prong two requires a balance of the employee's interest in free speech against the government's fulfillment of its responsibilities to the public through its employees. Karins v. Atlantic City, 152 N.J. 532, 550 (1998).

Here, the speech Bridge contends is protected by the First Amendment and New Jersey Constitution, occurred in the context of a union meeting, a private affair.[15/] The facts adduced at the hearing are that Bridge revealed an anti-Semitic comment of a rival seeking to replace him as Association president to the attendees at an Association meeting in an attempt to thwart a challenge to his union office. Bridge did not report the offensive comment to the AAO or file an AA complaint. The facts support, therefore, that his primary goal was to prevent his

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15/ Bridge's reliance on Rankin v. McPherson, 483 U.S. 378 (1987) is misplaced. There, the Court upheld the free speech rights of citizens in a public square even where the speech is outrageous (McPherson expressed support for a second assassination attempt on then-President Reagan). Here, the speech that is at issue occurred in the context of a private setting, namely an Association meeting.

removal as Association President and, by extension, thwart the challenge of his rival, the author of the offensive email. The question of who holds union office is an internal union matter, not a matter of concern to the public as asserted by Bridge.

Nevertheless, if the Board violated Bridge's right to communicate freely with union members, then a violation under the PERC statute is found. Public employees and their labor organizations have a free speech right of communication, but in a labor management setting, the trier of fact must balance the rights of a labor organization with the obligations of the public employer to deliver its governmental responsibilities. New Jersey Department of Corrections, P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997) adopting H.E. No 97-26, 23 NJPER 221, 223 (¶28106 1997); Jackson Tp., P.E.R.C. No. 89-124, 14 NJPER 405 (¶19160 1988) adopting H.E. No. 88-49, 14 NJPER 293, 304 (¶19109). In the school setting, that primary responsibility is to deliver an education to students.

Here, the essence of this petition is Bridge's assertion of a right to communicate with union members at an Association meeting free of government interference, a right protected by the PERC statute. These allegations are asserted under unfair practice charge CI-2013-60. I have denied the Board's motion to dismiss as to this charge, since giving every favorable inference to Bridge, I could not determine on the record before me and

applying a balancing test whether the Board's obligation to deliver educational services to students was impeded by Bridge's communication of the anti-Semitic email at the Association meeting, thus outweighing Bridge's right to communicate freely with union members. If the Board can prove on a review of all the facts that, on balance, the disruption to its delivery of governmental services justified the discipline imposed on Bridge, namely the withholding of his increment, then its actions will not have violated the PERC statute. A full review of the facts was warranted, so I denied the motion to dismiss that charge. Accordingly, Bridge's free speech claims, as asserted in this petition and established by Bridge in his case in chief, implicate PERC's jurisdiction, not the Commissioner's.[16/]

Based on the foregoing, I recommend that Respondent's motion to dismiss the petition under EDU 14001-2013N, Agency Dkt. No. 215-9/13 be granted.

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16/ There are no facts presented by Bridge to support that any statements he made at a Board meeting about the drug enforcement policies was stifled by any Board member or by the administration. Thus, no free speech rights are implicated in this regard. There are also no facts presented by Bridge to support that the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1 was violated that would necessitate the Commissioner's oversight. In essence, Bridge's complaint is against Ritchie who, he asserts, falsely accused him of threatening her job due to his remarks at the Board meeting. Whether Ritchie was correct or mistaken as to consequences of Bridge's remarks at the Board meeting does not convert this matter into an issue implicating the school laws.

**OAL Dkt. No. EDU 16637-2013N, Agency Dkt. No. 257-10/13**

This petition mirrors claims under CI-2013-59 and CI-2013-61. First, the petition alleges that Superintendent Fogelson issued Bridge a warning after Bridge distributed a flyer to staff at the beginning of school pertaining to his removal as Association president. Fogelson was responding to staff complaints about Bridge's behavior in person, by email and in public places in the school. The warning cautioned Bridge to cease his behavior or risk discipline. This warning, Bridge asserts, violates the PERC statute by interfering with his right to communicate with Association members.

Next, the petition alleges that a second affirmative action investigation was instigated by six staff members charging Bridge with bullying, intimidation and harassment as well as making sexist and offensive comments to female colleagues. His actions, it was charged, caused a hostile work environment. This investigation resulted in a finding of a violation of the Board's healthy workplace environment policy and a recommendation by the AAO that Bridge attend a workshop dealing with healthy workplace environment, and that the AA investigation be placed in his personnel file. The Board notified him of his right to appeal. Bridge did not appeal these findings or recommendations to the Board as was his right under the healthy workplace environment policy. These facts were presented in evidence at the hearing.

However, other allegations in this petition were not presented as facts either through testimony or documentary evidence. I, therefore, must dismiss these allegations since they were not proven by a preponderance, or even any evidence, at the hearing.

Specifically, Bridge alleges in this petition that after addressing the Board at a meeting about its drug policies, Superintendent Fogelson threatened that Bridge's comments could lead to his (Fogelson's) termination if the press had been present, and that Board President Hanelt also voiced concern to Bridge about the effect of his comments on the press. Bridge further contends in the petition that at the Association meeting to remove him as president, Substance Abuse Counselor, Tina Ritchie echoed the same sentiment, namely that her job could have been threatened if the press was at the Board meeting when Bridge made his comments about drug intervention (A-5 at page 3). No evidence in the record supports these comments about the press were made by Fogelson, Hanelt or Ritchie. Although he had subpoenaed Fogelson and Hanelt, Bridge opted not to call them. He accepted instead a stipulation from the Board that neither Fogelson or Hanelt ever threatened Ritchie's job as she had charged at the Association meeting, which charge prompted the motion to remove Bridge as association president.

The petition also alleges that two days after the filing of the second affirmative action complaint, Bridge was informed that he would not be teaching German V despite sufficient student interest and that he would only be teaching four courses, on short of a full load. The petition contends that these actions were taken to punish Bridge for republishing the anti-Semitic email. No evidence either testimonial or documentary was presented at the hearing to support these allegations. Accordingly, I dismiss these allegations since Bridge did not prove them by a preponderance, or even any, evidence on the record.

Finally, in the petition, Bridge suggests that in November or December 2012, he complained to the AAO that a cabal of female political opponents was overheard in the faculty room to express an intent to oust him from the Association presidency using the AAO's office as a weapon (presumably through false discrimination complaints). Bridge asserts that the AAO discriminated against him by not pursuing this report. No facts were presented at the hearing to support this allegation. Therefore, I cannot consider them for purposes of my analysis.

First, as a threshold issue, the Board contends that the Commissioner lacks jurisdiction to consider any allegations in this petition regarding the second affirmative action investigation because Bridge did not appeal the AAO findings and

recommendations to the Board. Unlike the increment withholding where a Board hearing was conducted and the AAO findings and recommendations adopted, here there was no final Board action. The Board asserts that the Commissioner has jurisdiction over this matter under N.J.S.A. 18A6-9 to "hear and determine . . . all controversies and disputes arising under the school laws." However, the Board argues, that jurisdiction extends only to a review of action taken by local boards of education not to review of action taken by local administrators such as local affirmative action officers. The Board cites two cases in support of this contention. In re Masiello, 25 N.J. 509, 604 (1958); Szymanski, et al. v. South River Bd. of Ed., 1978 S.L.D. 267, 269 (March 8, 1978).

Moreover, under N.J.A.C. 6A:3-1.3(I), the Board posits, any appeal to the Commissioner must be filed no later than the 90th day from the receipt of the notice of final order, ruling or other action of the district board of education. Here, the Board correctly contends, Bridge never received a final order or ruling from the Board because the matter was never appealed for its review. Accordingly, the Board contends, Bridge failed to exhaust his administrative remedies, a pre-requisite to his appeal to the Commissioner (A-6).

In response to this argument (A-10), Bridge distinguishes the Szymanski decision, contending that it is limited to the

particulars of the law being reviewed and has no application to this matter.[17/] Bridge also contends that the Board's appeal procedure stated that he "may" appeal the decision of the AAO but did not speak in the imperative. Therefore, he argues, the appeal was optional not mandatory, allowing him to file directly with the Commissioner without a decision of the Board. Additionally, Bridge explains, because the AAO's recommendations were carried out - e.g. he attended the proscribed workshop and the AA report was placed in his file - the Board effectively adopted the recommendations made to it. Therefore, its actions are now subject to review by the Commissioner.

The question raised by the parties is whether Bridge failed to exhaust his administrative remedies by not filing an appeal of the findings and recommendations of the AAO in the second affirmative action investigation to the Board for a final decision. N.J.S.A. 18A:6-9 confers on the Commissioner jurisdiction to hear "all controversies and disputes arising under the school laws. . . ." Regulations set out in N.J.A.C.

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17/ Bridge also contends, that an appeal to the Board would have been a waste of time, since Board President Hanelt and Superintendent Fogelson could not be impartial because Ritchie charged they had threatened her job. Thus, he suggests, they were implicated in the decision of the Association to remove him from union office. This convoluted logic is not supported by any facts presented at the hearing. No fact established that either Hanelt or Fogelson were prejudiced by Ritchie's allegations which were the basis for an internal union decision to remove Bridge from union office.

6A:7-1.1 et seq. provide rules to ensure that all students regardless of protected class are provided equal access to educational programs and services by district boards of education. N.J.A.C. 6A:7-1.3 defines "discriminatory practices" as:

> a policy, action, or failure to act that limits or denies equal access to or benefits from the educational activities or programs of a school, or that generates or permits injustice or unfair or otherwise inequitable treatment of students or staff on the basis of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability or socioeconomic status.

N.J.A.C. 6A7-1.5 requires each district board of education to annually designate an affirmative action officer (AAO) and to form an affirmative action team. The AAO is responsible for coordinating requisite professional development training for all staff, notifying all students and employees of district grievance procedures for handling discrimination complaints and ensuring that these procedures, including investigative and reporting responsibilities are followed. Under N.J.A.C. 6A:7-1.10, "[i]n accordance with N.J.S.A. 18A:6-9, any individual may petition the Commissioner of Education in writing to resolve a dispute arising under these rules pursuant to procedures set forth in N.J.A.C. 6A:3." Finally, N.J.A.C. 6A:3-1.3(I) states in pertinent part as to the initiation of a contested case for a Commissioner's

determination of a controversy or dispute arising under the school laws, that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." [emphasis added]

The cases cited by the Board in support of its argument on the issue of exhaustion of administrative remedies are distinguishable from the instant matter. First, in Masiello, a teacher appealed the decision of the State Board of Examiners denying him a school administrator's certificate. The denial was subsequently affirmed on appeal to the Commissioner of Education who reviewed the Board of Examiner's decision and to the State Board of Education which affirmed the Commissioner without opinion. Masiello then appealed to the Appellate Division.

The Court addressed the administrative hierarchy within the Department of Education and the nature of internal appeals afforded by the relevant statutes. In this instance, the Court reviewed the State Board of Examiner's procedures. It determined that the proceeding before the Board of Examiners was informal and that a hearing in the constitutional sense, providing for due process, was not afforded. The Court then determined that Masiello should be given an opportunity to have a full hearing before either the Board of Examiners or the Commissioner and an

adequate record made. The burden of the Commissioner is "to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility."

The Court in Masiello did not consider with the regulations at issue here, namely the Board's obligation to designate an AAO who is vested with the authority and powers to implement its affirmative action regulations and affirmative action policies, as well as determine violations of these policies and regulations. This case does not preclude appeal from an AAO determination directly to the Commissioner.

Similarly, Szymanski is distinguishable. There, the Commissioner dismissed a petition filed by a teacher challenging the decision of the South River Board of Education to non-renew his employment for the 1976-1977 school year. The teacher requested and received from the Superintendent a statement of reasons as to why his employment contract was non-renewed. The reasons were performance based and based also on the fact that pupil enrollment had dropped after a sending-receiving relationship with another school district ended. On appeal the teacher challenged the legitimacy of the Board's reasons, asserting he was non-renewed because the District wanted to leave

a position vacant to be filled by a vice-principal. The Commissioner determined that the Board's reasons were legitimate and took administrative notice of the decrease in pupil enrollment. While the Commissioner noted that the teacher had failed to request an informal appearance before the Board (a Donaldson hearing), the Commissioner did not expressly hold that the petition was dismissed for failing to do so. Accordingly, this case is not determinative here.

In Borough of Matawan v. Monmouth County Board of Taxation, Township of Matawan and Frederick Raubinger, Commissioner of the New Jersey Department of Education, 51 N.J. 291 (1968), the Court considered whether the Borough was being apportioned taxes correctly under several statutes governing apportionment of taxes between partners in a regional school district. The defendants urged that plaintiff's case should be dismissed because the Borough had not first appealed to either the Division of Tax Appeals or to the Commissioner of Education.

Considering the parties' arguments, the Court retained jurisdiction, determining that the case implicated statutory interpretation and a constitutional question for which the courts were uniquely suited, and that further use of administrative expertise would be futile, since either agency would be asked to declare its own actions illegal under the statue. In rendering its decision, the Court explained first that the exhaustion is

neither jurisdictional nor absolute and could be departed from in the interests of justice. Moreover, where the issue to be decided is solely a matter of law, the doctrine is not applicable. However, the Court, quoting Roadway Express, Inc. v. Kingsley, 37 N.J. 136 (1962), maintained that several factors needed to be considered before following the extraordinary course of bypassing administrative remedies made available by the Legislature. Those factors enumerated by the Court were the relative delay and expense, the necessity for taking evidence and making factual determination on the evidence, the nature of the agency, and the extent of judgment, discretion and expertise involved.

Unlike Matawan, Bridge's claims are not issues to be decided solely as a matter of law. Bridge challenged the AAO investigation as not fair, a claim which requires a factual record. Bridge was informed by the AAO that he could appeal the AAO's decision to the Board by filing specifically enumerated papers within seven working days, and that, unless Bridge requested a hearing, the Board would review all papers submitted on appeal and render a decision. If a hearing was requested, witnesses could be called and examined.

Bridge chose not to file an appeal to the Board. Since the assertions in his petition relate essentially to Bridge's belief that the witnesses interviewed by the AAO were lying, that a

cabal of female staff were out to get him, and that there was a conspiracy between the Association, the Superintendent and the AAO to suborn false reporting, that hearing would have been his opportunity to establish a factual record and challenge the efficacy of the AA investigation. I reject Bridge's assertions that the appeal to the Board would have been pointless because of some perceived prejudice of the Board President and the Superintendent based on statements attributed to them by a third party (Ritchie).

Nevertheless, N.J.A.C. 6A:3-1.3(I) permits the filing of an appeal to the Commissioner not only from a final ruling or order of a district board but also from an individual party or agency which is the subject of the requested hearing. Thus, it appears that any individual may petition the Commissioner in writing to resolve a dispute arising under the regulations delineated in N.J.A.C. 6A:7-1.1 et seq. pertaining to the establishment by district boards of affirmative action policies to be carried out by an affirmative action officer appointed by a district board. Accordingly, I do not dismiss this petition for failure to exhaust administrative remedies.

Even if, however, Bridge was entitled to a de novo hearing in this proceeding challenging the second affirmative action investigation, he was given full opportunity to do so by calling witnesses and presenting documentary evidence in his case in

chief. It was his burden to prove by a preponderance of evidence the allegations in this petition, that the investigation's findings and recommendation should be reversed because they were flawed, the witnesses lied, and the Association, Superintendent and AAO conspired against him by encouraging witnesses to lie. An examination of the record before me established that the AA investigation was fairly conducted and that the AAO's conclusions that Bridge had caused a hostile work environment through intimidation, bullying and harassment as well as making sexist statements offensive to female staff were supported by the interviews of witnesses.

Specifically, Bridge asserts in this petition that the AAO stacked the deck by calling only certain staff to interview. Nothing could be farther from the truth. In addition to the six complainants interviewed, the AAO requested Bridge to supply names of individuals to be interviewed. There was no limit placed on the number of recommended interviewees, and the AAO interviewed every individual named by Bridge. A review of all witness statements supports that sexist comments were made (Bridge admitted doing so in his testimony at this hearing) and that those comments were offensive to female staff as well as male colleagues. Female and male colleagues avoided the faculty room as a result of this conduct.

Bridge also admitted to speaking to Association members through emails and in the faculty room and other places in the school and during school hours about his objections to actions taken by the Association to remove him from union office and his threats to sue the Association and individual members. Those threats, Bridge understood, caused stress in the work place. Based on the evidence in this record, there is no basis to reverse the determination of the AAO. Any free speech claims fall because gender discriminatory comments as well as threats or intimidation are not protected by First Amendment rights.

Specifically, a public employee's free speech rights in the workplace are not unfettered. Tinker, supra. The Board's actions were prompted not by Superintendent Fogelson or by AAO Melchor, rather the warning to cease political activity advocating for his reinstatement as president as well as the second affirmative action investigation were initiated as a result of complaints by Bridge's colleagues of conduct in the school which they asserted was creating a hostile work environment. State and federal statutes and case law mandate that such claims be investigated which is what the Board did. See generally, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. §20003 et seq.; the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq.; Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993); Blakey v. Continental

Airlines, 164 N.J. 38 (2000). Thus, the institution of AA investigations under these circumstances does not violate any school laws.

Based on the foregoing, I recommend that Respondent's motion to dismiss the petition under EDU 16637-2013N, Agency Dkt. No. 257-10/13 be granted.

**RECOMMENDED DECISION ON THE UNFAIR PRACTICE COMPLAINT**

I recommend that the Respondent Board's motion to dismiss as the Complaint as to charge CI-2013-60 be denied. I further recommend that Respondent Board's motion to dismiss the Complaint as to charges under CI-2013-59 and CI-2013-61 be granted.

I shall advise the parties in writing of hearing dates so they may present evidence on portions of the Complaint and Answer not resolved by this decision.

**RECOMMENDED DECISION ON PETITIONS TO COMMISSIONER OF EDUCATION**

I recommend that the Respondent Board's motion to dismiss the petitions under EDU 14001-2013N, Agency DKT. NO. 215-9/13 and EDU 16637-13, Agency DKT. NO. 257-10/13 be granted.

/s/ Wendy L. Young
Wendy L. Young
Administrative Law Judge t/a

DATED: June 25, 2015
Trenton, New Jersey

8-7-16

OAL DKT. NO. EDU 05774-16
AGENCY DKT. NO. 61-2/16

| | | |
|---|---|---|
| J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY, | : | |
| RESPONDENT. | : | |

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

Upon review, the Commissioner observes that the proposed settlement agreement has not been executed by the parties. Without an executed agreement, the Commissioner cannot approve the within settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/16

Date of Mailing: 8/23/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 05774-16

AGENCY DKT. NO. 61-2/16

**J.T. on behalf of minor children, J.T., A.T. and B.T.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY**

Respondent.

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**J.T.**, petitioner, pro se

**Deryls Gutierrez**, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: July 5, 2016 Decided: July 13, 2016

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

On April 15, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearing on June 20, 2016 and during that time, the parties agreed to settle the matter. A signed copy of the Settlement Agreement and Release indicating the terms of settlement was forwarded to the undersigned on July 13, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

July 13, 2016

DATE

**JEFFREY A. GERSON**, ALJ

Date Received at Agency:

7-15-16

Date Mailed to Parties: JUL 15 2016

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

# SETTLEMENT AGREEMENT AND RELEASE

**J.T. o/b/o J.T., A.T. and B.T. v. South Brunswick Board of Education, Middlesex County,**
**Agency Docket No. 61-2/16**
**OAL Docket No.: EDU 05774-2016N**

This Settlement Agreement ("Agreement") is made this ____ day of June, 2016, by and between Petitioner J.T. ("J.T.") o/b/o J.T., A.T., and B.T. ("Children"), and Respondent/Cross-Petitioner South Brunswick Board of Education ("Board") (hereinafter collectively referred to as the "Parties").

**WHEREAS**, on or about February 26, 2016, J.T. filed a Pro Se Residency Appeal with the Commissioner of Education, which was docketed as 61-2/16 ("Petition"), challenging the Board's August 8, 2016 determination that J.T.'s Children did not reside in South Brunswick during the 2015-16 school year; and

**WHEREAS**, on or about April 12, 2016, the Board filed an Answer to J.T.'s Petition and also filed a Cross-Petition for tuition costs for J.T.'s Children; and

**WHEREAS**, the matter was transmitted to the Office of Administrative Law for a hearing before the Honorable Jeffrey Gerson, A.L.J. on June 20, 2016, which was docketed as EDU 05774-2016N; and

**WHEREAS**, the Parties intend to adopt, by way of compromise, without any admission of liability, all claims which were either raised or could have been raised in the Petition and Cross-Petition ; and

**NOW THEREFORE**, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. J.T. agrees to pay the Board a total sum of thirteen thousand dollars ($13,000.00).

a. Said amount shall be paid by J.T. over the course of sixty-one (61) monthly installment payments.

b. All monthly payments by J.T. shall be in the form of a check or money order made payable to the "South Brunswick School District."

c. All monthly payments shall be sent by J.T. to:

South Brunswick School District
P.O. Box. 181
Monmouth Junction, New Jersey 08852
Attention: School Business Administrator

d. The first payment by J.T. shall be in the amount of one thousand dollars ($1,000.00), and is due to the Board on or before August 15, 2016.

e. The remaining balance of twelve thousand dollars ($12,000.00) shall be paid to the Board in sixty (60) monthly installments of two hundred dollars ($200.00) each, beginning in September 2016. Each of these monthly sixty (60) payments is due to the Board on or before the 5th of each month.

f. If the initial monthly payment is not received by the Board by August 25, 2016, or if any subsequent payment is not received by the Board by the 15th of the respective month, the Board shall send J.T. a letter via certified and regular mail informing J.T. of his default of this Agreement. If J.T.'s default is not cured within five (5) days of the date of the Board's letter, the Board shall apply to the Office of Administrative Law or New Jersey Superior Court for a default judgment in the amount of thirty thousand dollars ($30,000), minus the amount already paid by J.T., if any. If it becomes necessary for the Board to seek a default judgment, J.T. agrees that the Board shall be entitled to counsel fees and costs associated with that application.

g. J.T. understands that his obligation to pay the full sum of thirteen thousand dollars ($13,000.00) in accordance with this Agreement shall remain in effect even if J.T. and/or his Children does not reside in South Brunswick.

3. J.T. has informed the Court that he is in the process of renting an apartment in South Brunswick, and that his Children will be residing with him in the South Brunswick apartment. As such, J.T. agrees to provide the Board with a copy of the fully executed lease agreement if and when he registers his Children for school in accordance with Paragraph 4.
4. J.T. understands that he is required to register his Children in the South Brunswick School District for the 2016-17 school year, provide sufficient proof of residency and comply with all Board Residency/Registration requirements and policies at all times.
5. Nothing in this Agreement shall prevent the Board, upon reasonable belief that J.T.'s Children do not reside in South Brunswick, from conducting any further residency investigations while J.T.'s Children are enrolled in the South Brunswick Public Schools.
6. In exchange for the promises set forth above, J.T. agrees to dismiss the instant Petition and the Board agrees to dismiss its Cross-Petition.
7. Additionally, J.T. agrees to and hereby releases and gives up any and all claims and rights which he may have against the Board (including any of its officers, employees, agents and representatives). This releases all claims of J.T. and his Children, including those of which J.T. is not aware and those not expressly mentioned in this Release. This Release applies to claims resulting from anything which has happened up until and through the date of execution of this Agreement by J.T.
8. The Parties agree that this Agreement, and all of its terms, are and will remain confidential to the maximum extent possible by law. J.T. is expressly forbidden from

discussing this Agreement with any person, other than his accountants, tax advisers, and attorney ("permitted disclosures"), and any other individual or entity as necessary to implement the Agreement or to which he is legally obligated to respond ("legally-required disclosures").

9. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
10. This Agreement shall not serve as a precedent for any other matter.
11. The Parties acknowledge that they have entered into this Agreement voluntarily and hereby sign it without duress or coercion, and with the opportunity to consult counsel.
12. This Agreement shall be governed by the laws of the State of New Jersey.
13. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.
14. The Agreement is subject to the formal approval of the Board

**PETITIONER**
GIROLAMO TOMASELLI (A/K/A JERRY TOMASELLI)

By: _____

Dated:

**RESPONDENT/CROSS-PETITIONER**
SOUTH BRUNSWICK PUBLIC SCHOOLS

By: _____

Dated:

OAL DKT. NO. EDU 14816-14
AGENCY DKT. NO. 272-9/14

| | | |
|---|---|---|
| GERRY RESNICK, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, the Commissioner observes that the President of the Palisades Park Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties

are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/16

Date of Mailing: 8/26/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 14816-14
AGENCY DKT. NO. 272-9/14

**GERRY RESNICK,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,**
Respondent.

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**Timothy A. Pedergnana**, Esq., for petitioner (Flicker, Garelick & Associates, LLP, attorneys)

**Richard A. Brovarone**, Esq., for respondent (Brovarone Law Firm, attorneys)

Record Closed: June 23, 2016 Decided: July 13, 2016

BEFORE **IRENE JONES**, ALJ:

On November 17, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearings on July 28 & 29, 2016, but the dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on June 23, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

July 13, 2016

DATE

Irene Jones

**IRENE JONES** ALJ

By Jeffrey A Gowen

7-15-16

Date Received at Agency:

Laura Stubbs

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:
sej

JUL 15 2016

FLICKER, GARELICK & ASSOCIATES, LLP
45 Broadway
New York, New York 10006
(212) 319-5240
Attorneys for Petitioner
ID No: 025724012

2016 JUN 23 A 10:18

| | | |
|---|---|---|
| GERRY RESNICK, Petitioner, | : | AGENCY DKT. No. 272-9714 |
| v. | : | |
| PALISADES PARK JR/SR HIGH SCHOOL, PALISADES PARK BOARD OF EDUCATION, Respondents, | : | |

**SETTLEMENT AGREEMENT**

The parties hereto agree to settle this case under the follow terms and conditions:

Palisades Park Jr/Sr High School and Palisades Park Board of Education (collectively "Respondents") herein agree to the following: (1) During the remainder of Gerry Resnick's career in the Palisades Park School District, Patrick Bott and Sandy Vazquez may not combine as Gerry Resnick's two evaluators in a single school year for any evaluations and/or assessments performed pursuant to the TEACHNJ Act, P.L. 2012, c. 26; and (2) During the remainder of Gerry Resnick's career in the Palisades Park School

District, the relevant school's Principal will be one of the two evaluators for any evaluations and/or assessments of Gerry Resnick performed pursuant to the TEACHNJ Act, P.L. 2012, c. 26.

In consideration of Respondents' aforementioned agreement, Gerry Resnick, Petitioner, herein agrees to voluntarily dismiss, with prejudice, all allegations set forth in her complaint filed with the Commissioner of the New Jersey State Department of Education, AGENCY DKT. No. 272-9/14.

Dated: 7/27, 2015

Gerry Resnick

Dated: 7/29, 2015

Palisades Park Board of Education
JEFFREY WOO, PRESIDENT

OAL DKT. NO. EDU 12499-15
AGENCY DKT. NO. 181-7/15

| | | |
|---|---|---|
| P.F., on behalf of minor child, C.F., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

In this matter, the petitioner is challenging the Washington Township Board of Education's (Board) decision to place C.F. in an alternative placement for the 2015-2016 school year based on an alleged violation of the Student Code of Conduct. After the matter was transmitted to the Office of Administrative Law (OAL), the parties proposed a settlement which the Administrative Law Judge sent to the Commissioner of Education with a recommendation for approval. Upon review of the terms of the proposed Settlement Agreement (Agreement), the Commissioner rejects same because the Board does not have the authority to agree to one of the provisions contained in the Agreement.

Paragraph 1 of the Agreement states:

> The student will continue her placement in a private school outside of the Washington Township School District. So long as the Student continues her placement outside of the Washington Township School District, her disciplinary record containing the disciplinary finding of June 25, 2015, will be conditionally discharged, meaning the disciplinary record will be held in abeyance until she graduates from the placement outside the Washington Township School District. Upon graduation from her placement outside the Washington Township School District, the disciplinary record containing the June 25, 2015 disciplinary finding will be permanently removed from the Student's record.

Under *N.J.A.C.* 6A:32-7.8(b), a board of education is permitted to destroy student records which are no longer educationally relevant while the student is still enrolled in a district. However – under *N.J.A.C.* 6A:32-7.8(c)(2) – upon graduation or permanent departure from the school district, student records may only be disposed of in accordance with the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.* [1]

C.F. was enrolled in a private school outside the Washington Township School District for the 2015-2016 school year. Therefore, since C.F. is no longer enrolled in the Washington Township School District, the Board is not authorized to remove the June 25, 2015 disciplinary finding from C.F.'s record upon her graduation from the private school. Instead the Board must follow the document retention schedule for student disciplinary records.[2] Further, the Board must be mindful that if the private school that C.F. is currently attending requests her disciplinary file, the Board must provide it pursuant to *N.J.A.C.* 6A:16-7.8(b).

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/25/16
Date of Mailing: 8/26/16

[1] Pursuant to *N.J.S.A.* 47:3-19, the Bureau of Records Management places all public records on Records Retention Schedules that list the minimum time periods they must be retained by State and local governmental and educational agencies.

[2] Student disciplinary files must be maintained by the school district between 1 and 100 years after graduation, depending on the nature of the disciplinary action. http://www.state.nj.us/treasury/revenue/rms/pdf/m700106_001.pdf

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 12499-15

AGENCY DKT. NO. 181-7/15

**P.F., ON BEHALF OF MINOR CHILD, C.F.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,**

Respondent.

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**John O. Poindexter, III,** Esq., for petitioners

**Lauren E. Tedesco,** Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: July 6, 2016 Decided: July 11, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on August 18, 2015, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

| | | |
|---|---|---|
| TAMI STEWART, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a mathematics specialist in respondent's school district – challenged the Board's request that she submit to an independent psychiatric evaluation, pursuant to *N.J.S.A.* 18A:16-2. The Board contended that petitioner exhibited unusual and erratic behavior beginning in the 2015-2016 school year, as well as physical changes, which justified the request that she submit to a psychiatric exam. Petitioner admitted to having experienced weight loss, but asserted that the Board's contentions regarding her behavior were subjective and unrelated to her work performance. The petitioner contended that her formal evaluations gave her an overall performance rating of proficient moving toward distinguished; further, petitioner argued that the Board has failed to meet its burden of proof to show that her behavior met the standard of a "harmful, significant deviation from normal mental health affecting her ability to teach, discipline or associate with children of the age of the children subject to her control in the school district." *Kochman v. Keansburg Board of Education*, 124 *N.J. Super.* 203, 212 (Ch. Div. 1973).

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:16-2 provides that "The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health;" in this case, both parties recognize *Kochman, supra*, as the seminal case interpreting *N.J.S.A.* 18A:16-2; it is the Board's burden to prove by a preponderance of the credible evidence that the petitioner demonstrated a harmful, significant deviation from normal mental health that affects her ability to do her job sufficient to compel her to undergo a psychiatric exam; the Board alleged a number of perceived improper behaviors exhibited by petitioner during the 2015-2016 school year – including, *inter alia*, extreme and rapid weight loss, mood swings, showing a colleague a tattoo located on her back, and hiding under a desk – but relied largely on uncorroborated hearsay testimony in making its case; there is no evidence that petitioner was a danger to students or co-workers, nor was she unable to perform the duties of her job; on the contrary, petitioner received only positive performance evaluations. The ALJ concluded that the Board has not met its burden of proof in this matter, and ordered that the Board's requirement that petitioner submit to a psychiatric evaluation was improper. Accordingly, the ALJ rejected and reversed the Board's decision to invoke *N.J.S.A.* 18A:16-2.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 8/26/16

OAL DKT. NO. EDU 01186-16
AGENCY DKT. NO. 3-1/16

| | | |
|---|---|---|
| TAMI STEWART, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record and Initial Decision of the Office of Administrative Law (OAL)[1] have been reviewed, along with the Board's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and petitioner's reply thereto.

In its exceptions, the Board argues that its witnesses provided un-rebutted testimony that the Board was reasonable in requiring that petitioner undergo a psychiatric examination. Citing excerpts of testimony, the Board contends that its witnesses demonstrated: changes in petitioner's physical appearance and weight, which were indicative of an eating disorder; petitioner's suspected drug or alcohol abuse; and petitioner's unusual and erratic behavior – such as hiding under a secretary's desk as she claimed that demons were chasing her, and unfastening her pants to show the Vice Principal a tattoo on her back. Accordingly, the Board maintains that the principal recommended that petitioner undergo a psychiatric examination out of concern for her health and the well-being of students and staff in the building.

The Board also disputes the Administrative Law Judge's (ALJ) finding that the testimony of the nursing staff and principal consisted of uncorroborated hearsay evidence as to

[1] The Initial Decision of the OAL appears to have been inadvertently captioned as a dismissal.

petitioner's erratic behaviors. The Board argues that the principal was informed by employees of these behaviors and – even though they did not testify at the hearing – the information that they told him influenced his decision to recommend a psychiatric examination. The Board further contends that petitioner's own rambling testimony corroborates that of the principal and nurses, and further claims that petitioner understood that people were worried about her well-being. As such, the Board maintains that it met its burden of proving that petitioner was required to submit to a psychiatric examination.

In reply, petitioner argues that the ALJ's decision should be adopted because the Board failed to present any competent evidence in support of most of its allegations. Additionally, with respect to the allegations that were supported by evidence, the ALJ properly found that petitioner's work performance was not affected and there was no evidence that she posed a threat to the health or safety of the students or staff. Petitioner points out that her performance evaluations were above average. Further, petitioner complied with the Board's request that she undergo an alcohol and drug screening, and the results were negative. Finally, petitioner disputes the Board's attempt to discredit her testimony; instead, petitioner maintains that her testimony – in which she acknowledges knowing that her coworkers were concerned – was sincere. As such, petitioner argues that the ALJ properly denied the Board's request that she undergo a psychiatric examination.

Upon review, the Commissioner concurs with the ALJ that the Board has not met its burden of proof that petitioner's behavior demonstrated a deviation from normal mental health that was harmful and affected her ability to teach. The Commissioner is not persuaded by the Board's exceptions, which do not warrant reversal of the ALJ's conclusion. Pursuant to *N.J.S.A.* 18A:16-2, a board may require "individual psychiatric or physical examinations of any

employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health." Such deviation from normal mental health has been defined to mean "harmful, significant deviation from mental health affecting the teacher's ability to teach, discipline, or associate with children of the age of the children subject to the teacher's control in the school district." *Kochman v. Keansburg Board of Education*, 124 *N.J. Super.* 203, 212 (Ch. Div. 1973). The Commissioner agrees with the ALJ that the evidence presented by the Board did not demonstrate a decline in petitioner's work performance or prove that she posed a health or safety threat to her students or co-workers. The Commissioner also concurs with the ALJ that – with respect to many of the allegations – the Board failed to present legally competent evidence to support the hearsay testimony, as required by the residuum rule, *N.J.A.C.* 1:1-15.5. As such, the Board failed to meet its burden of demonstrating that petitioner deviates from normal mental health, thereby requiring a psychiatric examination.

Accordingly, for the reasons stated therein, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/16

Date of Mailing: 8/26/16

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), final decisions of the Commissioner are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSAL**
OAL DKT. NO. EDU 01186-16
AGENCY REF. NO. 3-1/16

**TAMI STEWART,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,**
Respondent.

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**Edward A. Cridge**, Esq., for Petitioner (Mellk O'Neil, attorneys)

**Mark A. Tabakin**, Esq., for Respondent (Weiner, Lesniak, attorneys)

Record Closed: May 10, 2016 Decided July 14, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from an appeal filed by Petitioner challenging the decision to require her to undergo a psychiatric evaluation pursuant to N.J.S.A. 18A:16-2.

On November 12, 2015, Stewart was ordered to take a drug and alcohol screening test, and was notified that she would be placed on administrative leave with pay effective November 13, 2015. (P-A, P-B.) The result of the drug and alcohol test administered on November 12, 2015, was negative. On November 19, 2015, Respondent requested that Stewart undergo a psychiatric examination on November 23, 2015. On December 14, 2015, Stewart waived her request for a hearing before Respondent to appeal before the Commissioner of Education. On January 8, 2016, Petitioner filed her appeal and Respondent filed its Answer on January 13, 2016. On January 20, 2016, this matter was transmitted to the Office of Administrative Law (OAL) as a contested case for a hearing pursuant to N.J.S.A. 52:14B-1 to -15. A hearing was held on March 23, 2016, post-hearing briefs were filed on May 5, 2016, and May 10, 2016, respectively, and the record closed.

## SUMMARY OF TESTIMONY AND FACTUAL DISSCUSSION

Stewart has been an employee of the New Brunswick School District since September 1, 2011. (T104:5-7.) Principal Jeremiah Clifford (Clifford) worked with Stewart for four years in Woodrow Wilson School as her direct supervisor. (T67:14-18.) One year after Clifford transferred to New Brunswick Middle School (the Middle School) as principal, he asked Stewart to transfer to the Middle School as a mathematics specialist. (T67:21 to 68-4.) As a mathematics specialist she worked as a "professional leader, instructor, and a coach" responsible for assessing student's progress and working with mathematics teachers as an instructional specialist. (T105:18-24.) Stewart was not assigned any students, but did have some interaction with students. (T76:5-18.) In two evaluations from the 2014-2015 school year in the Middle School, Stewart was evaluated by Deborah Graham, Math Supervisor, as "proficient" moving towards "distinguished." (P-1, P-2.) "Distinguished" is the highest performance rating describing the specialist as having a "mastery of the component/domain, seamlessly managing all aspects of the component domain" and "helping to create an exceptional learning environment." (P-1 at 1.) "Proficient" is the second highest performance rating describing the specialist as demonstrating a "command of the component/domain, effectively meeting expectations" and "creating an effective learning environment."

(Ibid.) Her supervisors described Stewart as a "valuable member of the building and district teams" in the Instructional Specialist Observation Form. (P-1 at 5, P-2 at 5.)

During the 2015-2016 school year, Clifford, School Nurse Marilyn Crawford (Crawford), and School Nurse Carla Crow (Crow), began noticing behavioral and physical changes that concerned them regarding Stewart. These concerns led Clifford to recommend to the Board of Education that Stewart undergo a drug and alcohol screening test and a psychiatric evaluation.

Crow has been a union representative for four or five years and a school nurse for thirteen years at the Middle School. (T10:6-8, 38:1-5.) Crow first met Stewart at the Middle School during the 2014-2015 school year, introducing herself and requesting emergency contact information. (T11:7-21.) Crow developed concerns for Stewart at the beginning of 2015-2016 school year because started to dress differently, wearing more skirts, not covering up her arms and shoulders, wearing shorter tops and skirts, although Crow was not aware if Stewart had violated the dress code. (T12:14-19, 28:5-17.) She also noticed that Stewart appeared thinner with clothes that fit looser to the point where Stewart would come to the nurses' office for pins to hold up a skirt that fit the previous year. In addition, Crow noticed that Stewart's hair became brittle, and that she lost facial fat; although she was not sure if Stewart actually lost weight, or if so, how much. (T26:24-25.) Crow suspected that Stewart had anorexia, and recommended at least two places that Stewart could go to receive treatment. (T13:11-25, 14:15-21.) Crow had never heard Stewart say that she had anorexia, or that she was not eating, and was aware that teachers are not obligated follow the advice of school nurses. (T23:9-13, 25:5-11.) Crow is also aware that weight loss is not an absolute sign of anorexia. (T27:18-21.)

Crow's other concerns stemmed from Stewart's increased anxiety about receiving "late notice" that she would have to run some staff meetings and Stewart's anxiety regarding a skin rash, which was not apparent to Crow. She stated that Stewart is "very, very smart" and "knows her math background, front and back and in between," but became concerned at the beginning of the 2015-2016 about Stewart's ability to do her job in that she "would not be able to put her best foot forward." (T16:11-14.)

Crow was aware, from the initial emergency form, that Stewart took migraine medication called Imitrex. This is a self-injected drug that Stewart administered in the nurses' office. (T18:9-17.) Crow was not aware of any time that Stewart had misused or improperly handled the medication. However, there was one instance where Stewart felt the drug was not taking effect and wanted to take another dose, but ultimately did not do so. (T18:14-23, 34:15 to 35:6.) Crow had a conversation with Stewart where she learned that Stewart thought she might have a thyroid problem, and that she did not like her doctor. (T17:20 to 18:5.) Crow, as a school nurse and union representative, had no responsibility for evaluating, overseeing, or observing Stewart in her professional capacity and had no knowledge of whether Stewart's weight was adversely affecting her ability to do her job. (T26:21 to 27:1.)

In November of 2015 Crawford, Clifford, and Nancy Coppola, the New Brunswick Education Association President and former nurse (Coppola), had a meeting regarding their concerns, and the concerns brought by other staff members regarding Stewart's behavior. Crow recommended that Stewart undergo both a drug test and a psychiatric evaluation. (T39:13-16.) The decision was left up to Clifford, the principal, to determine whether to make the recommendation to the Board of Education. (T37:6-9.)

Crawford is also a union representative in the Middle School and has been a school nurse there for eight to ten years. (T40:14-22, 49:22-23.) Crawford was aware that Stewart used the prescription drug Imitrex and used the nurses' office on a regular basis to self-administer the drug. Crawford was concerned that Stewart was taking more than one Imitrex dose a day. (T42:4-23.) Crawford is required to report certain instances of employee misuse of medication to the administration; however, she did not report Stewart because, based on her observations, Stewart's use of the Imitrex was appropriate. (T57:6-9.) Crawford was unaware if Stewart was using Imitrex outside of the nurses' office. (T43:6-11.)

Crawford first became concerned when Stewart needed to pin a strap of her shirt and Crawford described her frame as looking like "skin on bones." (T44:7-14.) Crawford had a conversation with Stewart about her weight and referred her to

Somerset Medical Center. (T45:8-17.) Crawford "threatened" Stewart that if she did not call to get help, Crawford would tell Clifford about her concerns for Stewart's weight. (T45:19-23.) Crawford is aware that Stewart is not required to follow the medical advice of school nurses or disclose personal medical information to them. (T58:7-10.) Crawford told Clifford of her concerns a couple of days later without having made any calls to Somerset Medical Center. Crawford did not tell Clifford for disciplinary reasons, but because she was worried about Stewart's health and because Stewart told her "well, you should speak to Mr. Clifford." (T60:6-14.)

Crawford was also concerned about Stewart's behavior, describing it as a "little erratic at times." (T46:18.) Crawford had conversations with Stewart in which Stewart's personality changed from nice and pleasant to screaming "with the blink of an eye." (T46:18-23.) Crawford also observed Stewart telling a teacher that she did not have time to get calculators for a teacher because she was getting food for a meeting. (T47:13-22.) Crawford does not supervise Stewart, but told Stewart, that as the Union representative, "your first job is the math coach and to provide the things that the teachers need." (T62:12-23, 47:17-19.) When Crawford learned that Stewart was resistant to being tested for drugs and alcohol, she went to Stewart's office and told her, "Tami just go and do it" . . . "for the protection of your job, just do it." (T48:4-11.) When Stewart was still resistant and stated that she did not know why it was necessary, Crawford explained the concerns that led to the decision to require a drug and alcohol test as follows:

> [Y]ou hiding under the secretary's desk saying demons were chasing you. There was a concern that you were chasing the VP around the office trying to show him the tattoo on your lower back unbuttoning your pants. There was the time that you kind of yelled at a student. There was a time when you go to CPT and you kind of yelled at the teachers and say inappropriate things to them.
>
> [T48:14-22.]

Crawford did not see any of these occurrences first hand. (T51:2 to52:9.) Stewart then told Crawford to leave her office and began screaming inappropriately. (T48:22 to 49:4.) Crawford's concern was primarily for Stewart's health. (T92:9.)

Clifford became concerned about Stewart in the fall of the 2015-2016 school year. (T68:5-9.) He had worked with her for five years previously, four as her direct supervisor and one year as her principal in the Middle School. (T67:10-23.) Her evaluations at the previous school had been good and he asked her to transfer to the Middle School. (T67:17-20.) Clifford was concerned after noticing Stewart's weight loss, her change in clothes, and that she became very intense and a little bit erratic, which was out of character for her. (T69:18-23.) Clifford was unaware if Stewart was technically in any violation of the dress code, and did not recall any written or oral notification given to Stewart about a violation of the dress code. (T74:8-10, 75:8-22.) Stewart did not receive any student or parent complaint. (T75:3-18.) Clifford is unsure as to whether the complaints he brought to Stewart were in writing pursuant to the Collective Bargaining Agreement Article 33. (T79:7-10, P-6.) Clifford also stated that Stewart had no written disciplinary notices. (T80:18-20.) The concerns brought by other employees that Clifford relayed to Stewart were brought out of concern about her well-being, "nobody was being mean." (T82:6-10.)

One of the instances that were brought to his attention was that one teacher claimed she was uncomfortable being in a meeting with Stewart because of her erratic behavior. Clifford was not in attendance at this meeting. (T82:14-22.) One other instance was when Stewart brought organic cookies to work and passed them around to her co-workers. Clifford recalls that it was a nice gesture but it seemed that Stewart was almost forcing the cookies on her co-workers and the behavior was not out of character. (T82:23 to 83:11.)

Clifford recalls that his secretary reported that Stewart called her one weekend asking for "some type of mantra to kind of keep away evil spirits" and did not answer the secretary's return call because she thought someone was watching her. (T83:13-18.) Clifford did not hear Stewart say this directly. (T83:13-18.) Clifford also learned from his vice principal that Stewart had sent a message to the vice principal (VP) with a picture of her tattoo. The VP and Stewart were friendly and would text each other but the VP thought this was unusual. (T84:21 to 85:3.) Clifford also received a message

containing a picture of Stewart's tattoo. (T85:4-6.) Clifford also described her as being out of character:

> when you saw her walking, sometimes it looks like she was just so intense that there was—you can be in a school with 1,400 and 285—or 185 staff members, and when she was walking, the intensity of just like being on task is far beyond someone who's worried about their work. It was scary looking. The movement of the hands down the hall and all looked like she was on this most urgent mission, and I don't think working in a school things are urgent but not to that level where—where people would ask almost—you know, I would say on a weekly basis "Is she okay?" "Are you doing anything?" "Did you notice how she looks?"
>
> [T85:11-23.]

During the 2015-2016 school year Clifford also noticed that there were more issues arising out of Common Planning Time meetings. During these meetings teachers of the same grade level and content areas worked for forty minutes on planning and reviewing assessments, focused on instruction. (T87:13-17.) Clifford stated that "everyone was saying the same thing to me, 'Is she all right?'" (T86:10-12.) Disagreements between Stewart and Clifford that were previously discussed in private were now discussed in public, and her unusual behavior crossed the line more frequently. (T86:20 to 87:3.) In Clifford's view, his recommendation to the Board about the drug and alcohol testing as well as the request for a psychiatric evaluation was not disciplinary in nature, and was not a reprimand. He stated that he had no concern about her ability as a mathematician or an instructional specialist, but that his concern came about because "something was going on and her behavior had changed that much from what I knew." (T90:14-23.)

Stewart states that she does not have, has not been diagnosed with, nor treated for anorexia or any eating disorder. She was very upset by the nurses' allegations that she had anorexia, and that the allegations continued after she told them that she did not have an eating disorder. (T106:24 to 107:5, 114:14-19.). Stewart does not feel that her weight loss from the 2014-2015 school year to the 2015-2016 school year was "significant." (T123:23 to 124:3.) Stewart has had a prescription for Imitrex for over ten

years from the same neurologist, and follows the prescription guidelines; she never used it twice during school. (T107:13-22, 108:2-15.) Stewart stated that the nurses never requested documentation about her Imitrex use and she always followed the nurses' directive when taking it in school. (T120:6-14, 121:8-10.)

Stewart states that she never hid under a desk to get away from evil spirits; she never attempted to kiss the VP; and she did not ask Clifford's secretary for a mantra to keep away evil spirits. (T108:22 to 109:2.) Stewart states that she had a friendly relationship with the secretary, having exchanged cell phone numbers, and that they talked outside of school hours about non-school-related things. (T109:7-20.) Stewart recalls that the secretary was religious and involved in her church. There was an instance when she asked the secretary to say a prayer for a friend that was going through a rough time. (T109:21 to 110:15.) Stewart states that she never showed a student any of her tattoos. (T111:7-9.) She did send the VP a picture of a new tattoo located on her upper back, a location that would not be covered by a bathing suit, because they were friendly with each other. (T111:3-6.) Stewart states that during the 2015-2016 school year she was never shown a complaint about her. In her talks with Clifford, she never heard him say anything about her having problems with her behavior with students. (T111:10-24.) Stewart had no problems or outbursts at any collaborative meetings with other staff that was outside of the normal disagreements. (T119:21 to120:5.) Stewart was very upset when asked to submit to a drug and alcohol test, and took the drug test because she was told if she did not, she would be terminated. (T112:13-16, 117:9-18.) After the Board of Education's request that she submit to a psychiatric evaluation, Stewart went to her own independent psychiatrist for an evaluation, but was denied because the psychiatrist thought it was unusual for a school board to ask a teacher to be evaluated. (T129:6-23.) Stewart has no trouble focusing at work and denies absolutely all the alleged incidents cited against her. (T135:21-23, 138:8-11.)

## Findings of Facts

Based upon the totality of the testimony and evidence produced, I **FIND** the following to be the **FACTS** of the case:

Stewart has been an employee of the New Brunswick School District since September 1, 2011. Principal Jeremiah Clifford worked with her for four years in Woodrow Wilson School as her supervisor. One year after Clifford transferred to the New Brunswick Middle School as principal, he asked Stewart to transfer to there as a mathematics specialist. As a mathematics specialist she worked as a "professional leader, instructor, and a coach" responsible for assessing student's progress and working with mathematics teachers as an instructional specialist. Stewart was not assigned any students, although she had some interaction with students. In two evaluations from the Middle School, Stewart was evaluated by her supervisor, as "proficient" moving towards "distinguished." The latter is the highest performance rating and demonstrates a "mastery of the component/domain, seamlessly managing all aspects of the component domain" and "helping to create an exceptional learning environment." The former is the second highest performance rating and demonstrates a "command of the component/domain, effectively meeting expectations" and "creating an effective learning environment." Stewart's supervisors regarded her as a valuable member of the staff in their Instructional Specialist Observation Form.

I further **FIND** that Petitioner engaged in unusual behavior beginning in the 2015-2016 school year. Her principal and the nursing staff developed a great concern for her physical health because of an admitted loss of weight. They also developed great concern for Petitioner's mental health due to behaviors both observed and rumored. None of these colleagues concluded or believed that Petitioner's physical or mental health compromised her ability to do her job. None of them sought disciplinary action against Petitioner as a result of the physical and behavioral changes that were observed by members of the school staff and administration. Respondent did not determine that Petitioner's conduct threatened the health or safety of the students or her co-workers.

## LEGAL DISCUSSION AND CONCLUSIONS

Generally, pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education has the authority to hear and determine "all controversies and disputes arising under school laws." Prior to the Commissioner deciding a contested issue however, a petitioner must

create a petition of appeal that meets specific requirements, which are delineated in N.J.A.C. 6A:3-1.4.

**Parties' Arguments**

Petitioner

Petitioner argues that Stewart cannot be compelled to undergo a psychiatric evaluation because Respondent has not met its burden of proof under the seminal case interpreting N.J.S.A. 18A:16-2. The Superior Court of New Jersey interpreted the statutory language "deviation from normal mental health" to mean "harmful, significant deviation from mental health affecting the teachers ability to teach, discipline, or associate with children of the age of the children subject to the teacher's control in the school district." Kochman v. Keansburg Bd. of Educ., 124 N.J. Super. 203, 212 (Ch. Div. 1973).

Petitioner argues that Respondent has failed to meet that burden and points to several things in the record that prove there was not a harmful, significant deviation from mental affecting the teacher's ability to teach. First, as acknowledged by Crow's testimony, Stewart was under no obligation to discuss her medical history with the school nurses; Stewart passed the requested drug and alcohol screening test; to Crow's knowledge Stewart had never felt faint or passed out while at work; Stewart's use of Imitrex was appropriate; and Crow had no knowledge that Stewart's weight had affected her job performance.

Second, Crawford never actually witnessed any of the alleged behaviors that prompted her concern for Stewart's well-being; Stewart's use of Imitrex was appropriate; Crawford's concern for Stewart's weight was based solely on observation, not on any medical diagnostic tests; Stewart is under no obligation to follow the advice of school nurses, and Crawford is not Stewart's supervisor.

Third, Clifford acknowledged that Stewart's attire did not violate the dress code and he does not recall ever advising her of a dress-code violation; there were no

complaints made by parents against Stewart; he did not recall notifying Stewart of any complaints or concerns made against her in writing pursuant to the Collective Bargaining Agreement; and he was not present in the meeting which prompted one teacher's concerns for Stewart.

Fourth, Petitioner notes that she has never had a letter of reprimand, and never had her salary increment withheld. Stewart has never been diagnosed with an eating disorder; was upset by the unsolicited advice of the school nurses and their referrals to treatment centers; knows that the nurses actions came from good intentions; never took a sick leave; denied ever referencing evil spirits on a phone call to the principal's secretary, and only that she was asking the secretary to say a few prayers because they were friendly and Stewart knew the secretary to be religious; denied all the hearsay allegations brought against her; and sent the picture of her tattoo on her upper back because she was friendly with the vice principal.

Petitioner then references the evaluations made in the 2014-2015 school year as her most recent performance evaluation and quotes "relationships with Stewart are cordial," "all teachers were engaged and shared experiences and suggestions," "Stewart exhibits clear norms of mutual respect for professional interactions," and "Stewart's formal evaluation has an overall rating of proficient moving towards distinguished."

Petitioner concludes by arguing that Respondent's concerns are subjective, unrelated to her work performance, and that Respondent's evidence is not sufficient to meet the standard of a "harmful, significant deviation from normal mental health affecting her ability to teach, discipline or associate with children of the age of the children subject to her control in the school district." Therefore, the Board of Education cannot compel her to undergo a psychiatric evaluation.

Respondent

In its brief Respondent lists various allegations made regarding Stewart's conduct: the call made to Principal Clifford's secretary with a reference to evil spirits;

showing tattoos that are located in private areas to colleagues; making references to her own sexual arousal in front of colleagues; her inability to focus on tasks; her becoming highly defensive or manic; her inappropriate physical behavior by touching colleagues or grabbing their legs; increased anxiety; a faculty member indicating to Clifford that she will not meet with Stewart based on her inappropriate physical behavior; her numerous requests for letters of recommendations when she believed that a situation was not going her way; the nurses' observation that her physical and condition were deteriorating; a refusal to provide the school nurses with medical documentation they had requested; Stewart's non-compliance with the nurses' recommendations to seek treatment for an eating disorder; and that Crow and Crawford as union representatives had heard complaints from the faculty about her.

Respondent's relies on N.J.S.A. 18A:16-2(a) to wit:

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

Respondent asserts that the actions outlined in its brief, and presumably adduced at the hearing[1] are sufficient to satisfy the requirements of this regulation.

Respondent also argues that they have fully complied with the due process procedures established in Kochman by submitting to Petitioner the list of reasons as to why they were requesting the psychiatric evaluation; allowing Petitioner an opportunity to request a hearing; and complying with Petitioner's to appeal to the Commissioner. Kochman, supra, 124 N.J. Super. 203.

[1] It should be noted that Respondent filed a Brief on the same day as the hearing, therefore could not reference the testimony adduced during the hearing or the evidentiary documents admitted into evidence. Its Post-hearing Brief responded to Petitioner's Post-hearing Brief but did not make an independent legal argument beyond that made in the initial Brief.

In Respondent's response to the Petitioner's Post-Hearing Letter Brief, the Board recognizes that Kochman is the seminal case interpreting N.J.S.A. 18A:16-2, and states simply that the case supports its position, not the Petitioner's. Respondent also simply lists two other cases in support of its position: Board of Education of Lyndhurst v. Blevis, A-6004-07T3, (App. Div. Oct. 8, 2009), http://njlaw.rutgers.edu/collections/courts/, and Gish v. Board of Education, 145 N.J. Super. 96 (App. Div. 1976), certif. denied, 74 N.J. 251 (1977). Gish v. Bd. of Educ., 145 N.J. Super. 96 (1976), cert. denied, 434 U.S. 879, 98 S. Ct. 233, 54 L. Ed. 2d 160 (1977).

Respondent concludes by stating that the concern of the Board for the well-being of the Petitioner and the other staff and students has been comprehensively demonstrated and evidenced by the testimony of Jeremiah Clifford, Marilyn Crawford, and Carla Crow. Therefore Stewart should not be allowed to return to work without having complied with the Board's request for a psychiatric examination.

The Law

A School District may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health. N.J.S.A. 18A:16-2. The New Jersey Superior Court, Chancery Division, in hearing a case contesting the constitutionality of N.J.S.A. 18A:16-2, construed the meaning of the term "deviation from normal mental health" to mean "harmful, significant deviation from mental health affecting the teacher's ability to teach, discipline, or associate with children of the age of the children subject to the teacher's control in the school district." Kochman, supra, 124 N.J. Super. at 212. The Court held that the state had a compelling interest in protecting children from teachers who have shown evidence of a harmful, significant deviation from mental health. Id. at 213. Therefore, the intrusion into the Board of Education employee's right of association, expression, and privacy was constitutionally balanced against this compelling government interest. Ibid. The Court also implemented due process measures, such as a statement of reasons provided to the teacher before submitting to the evaluation, the right to request a hearing, and the right to appeal to the State Board

of Education. Ibid. Neither party addresses the due process procedures exercised in this case. Both parties recognize Kochman as the seminal case interpreting N.J.S.A. 18A:16-2.

It is the Board of Education's burden to prove by a preponderance of the credible evidence that Petitioner evinced a harmful, significant deviation from normal mental health that affects her ability to do her job sufficient to compel her to undergo a psychiatric examination.

Respondent identified incidents in support of its claims that Petitioner exhibited behavior that deviated from normal mental health through a letter sent to Petitioner and through a pre-hearing memorandum. By letter dated November 19, 2015, Respondent cites the following behaviors: extreme and rapid weight loss; mood swings that are extreme highs and extreme lows; hiding under a desk; chasing a staff member and asking for a kiss; telling the principal to be careful because another staff member was in a cult and "trying to get in your head"; and the concern of many staff members as expressed to the principal about being uncomfortable in her presence.

By letter memorandum dated March 23, 2015, Respondent outlined the following incidents: calling the home of the principal's secretary on the weekend requesting a "mantra to keep away bad spirits"; showing a colleague a tattoo located in a private area; making reference to her sexual arousal in front of colleagues; an inability to focus on tasks which resulted in highly manic and defensive behavior; her constant inappropriate physical behavior by touching, hugging, patting, and grabbing the legs of colleagues which resulted in a faculty member telling Clifford that she will not meet with the Petitioner; her repeated episodes of anxiety when requested to do routine assignments such as covering a class or meeting; numerous requests for letters of recommendation from both the principal and vice principal when she perceived that circumstances did not go her way; a noted deterioration in her physical and mental condition by the school nurses; Petitioner's refusal to supply the school nurses with medical documentation relative to her behavior and condition; her defensiveness when questioned by the school nurses; her failure to follow up with the school nurses' advice

and recommendations to medical treatment; and complaints heard by Crow and Crawford as union representatives.

Following is an analysis of the indicia of the improper behaviors alleged by Respondent and the actual evidence offered to support it position:

1. Extreme and rapid weight loss. For Respondent, both Crow and Crawford testified that Petitioner looked much thinner during the 2015-2016 school year. Along with the general weight loss, her hair seemed brittle and her face looked thinner, which in the medical opinion of a registered nurse and school nurse, is a sign of anorexia. Crow also testified that Petitioner needed pins to adjust the fit of her loose-fitting clothing. Crow was concerned that this weight loss would negatively affect Stewart's work performance; however, there was no evidence that her job performance suffered. Crow and Crawford generally felt that Petitioner was "unhealthily thin" and recommended she get medical attention. There is no evidence of a decline in work performance or that she posed a health or safety threat to the students or to her co-workers.

Petitioner acknowledged that she had lost weight, but asserted that it was not significant and that she had no problems with the fit of her clothing. Petitioner also testified that she had never been diagnosed as having an eating disorder and she did not believe she had one.

2. Mood swings. For Respondent Crawford testified that Petitioner displayed inappropriate anger. Crawford testified that Petitioner went from having a pleasant and calm conversation to inappropriately yelling. Clifford testified that normal professional disagreements that previously were discussed in private became inappropriate public arguments that were out of place and out of the ordinary for Petitioner. He also noted that Petitioner's intensity changed, and was well beyond what was normal for Petitioner; she looked scary while walking down the hallway. There was no evidence that any of the behaviors prevented Petitioner from performing the duties of her job or posed a threat to the health or safety of her co-workers. Petitioner denied all of the allegations.

3. Hiding under a desk. Crawford testified that she heard of this incident from a colleague but she did not witness it herself. There was no evidence other than this uncorroborated hearsay testimony confirming that this incident occurred. Petitioner denied the allegation.

4. Chasing a staff member asking for a kiss. There was no evidence offered other than uncorroborated hearsay testimony confirming this incident. Petitioner denied the allegation.

5. Telling the principal to be careful because another staff member was in a cult and "trying to get in your head." There was no evidence offered confirming this incident other than uncorroborated hearsay testimony. Petitioner denied the allegation.

6. Staff was uncomfortable in Petitioner's presence. Clifford testified that a teacher told him that she was uncomfortable going to a meeting with Stewart because of her erratic behavior. Clifford was not present at that meeting but he received frequent questions from other staff members asking "is she alright?"; "are you doing anything?"; and "did you see how she looks?" He received complaints from teachers about Petitioner's behavior at other meetings throughout the year. There was no evidence that any of the complaints were about Petitioner's inability to perform the duties of her job or that she posed a threat to the health or safety of the students or her co-workers. There was no evidence offered other than uncorroborated hearsay testimony.

According to Article 33 of the Collective Bargaining Agreement, a complaint about an employee that could affect their status or evaluation must be in writing and presented to the employee with an opportunity to respond. None of the complaints or concerns of staff were submitted in writing to Petitioner. Petitioner denied all of the allegations.

7. Telephone call to Clifford's secretary over the weekend. There was no first-hand testimony or an affidavit from the secretary that Petitioner expressed an interest in

receiving help to "keep away bad spirits" or to "keep away evil spirits." This evidence was offered through the uncorroborated hearsay testimony of Clifford.

Petitioner testified that she and the secretary had a friendly relationship. They had each other's cell phone numbers and had talked outside of school hours about non-school-related issues. Stewart states that she asked the secretary to keep a friend of hers in her prayers because she knew the secretary to be a religious person. She denies allegations of improper or "strange" conduct.

8. Showing a colleague a tattoo located in a private area. Petitioner testified that she sent a message containing a picture of her tattoo located on her upper back to the vice principal because they were on friendly terms. Stewart stated that the tattoo is not located in an area of her body that would be covered by a bathing suit. Clifford's testimony regarding the incident confirms that Stewart and the vice principal were friendly, but that the vice principal found it unusual. Clifford stated he also received a message containing a picture of a tattoo of Stewart's but was unaware if it was the same picture. There was no evidence offered confirming that Petitioner sent a picture of a tattoo located in an inappropriate place on her body other than uncorroborated hearsay testimony. Petitioner denied the allegation. Petitioner denies any inappropriate conduct.

9. Making reference to her sexual arousal in front of colleagues. This statement is the subject of a pre-trial letter memorandum dated in March 23, 2016. This allegation was made months after Respondent requested the psychiatric evaluation. No evidence was offered in support of this allegation. It is of no evidentiary value in this case.

10. An inability to focus on tasks, which resulted in highly manic and defensive behavior. In support of this allegation Crawford testified about an incident in which Petitioner placed a higher priority on getting food for a meeting over getting supplies (calculators) for a teacher who requested them. Crawford also noted that Petitioner displayed defensive behavior on the day that she was requested to undergo a drug and alcohol screening. Petitioner denied being unable to focus on, or to perform the duties

of her job. The undersigned is not persuaded that this incident alone demonstrates an inability to focus on tasks.

11. Inappropriate physical behavior - touching, hugging, patting, and grabbing the legs of colleagues. In support of this allegation Clifford testified that the behavior resulted in a faculty member telling Clifford that she would not meet with Petitioner. There is no evidence to support this allegation other than uncorroborated hearsay testimony. Petitioner denied the allegation.

12. Repeated episodes of anxiety when requested to do routine assignments. Crawford and Crow offered testimony about incidents in with Petitioner overreacted when asked to perform tasks such as covering a class, and at the last minute, conducting a meeting. Petitioner acknowledged the latter and explained that her reaction was due to an uncomfortable rash that was not visible to Crow. There was no evidence that Petitioner was unable to perform the duties of her job or that she posed a threat to the health or safety of the students or her co-workers.

13. Numerous requests for letters of recommendation. Clifford testified that whenever "things didn't go her way," Petitioner asked for "letters of recommendation" as a "threat" that she was going to look for another job. There is no evidence of any conduct that demonstrates an inability to perform the duties of her job or that she posed a threat the health or safety of the students or her co-workers.

14. Deterioration in her physical and mental condition. Both Crawford and Crow observed a change in Petitioner's character at the beginning of the 2015-2016 school year, where she became more anxious and intense. Both of these nurses only anecdotally concluded that Petitioner's mental and physical condition deteriorated. There is no medical evidence in the record to support this conclusion. There is no evidence that, even if these nurses are correct in their observations, Petitioner's ability to perform the duties of her job declined or that she posed a threat to the health or safety of the students or to her co-workers. Petitioner denies any such deterioration.

15. Petitioner's refusal to supply the school nurses with medical documentation relative to her behavior and condition. Respondent was aware of Petitioner's use of the drug Imitrex and Crawford testified that, to her knowledge, it was used properly Crawford acknowledged that teachers are not required to disclose medical information to school nurses. There is no evidence that Petitioner had a legal or contractual obligation to disclose information regarding her use of the drug or that her use of the drug impaired her ability to perform the duties of her job or that she posed a threat to the health or safety of the students or to her co-workers.

16. Resistance to questions about following up with treatment referrals. Crawford testified that she made recommendations about receiving treatment for anorexia. Petitioner was defensive and failed to follow up on those recommendations. Petitioner had no obligation to follow up on the referral and there is no evidence that Petitioner demonstrated an inability to perform the duties of her job or posed a threat to the health or safety of the students or to her co-workers.

17. Complaints heard by Crow and Crawford as union representatives. There is evidence of only one specific complaint that either nurse received in their capacity as union representatives. That incident was when Petitioner chose to pick up food for a meeting and stated she did not have time to fill a teacher's request for calculators. There is no evidence submitted by Petitioner or Respondent of written complaints given to either Crow or Crawford by other employees. Crow testified that she had no knowledge of Petitioner ever being questioned or disciplined for any conduct.

In support of its position Respondent cites Blevis, supra, A-6004-07T3. In this case the Appellate Division held that the request for a psychiatric evaluation of a teacher was appropriate when that teacher had evinced a harmful, significant deviation of mental health that threatened coworkers which affected his ability to do his job. Mr. Blevis was a reportedly good employee until his behavior became erratic and unusual in 2006. Mr. Blevis would become so upset that his face turned red and his body would shake with his arms flailing. He became so erratic as to be threatening and confrontational to other employees. He was asked to leave a meeting because he was loudly muttering that the meeting was a waste of time. After he left the meeting, he tore

up the papers from the meeting. He refused to listen to the suggestions of special education teachers to accommodate the needs of students in his class. He went into other teachers' classrooms visibly angry, complaining of a political girls club that was out to get him and would leer at his female colleagues in the hallways. Mr. Blevis would secretly tape the conversations of his colleagues and when complaining to the librarian of conspiracies against him, he became so angry he could not calm down and would not listen to reason. Mr. Blevis, as an earth science teacher, sabotaged experiments and repeatedly failed to follow protocol regarding experiments that he conducted. Numerous staff members reported feeling threatened by him and did not feel safe around him.

The Administrative Law Judge and the Appellate Division determined that Mr. Blevis exhibited a harmful, significant deviation from mental health which affected his ability to teach. He was unstable, prone to uncontrollable anger, and many teachers feeling threatened by Mr. Blevis based on their personal interactions with him.

Fitness to teach is not based exclusively on the teacher's classroom proficiency or the absence of misconduct but "depends on a broad range of factors." In re Grossman, 127 N.J. Super. 13, 30 (App. Div. 1974). The Appellate Division agreed with the ALJ's finding:

> While the majority of the incidents cited by the Board dealt with erratic behavior by the respondent against staff members, this type of behavior cannot be isolated from the student body. In a school setting there is constant interaction among teachers and students. Problems with staff will ultimately affect the students. Teachers who feel threatened will eventually react to the tension they are feeling. This is bound to impact on students as well. In addition, if the staff is threatening to leave, that certainly affects the student body. This does not mean that, if a group of teachers, for no good reason, have decided that they do not wish to work with a fellow teacher[,] that the Board should acquiesce to their demands. However, that is not the case in this situation. There is ample evidence that Mr. Blevis has acted in an irrational and threatening manner to his fellow teachers and supervisor.
>
> [Blevis, supra, A-6004-07T3 at *10.]

Arguably Petitioner's "out-of-character behavior has affected the staff, however her conduct is not comparable to that of a teacher who made his colleagues feel physically threatened when in his presence. In the present case, there was hearsay testimony that one staff member complained of being uncomfortable in Petitioner's presence. There is no corroborating evidence. Further, there is no evidence that Petitioner was a danger to the students or co-workers, nor that she was unable to perform the duties of her job. On the contrary, she received positive performance evaluations.

Respondent's reliance on Gish, supra, 74 N.J. 251. Gish also is unavailing and distinguishable from the present case. In 1976 the Superior Court found that Gish, an English teacher and one of the original teachers challenging the constitutionality of N.J.S.A. 18A:16-2 in Kochman, was unfit to be a teacher based solely on his involvement with an activist group supporting gay rights. Two psychiatrists found that this posed a psychological harm to impressionable young minds. Mr. Gish did not display conduct unbecoming of a teacher, or any inappropriate behavior towards students. Petitioner, unlike Mr. Gish, is not being requested to undergo this evaluation based on activities in her personal life, but because of her behavior during school hours.

For the foregoing reasons, I **CONCLUDE** that Respondent has not met its burden of proof that Petitioner's behavior was a "harmful, significant deviation from mental health affecting the teachers ability to teach, discipline, or associate with children of the age of the children subject to the teacher's control in the school district." Kochman, supra, 124 N.J. Super. at 212.

Therefore I further **CONCLUDE** that Respondent may not avail itself of the provisions of N.J.S.A. 18A:16-2.

## ORDER

Accordingly, I hereby **ORDER** that Respondent's requirement that Petitioner submit to a psychiatric evaluation was improper and it decision to invoke N.J.S.A. 18A:16-2 is hereby **REJECTED** and **REVERSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 14, 2016
DATE

**LELAND S. McGEE**, ALJ

Date Received at Agency: July 14, 2016

Date Mailed to Parties: JUL 18 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

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

July 11, 2016
DATE

**SARAH G. CROWLEY**, ALJ

Date Received at Agency: July 11, 2016 (emailed)

Date Mailed to Parties: July 11, 2016 (emailed)

/mel

## APPENDIX

## WITNESSES

For Petitioner:

Tami Stewart

For Respondent:

Carla R. Crow

Marilyn B. Crawford

Jeremiah Clifford

## EXHIBITS

For Petitioner:

P-1 Evaluation dated January 29, 2015

P-2 Evaluation dated April 16, 2015

P-3 Not offered

P-4 Prescription

P-5 Not offered

P-6 Excerpt from Collective Bargaining Agreement

For Respondent:

R-1 Laboratory Report

R-2 Suspension letter

R-3 Board response to petition

R-4 Answer to Petition

R-5 Letter dated December 14, 2015

312-16

OAL DKT. NO. EDU 7069-16
AGENCY DKT. NO. 81-3/16

| | | |
|---|---|---|
| ANTHONY CALANDRILLO, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF TRUSTEES OF THE TEANECK COMMUNITY CHARTER SCHOOL, BERGAN COUNTY AND ALEXANDRA SORIANO-TAVERAS, BOARD PRESIDENT, | : | DECISION |
| RESPONDENTS. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/16

Date of Mailing: 8/31/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 07069-16N
AGENCY DOCKET NO. 81-3/16

**ANTHONY CALANDRILLO,**

Petitioner,

v.

**BOARD OF TRUSTEES OF THE TEANECK COMMUNITY CHARTER SCHOOL, BERGEN COUNTY AND ALEXANDRA SORIANO-TAVERAS, BOARD PRESIDENT,**

Respondents.

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**Robert J. Pruchnik**, Esq. appearing on behalf of petitioner (Campbell & Pruchnik, LLC)

**Seth Spiegal**, Esq., for respondent (McElroy Deutsch Mulvaney & Carpenter, LLP)

Record Closed: July 13, 2015 Decided: July 14, 2015

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 9, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and

N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on June 10, 2016 during which time the parties agreed to an in person settlement conference on Jun 22, 2016. During the settlement conference the parties reached a tentative agreement. On July 13, 2016, the submitted a copy of the signed Settlement Agreement and Board Resolution, which is attached hereto for reference.

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

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

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

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

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

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

7-14-16

DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency: 7-19-16

Date Mailed to Parties: JUL 19 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

# TCCS Board Meeting
## July 6, 2016
## *Resolution 1607-12*
## *Settlement Agreement*

RECEIVED
2016 JUL 13 P 3:39

**WHEREAS**, Anthony Calandrillo filed an action with the New Jersey Bureau of Controversies and Disputes against the Teaneck Community Charter School Board of Trustees ("TCCS"), entitled Anthony Calandrillo v. Teaneck Community Charter School Board of Trustees, Alexandra Soriano-Taveras, et al., OAL Docket. No.: 81-3/16, which was referred to the Office of Administrative Law, OAL Docket. No.: EDU 07069-2016 N, in connection with the end of his employment with TCCS, and

**WHEREAS**, on June 22, 2016, the claim was mediated before a sitting administrative law judge, and a settlement in principle was reached; and

**WHEREAS**, the terms and conditions of settlement have been memorialized into a written Settlement Agreement and General Release ("Agreement"), in the form attached and made a part of this Resolution; and

**WHEREAS**, the TCCS Board of Trustees finds it to be in the best interest of TCCS to consent to the terms of the Agreement;

**NOW, THEREFORE, BE IT RESOLVED** that the TCCS Board of Trustees hereby consents to the settlement under the terms of the Agreement; and

**BE IT FURTHER RESOLVED** that the TCCS Board of Trustees hereby authorizes TCCS to take any and all actions required to complete the settlement and fulfill the purpose of this Resolution and the Agreement; and

**BE IT FURTHER RESOLVED** that this Resolution shall take effect pursuant to law.

| **Moved by:** | PINEY | **Seconded By:** | PARSONS |
|---|---|---|---|

| **Vote** | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | **Yes** | **No** | | **Yes** | **No** | | **Yes** | **No** |
| **Eleby** | | | **Johnson** | | | **Piney** | ✓ | |
| **Elliott** | ✓ | | **Karibi-Whyte** | ✓ | | **Simmonds** | ✓ | |
| **Jackson** | | | **Parsons** | ✓ | | **Taveras** | ✓ | |

| **Resolution Carried:** | **Yes** ✓ | **No** |
|---|---|---|

**Date:** 7/6/2016

**Signed:** Alexandra Soriano-Taveras

## CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

**THIS CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE** ("Agreement") is by and between Anthony Calandrillo ("Calandrillo") and the Teaneck Community Charter School ("TCCS"). As used in this Agreement, any reference to TCCS shall include its Board of Trustees and each Board member individually, TCCS's predecessors and successors, all of its affiliates, its parent or controlling corporations, partners, divisions, and subsidiaries, and all of their present, past, and future directors, officers, Board members, employees, representatives, attorneys, insurers, reinsurers, agents, and assigns. Any reference to Calandrillo shall include his family, heirs, administrators, representatives, agents, successors, and assigns. Hereafter Calandrillo and TCCS are collectively referred to as "Parties."

**WHEREAS**, Calandrillo was employed by TCCS as Lead Person and Director of Academics under an Employment Contract executed July 31, 2014; and

**WHEREAS**, Calandrillo resigned from employment on December 16, 2015; and

**WHEREAS**, this Agreement is made and entered into in full settlement of the action filed in the New Jersey Bureau of Controversies and Disputes and pending in the Office of Administrative Law, captioned as Anthony Calandrillo v. Teaneck Community Charter School Board of Trustees, Alexandra Soriano-Taveras, et al., OAL Docket. No.: EDU 07069-2016 N, Agency Ref. No.: 81-3/16 ("Administrative Action"), and any and all other claims or potential claims that Calandrillo may have, whether known or unknown, against TCCS;

**NOW THEREFORE**, in consideration of the mutual promises contained herein, and intending to be legally bound, it is **AGREED** as follows:

1. Resignation. The Parties agree that Calandrillo resigned from employment with TCCS effective December 16, 2015.

2. Consideration. In consideration for the releases set forth in this Agreement, including but not limited to the General Release in Paragraph 4, TCCS agrees to provide Calandrillo with the following:

   a. Settlement Pay. Within 30 days of approval of this Agreement by the New Jersey Office of Administrative Law and the New Jersey Department of Education, and provided that, as referenced in Paragraph 22 of this Agreement, he does not revoke the Agreement, TCCS shall remit to Calandrillo's counsel, Robert Pruchnik, one check in the amount of $50,850 ("Settlement Amount"), which shall be made payable to "Anthony Calandrillo." This payment will be reported on an IRS Form 1099.

   b. Unemployment Compensation. TCCS agrees not to contest any claim for unemployment compensation that Calandrillo may file. However, TCCS makes no representation with regard to the legitimacy of any unemployment claim, and Calandrillo acknowledges that the ultimate decision as to his eligibility for

benefits is made by the New Jersey Department of Labor. Whether any unemployment claim is approved or denied will have no bearing on the enforceability or the full and complete implementation of all terms of this Agreement.

3. Tax Treatment and Indemnification. Calandrillo warrants and represents that he will file all necessary tax forms and make all necessary tax payments (if any) in connection with the payment of the Settlement Amount under Paragraph 2 of this Agreement. Calandrillo understands and agrees that TCCS has made no representations to him or to his counsel concerning the taxability of the Settlement Amount. Calandrillo further understands and agrees that in the event the Internal Revenue Service, or any other taxing entity, including, but not limited to, the Division of Taxation of the State of New Jersey, or any court or other tribunal of competent jurisdiction, ultimately determines that the Settlement Amount, or any portion of it, in constitutes income for which any taxes remain due and owing, Calandrillo shall be responsible for the payment of such taxes, and he shall make no claim against TCCS for payment of any such taxes, or for the payment of any applicable interest or penalties. Calandrillo agrees to indemnify and hold TCCS harmless from any and all liability, including, without limitation, all penalties, interest, and other costs that may be imposed by the Internal Revenue Service or other governmental agencies regarding any tax obligations that may arise from the payment made to Calandrillo under Paragraph 2. In the event it is ultimately determined that any taxes are due and owing with respect to said sum, the validity of this Agreement shall not be affected in any way.

4. General Release. In exchange for the consideration provided under this Agreement, Calandrillo hereby knowingly and voluntarily releases and forever discharges TCCS from any and all suits, causes of action, complaints, obligations, demands, or claims of any kind, including those relating to his employment, whether in law or in equity, direct or indirect, known or unknown (hereinafter "Claims"), that Calandrillo ever had or now has against TCCS arising out of or relating to any matter, thing or event occurring up to and including the date of this Agreement, exclusive of a claim for breach of this Agreement. This is a General Release. This General Release specifically includes, but is not limited to:

a. any and all Claims for wages and benefits including, without limitation, salary, commissions, health and welfare benefits, settlement pay, vacation pay, and bonuses;

b. any and all Claims for wrongful discharge in violation of express or implied public policy of the United States, the State of New Jersey, or any state, constructive discharge, retaliatory discharge, hostile work environment, breach of contract (whether express or implied), including breach of Calandrillo's Employment Contract, and breach of the implied covenant of good faith and fair dealing;

c. any and all Claims for employment discrimination or retaliation on the basis of age, race, color, religion, sex, national origin, veteran status, disability and/or handicap, marital status, sexual orientation, or any other characteristic protected by law, and any and all claims in violation of any federal, state or local statute,

ordinance, executive order, or common law doctrine including, but not limited to, Claims for discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act, as amended; the Americans with Disabilities Act; the Americans with Disabilities Amendments Act of 2008; the Genetic Information Nondiscrimination Act of 2008; the Pregnancy Discrimination Act of 1978; the Employee Retirement and Income Security Act of 1974, and any other applicable federal or state statute relating to employee benefits or pensions; 29 U.S.C. Sec. 1001; the Electronic Communications Privacy Act; the Consolidated Omnibus Budget Reconciliation Act; the Occupational Safety and Health Act; 42 U.S.C. Sec. 1981; the National Labor Relations Act; the Fair Labor Standards Act; the Rehabilitation Act of 1972; the Family and Medical Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage Payment Law; all New Jersey wage and hour, overtime, disability and maternity leave laws; any and all federal or New Jersey education laws relating to public schools and/or charter schools; the Open Public Meetings Act; the New Jersey Constitution; the U.S. Constitution; and any other federal, state, foreign, or local laws or regulations prohibiting employment discrimination of any kind;

d. any and all Claims in tort (including, but not limited to, any Claims for misrepresentation, fraud, defamation, libel, slander, interference with contract or prospective economic advantage, intentional or negligent infliction of emotional distress, duress, loss of consortium, invasion of privacy, and negligence);

e. any and all Claims for compensatory, emotional distress, or punitive damages; and

f. any and all Claims for attorneys' fees and/or costs.

This Release is intended by the Parties to be construed as a General Release and to release any and all claims and rights of Calandrillo (whether known to him or not), including, but not limited to, any claims for attorneys' fees, arising on or before the date of the execution of this Agreement, to the fullest extent permitted by law.

5. Calandrillo's Acknowledgment. Calandrillo understands that the General Release set forth in Paragraph 4 extends to all of the aforementioned claims and potential claims against TCCS, its Board of Trustees and each Board member individually, TCCS's predecessors and successors, all of its affiliates, its parent or controlling corporations, partners, divisions, and subsidiaries, and all of their present, past, and future directors, officers, board members, employees, representatives, attorneys, insurers, reinsurers, agents, and assigns, which arose on or before the effective date of this Agreement, whether now known or unknown, suspected or unsuspected, and that this Release constitutes an essential term of this Agreement. This General Release shall not, however, preclude Calandrillo from bringing any action to enforce this Agreement if TCCS fails to provide the consideration set forth in Paragraph 2.

6. Calandrillo's Assignment of Right to Obtain Monetary Relief. To the extent, notwithstanding the General Release in Paragraph 4, Calandrillo is legally permitted to file against TCCS any lawsuit or proceeding with any court or government agency, Calandrillo hereby assigns to TCCS any right he may have to recover monetary relief of any kind in any such lawsuit or other proceedings.

7. Acknowledgment of Consideration. Calandrillo acknowledges that, in return for executing this Agreement, he is receiving the consideration described in Paragraph 2 of this Agreement. Calandrillo agrees that other than the consideration described in Paragraph 2 (which he will receive in return for executing this Agreement and upon approval of this Agreement by the New Jersey Office of Administrative Law and the New Jersey Department of Education), he is entitled to no other consideration from TCCS.

8. Confidentiality of TCCS's Information. Calandrillo acknowledges and agrees that as an employee of TCCS, he had access to and/or was entrusted with the confidential and proprietary business information of TCCS ("Confidential Information"). Calandrillo further agrees that at all times prior to, during, and following his separation, he will maintain such information in strict confidence and has not and will not disclose (directly or indirectly) the information to any third party. "Confidential Information" includes, but is not limited to, keys and access cards; software and other computer programs or equipment; credit cards; telephone charge cards; forms; documents and files including forms and correspondence; business cards; business and financial plans or strategies, projections, results and prospects; student, faculty, administration, staff and other business or education data and information; employee lists; student information; parent information; personnel data; administrative procedures and manuals; trade secrets; contracts; brochures and catalogues; training materials; PowerPoint presentations, literature, articles, educational materials, computer tapes and diskettes or other portable media, and other written and oral materials that are related to the business of TCCS and the confidentiality of which TCCS attempts to maintain with reasonable efforts and that TCCS has not released to the general public.

9. No Admission of Liability. Neither the execution of this Agreement by TCCS, nor the terms hereof, constitute an admission by TCCS, or by any principal, agent, Board member, or employee of TCCS, of liability with respect to any possible claim that was or could have been made by Calandrillo. By entering into this Agreement, TCCS does not admit, and expressly denies, that it has violated any contract, rule, law, statute, or regulation, including, but not limited to, any federal, state or local law, statute, or regulation relating to employment, employment discrimination, or education, or that the actions of TCCS were unwarranted, unjustified, retaliatory, discriminatory, or otherwise unlawful.

10. Acknowledgment of End of Employment. Calandrillo confirms that his employment with TCCS has ended. Calandrillo agrees he will not apply for or otherwise seek employment or reemployment with TCCS. If Calandrillo applies or otherwise seeks employment or reemployment with TCCS, TCCS shall have no obligation to consider his employment. Calandrillo agrees not to take legal action of any kind as a result of a refusal by TCCS to consider his employment.

11. Non-Interference and Non-Disparagement. Calandrillo agrees that he will not, in any manner whatsoever, directly or indirectly, interfere with TCCS's operations or other third-party relationships, including its relationships with any past, present, or prospective student or any parent of any past, present, or prospective student. In addition, Calandrillo agrees that he will not in any manner whatsoever, directly or indirectly, disparage TCCS, its Board of Trustees, TCCS's principals, its officers, its directors, its board members, its employees, its agents, its insurers, its education, its curriculum, or any other aspects of TCCS's operations. TCCS agrees that it will not directly or indirectly disparage Calandrillo.

12. Confidentiality.

a. Calandrillo agrees to keep the terms of this Agreement, including the consideration he has received, the circumstances surrounding this Agreement, and the negotiations leading to this Agreement strictly confidential, except as required by legal process. Calandrillo represents that he has not disclosed, and that he will not disclose, such information to anyone, either directly or indirectly, with the following exceptions. He may disclose the Agreement to his spouse, attorneys, accountants, and/or tax advisors in order to obtain professional advice within the scope of their representation. All such individuals are also bound by this confidentiality pledge, and shall be advised of their obligations by the person disclosing before any disclosures are made concerning this Agreement. Calandrillo understands that this Confidentiality provision shall remain in full force and effect notwithstanding the fact that this document may become public under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq., or other legal process or proceeding.

b. TCCS agrees that its Board members will not disclose the amount of the Settlement Payment except: (i) to those required to know in order to effect the payments under this Agreement or in performance of this Agreement or in connection with the operation of TCCS; (ii) unless such disclosure is required by law or regulation (e.g., in connection with the filing of tax returns); or (iii) to its financial advisors, attorneys and other representatives, provided that TCCS first informs them of the confidentiality of this Agreement and they agree to maintain its confidentiality.

13. Breach. Calandrillo understands that if he brings any future legal action or proceeding of any kind or makes any claim against TCCS for any claim released in this Agreement, or if he otherwise breaches this Agreement, he shall immediately return to TCCS the entire Severance Amount. TCCS shall further be entitled to recover any damages proven to result from such breach and shall be entitled to be reimbursed by Calandrillo for all reasonable attorneys'' fees, costs, and expenses incurred by TCCS in defending itself in enforcing its rights relative to such matters.

14. Agreement To Refrain From Filing Claims. Calandrillo represents that, other than the Administrative Action, he has no lawsuits, charges, administrative proceedings, assertions, or other claims of any nature pending against TCCS in any state or federal court, or before any agency or other administrative body. Calandrillo shall cause the Administrative Action to be withdrawn, with prejudice, within 5 days of approval of this Agreement by the New Jersey Office of Administrative Law and the New Jersey Department of Education, by execution

by his counsel of a Stipulation of Dismissal in the form attached hereto as Exhibit A. Further, Calandrillo agrees, to the fullest extent permitted by law, that he will not institute any lawsuit, charge, action or other claim of any nature whatsoever against TCCS in any forum, based upon any event, whether known or unknown, occurring prior to the date of the execution of this Agreement.

15. No Assignment of Any Released Claim. Calandrillo represents and warrants that he has not assigned, transferred, or purported to assign or transfer, to any person, firm, partnership, corporation, association, or entity whatsoever, any released claim. Calandrillo agrees to indemnify and hold TCCS harmless against, without any limitation, any and all rights, claims, warranties, demands, debts, obligations, liabilities, costs, court costs, expenses (including attorneys' fees), causes of action, or judgments based on or arising out of any such assignment or transfer. Calandrillo further warrants that there is nothing that would prohibit him from entering into this Agreement.

16. Understanding of Agreement. Calandrillo acknowledges that he is over the age of 18 years of age and has carefully read this Agreement and fully understands the terms thereof, and signs this Agreement voluntarily as his own free act.

17. Governing Law and Forum Selection. This Agreement shall be governed by and construed under the laws of the State of New Jersey, without regard to conflict of law principles. Any disputes relating to this Agreement shall be resolved exclusively by a state or federal court in the State of New Jersey.

18. Entire Agreement. This Agreement contains the entire agreement of the Parties with respect to this subject matter and supersedes any prior agreements or understandings with respect to this subject matter. The Parties acknowledge that in signing this Agreement, they do not rely upon and have not relied upon any representation or statement made by any of the Parties or their agents with respect to the subject matter, basis or effect of this Agreement, other than those specifically stated in this written Agreement.

19. Legally Binding. The terms of this Agreement contained herein are contractual, and not a mere recital. This Agreement shall be binding upon the Parties and upon their heirs, administrators, representatives, executors and assigns. Calandrillo represents and agrees that he is not impaired, by bankruptcy or otherwise, from signing this Agreement or releasing any of the rights or claims released in this Agreement.

20. Severability. If any term or provision of this Agreement shall be held to be invalid or unenforceable for any reason, the validity or enforceability of the remaining terms or provisions shall not be affected, and such term or provision shall be deemed modified to the extent necessary to make it enforceable.

21. Amendments. Neither this Agreement nor any term hereof may be orally changed, waived, discharged, or terminated, and may be amended only by a written agreement between the Parties.

22. THIS AGREEMENT SPECIFICALLY WAIVES ALL OF CALANDRILLO'S RIGHTS AND CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") (29 U.S.C. § 621, ET SEQ.), AS AMENDED, AND THE OLDER WORKERS' BENEFIT PROTECTION ACT, AS AMENDED. In connection with this waiver, Calandrillo acknowledges and agrees that:

a. This Agreement is voluntarily entered into by Calandrillo, and Calandrillo has had a full and fair opportunity (at least twenty-one (21) days) to review, consider, and negotiate the terms of this Agreement.

b. Calandrillo has been advised to seek the advice of an attorney concerning the meaning of this Agreement, Calandrillo's attorney negotiated this Agreement with his knowledge and consent and reviewed the terms of the Agreement with him, and Calandrillo acknowledges that he understands each and every term of this Agreement;

c. Calandrillo further understands that he may revoke this Agreement at any time within seven (7) days after he signs it, and that this Agreement shall not become effective or enforceable, and the consideration in Paragraph 2 will not be provided, until the seven (7) day revocation period has expired. Calandrillo has seven (7) calendar days after signing this Agreement to revoke this Agreement, but must do so in a writing sent and postmarked within the seven (7) day period to Seth Spiegal, Esq., McElroy, Deutsch, Mulvaney & Carpenter, LLP, 1300 Mount Kemble Avenue, P.O. Box 2075, Morristown, New Jersey 07962;

d. If Calandrillo signs this Agreement prior to the end of the twenty-one (21) day time period, Calandrillo certifies that, in accordance with 29 CFR § 1625.22 (e)(6), he knowingly and voluntarily decided to sign the Agreement after considering it for less than twenty-one (21) days, and his decision to sign was not induced by TCCS through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the twenty-one (21) day time period;

e. Calandrillo has carefully read and fully understands all of the provisions and effects of this Agreement, and he knowingly and voluntarily entered into all of the terms set forth in this Agreement;

f. Calandrillo knowingly and voluntarily intends to be legally bound by all of the terms set forth in this Agreement;

g. Calandrillo has relied solely and completely upon his own judgment and, if he has retained an attorney, the advice of his attorney in entering into this Agreement; and

h. Calandrillo is, through this Agreement, releasing TCCS from any and all claims he may have against TCCS, including, but not limited to, claims arising under the ADEA.

23. This Agreement, consisting of nine typed pages (including a page for Exhibit A), and containing 23 numbered paragraphs (some with subparts) before the signature lines, is a legally enforceable contract.

**IN WITNESS WHEREOF,** the Parties have caused this Agreement to be executed.

By: _____
Anthony Calandrillo

Dated: 7/6/16

Signed and subscribed to before me
this 6th day of July, 2016

_____
A Notary Public of New Jersey
My Commission Expires 11/18/16

2414704

Teaneck Community Charter School

By: _____

Dated: 7/7/16

Signed and subscribed to before me
this 7th day of July, 2016

7/7/2016 _____

A Notary Public of New Jersey
My Commission Expires _____

Shamala Nagaraj
Notary Public of New Jersey
Commission ID# 2323326
Commission Expires 11/30/2019

**EXHIBIT A**

| | |
|---|---|
| ANTHONY CALANDRILLO,<br><br>Petitioner,<br><br>vs.<br><br>TEANECK COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES, ALEXANDRA SORIANO-TAVERAS, PRESIDENT, et al.,<br><br>Respondents. | **NEW JERSEY DEPARTMENT OF EDUCATION**<br><br>**COMMISSIONER OF EDUCATION**<br><br>**OAL Docket. No.: EDU 07069-2016 N,**<br>**Agency Ref. No.: 81-3/16**<br><br>**STIPULATION OF DISMISSAL** |

The undersigned parties, having amicably resolved this matter, it is hereby stipulated that this matter is dismissed with prejudice as between and among Petitioner, Anthony Calandrillo, and Respondents, Teaneck Community Charter School Board of Trustees and Alexandra Soriano-Taveras, et al., without costs or attorneys' fees to any party.

**Campbell & Pruchnik, LLC**
Attorneys for Petitioner
Anthony Calandrillo

By: _____
Robert J. Pruchnik, Esq.

**McElroy, Deutsch, Mulvaney & Carpenter, LLP**
Attorneys for Respondents Teaneck Community Charter School Board of Trustees and Alexandra Soriano-Taveras, et al.

By: _____
Seth Spiegal, Esq.

313-16

| | | |
|---|---|---|
| J.S., on behalf of minor child, M.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter in May 2016, seeking a determination that M.S. is entitled to a free public education in the Morris School District. The matter was transmitted to the Office of Administrative Law (OAL) to ascertain petitioner's residency and the amount of any tuition due. A hearing was scheduled in the OAL for July 14, 2016. Petitioner failed to appear at the hearing, and offered no explanation for her non-appearance. The Board subsequently sent a letter to the OAL, stating, *inter alia*, that J.S. and M.S. had relocated to the Netherlands at the end of the school year. The Board further stated that it would not pursue any claim for tuition for the 2015-2016 school year.

Upon review, the Commissioner found that this matter is no longer deemed to be a contested case before the Commissioner, and dismissed the petition.

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

August 30, 2016

OAL DKT. NO. EDU 7452-16
AGENCY DKT. NO. 116-4/16

| | | |
|---|---|---|
| J.S., on behalf of minor child, M.S., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at the scheduled July 14, 2016 OAL hearing – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/16
Date of Mailing: 8/31/16

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

314-16

OAL DKT. NO. EDU 12771-15
AGENCY DKT. NO. 148-6/15

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE, | : | |
| RESPONDENT. | : | |

The record of this matter, the proposed consent order for dismissal with prejudice, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/16

Date of Mailing: 8/31/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 12771-15

AGENCY REF. NO. 148-6/15

**BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,**

Petitioners,

v.

**NEW JERSEY STATE DEPARTEMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,**

Respondents

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**Robert F. Varady**, Esq., for petitioners (LaCorte, Bundy, Varady & Kinsella, attorneys)

**Lauren A. Jensen**, Deputy Attorney General, for respondents (Christopher S. Porrino, Acting Attorney General of New Jersey, attorney)

Record Closed: July 14, 2016 Decided: July 26, 2016

BEFORE: **THOMAS R. BETANCOURT**, ALJ

## NATURE OF PROCEEDINGS

Petitioners, seek a revision of the Report of Examination (ROE) performed by Respondent OFAC removing language suggesting petitioner violated any law; revision of the ROE regarding attribution of total expenditures for meals; and, an order acknowledging that OFAC waived any requirement for a public hearing In the settlement agreement, or in the alternative, an order directing that petitioner is not required to comply with N.J.A.C. 6A:23A-5.6.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on August 24, 2015.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Consent Order for Dismissal with Prejudice.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

## ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

July 26, 2016
DATE

**THOMAS R. BETANCOURT**, ALJ

Date Received at Agency: July 28, 2016

Date Mailed to Parties: July 29, 2016
db

~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,<br><br>Petitioner,<br><br>v.<br><br>NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,<br><br>Respondent. | : | STATE OF NEW JERSEY<br>COMMISSIONER OF EDUCATION<br><br>AGENCY DKT. NO. 148-6/15<br>OAL DKT. NO. EDU 12771-2015N<br><br>CONSENT ORDER FOR DISMISSAL WITH PREJUDICE |

WHEREAS, Respondent New Jersey Department of Education, Office of Fiscal Accountability and Compliance ("OFAC"), issued a Report of Examination ("Report") titled "Elizabeth School District: Food Service Expenditure Review" dated April 2015; and

WHEREAS, Petitioner Board of Education of the City of Elizabeth ("Petitioner") filed a Petition of Appeal with the Commissioner of Education on June 30, 2015, under Docket Number 148-6/15 challenging certain statements and findings in the Report; and

WHEREAS, OFAC filed an Answer on August 19, 2015; and

WHEREAS, the matter was transmitted to the Office of Administrative Law as a contested case and was filed under Docket Number EDU 12771-2015N; and

WHEREAS, OFAC issued a revised Report on May 27, 2016, removing any statement that Petitioner acknowledged violating

the Accountability Regulations, N.J.A.C. 6A:23A-7.12 et seq.; and

WHEREAS, Petitioner no longer contests the remainder of the Report;

**IT IS** on this 25th day of July, 2016, **ORDERED** that this case be and is hereby **DISMISSED WITH PREJUDICE.**

Hon. Thomas Betancourt, A.L.J.

We hereby consent to the proposed form of Order:

Attorneys for Petitioner:

Robert F. Varady, Esq.
LaCorte, Bundy, Varady & Kinsella

Date: 7/14/16

For Respondent:

Christopher S. Porrino
Acting Attorney General of New Jersey

By: _____
Lauren A. Jensen
Deputy Attorney General

Date: 6/24/16

315-16

315-16E

OAL DKT. NO. EDU 10582-16
AGENCY DKT. NO. 189-7/16

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| CONSTANCE BAUER, STATE-APPOINTED MONITOR, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/16

Date of Mailing: 8/31/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON EMERGENT RELIEF**
OAL DKT. NO. EDU 10582-16
AGENCY DKT. NO. 189-7/16

**BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,**
Petitioner,
v.
**CONSTANCE BAUER, Ed. D., NEW JERSEY STATE APPOINTED MONITOR, PLEASANTVILLE SCHOOL DISTRICT,**
Respondent.

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**Daniel J. Gallagher,** Esq. and Benjamin **B. Brenner**, Esq., for petitioner (The Carroll Law Firm, PLC, attorneys)

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

BEFORE **JOSEPH A. ASCIONE,** ALJ:

Petitioner, The Board of Education of the City of Pleasantville, Atlantic County, (Pleasantville BOE), brings this emergent relief application to the Commissioner of Education. It seeks an order against respondent, Constance Bauer, Ed. D., the New Jersey State Monitor of Pleasantville Board of Education (Monitor Bauer) to reverse her

position opposing the non-renewal of five teachers/administrators of the Pleasantville BOE. Petitioner argues that Monitor Bauer's failure to do so is arbitrary and capricious. Monitor Bauer's opposition is on multiple levels. Monitor Bauer argues that the petitioner's application is fatally lacking in any factual certification or documentation to support its position. She also argues that petitioner has shown neither irreparable injury nor a likelihood of success on the merits of the application.

On July 14, 2016, petitioner made this application for emergent relief to the New Jersey State Commissioner of Education. On July 15, 2016, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-8.2. The OAL conducted oral argument on the application on July 27, 2016.

## FACTUAL DISCUSSION

This tribunal is not reviewing a petition for relief as required by N.J.A.C. 6A:3-1.4. A chairperson or secretary of the Pleasantville BOE did not certify or affirm the information included in the petitioner. Rather, alleged counsel to the Pleasantville BOE, completed the petition and chose to certify the information. The application did not attach any action taken by the Pleasantville BOE in authorizing this litigation, or the approval of the non-renewal list. To this tribunal's inquiry to this deficiency, counsel responded, the emergent nature of the application. However, to the inquiry of the nature of the irreparable harm, counsel responded that at some time during the fiscal year, funds would be exhausted resulting in actions that would need to be taken. The application also alleges the wasted time already spent on the Donaldson[1] hearings.

It appears from the application that consideration of a non-renewal list occurred in the petitioner's committees during the months of March, April and May 2016. Counsel argues Monitor Bauer did not attend. Petitioner offered no proof Monitor Bauer had notice of the meetings. On May 9, 2016, the petitioner approved the budget for fiscal year 2016-2017, based upon the termination of various names listed on the non-

[1] Reference is to Donaldson v. Board of Educ., 65 N.J. 236, 242-43 (1974)

renewal list. Counsel argues that respondent never objected to the budget it approved, until June 14, 2016, when respondent objected to the non-renewal list. Counsel maintains that respondent attended the Donaldson hearings in early June. The petition then states that the respondent's June 14, 2016, correspondence overruled the Superintendent's decision regarding the non-renewals.

During oral argument, counsel argues that paragraph twelve and thirteen of respondent's certification reflects that she overruled the decision of the Pleasantville BOE. However, the petition alleges that the respondent overruled the Superintendent's decision to non-renew. The petition therefore clouds whether this distinction is meaningful.

Petitioner's counsel could not refute the allegations of the respondent as set forth in her July 25, 2016, certification.

## RESPONDENT'S CERTIFICATION

Monitor Bauer's certification advises this tribunal of the July 2, 2007, New Jersey State's Commissioner of Education appointment of a fiscal monitor for the Pleasantville BOE. Monitor Bauer accepted her appointment as a State monitor for petitioner on June 23, 2015. She advised of her Masters of Arts and Doctorate of Education degrees, and her experience as a Superintendent of Schools for the Bordentown Regional School District from 2008 to 2014. She represented her knowledge of school district staffing, budgets and operations. She identified the amount the state contributed to the Pleasantville BOE in 2015-2016 as $72,263.704. She confirmed her attendance at the Donaldson hearing on June 7, 2016. She noticed the absence of employee file documentation at the Donaldson hearings and the petitioner's request of the Interim Superintendent for said documents by e-mail the following day. On June 8, 2014, she advised by correspondence to the petitioner of her intended consideration of the non-renewals under her authority as a State Monitor. On June 9, 2016, respondent met with the Interim Superintendent, at that time the Interim Administrator had not yet delivered the personnel records for the non-renewed employees. She obtained the personnel records thereafter and upon review determined to reverse the non-renewal of five of

eight of the proposed non-renewal employees, due to her determination of serious deficiencies regarding the justification and documentation available during the Donaldson hearings. She determined there was inadequate support to non-renew. She also determined that the salaries of the five employees would not affect the proposed expenditures of the 2016-2017 budget.

## STATEMENT OF FACTS

After consideration of the supporting petition and opposition from the respondent, for purposes of this emergent application, I **FIND** as **FACT**:

1. Petitioner made a determination to non-renew eight employees of the Pleasantville School District on or about May 9, 2016.

2. Petitioner scheduled Donaldson hearings for June 7, 2016; respondent attended those hearings. Employment records of five of the employees were not available to respondent at the Donaldson hearings.

3. On June 8, 2016, respondent requested of the Interim Administrator copies of the employment records of all of the employees subject to the Donaldson hearings; and advised the petitioner that the non-renewed employees were under review. On June 9, 2016, respondent met with the Interim Administrator but again did not have the employment records of the non-renewed employees.

4. Respondent's review of the employment records, upon receipt, raised issues of serious deficiencies in the support for non-renewal. Respondent expressed concern over the petitioner's exposure to litigation costs related to the lack of documentation in connection with the non-renewal of five of the eight employees.

5. Respondent determined to reverse the decision of the petitioner and the Interim Administrator upon fiscal considerations related to litigation exposure, and replacement personnel costs. These considerations are all of a personnel and fiscal management.

6. Respondent did allow the non-renewal of three recommended personnel.

## LEGAL DISCUSSION

Initially, respondent argues that petitioner's request for emergent relief is deficient. See N.J.A.C. 6A-3:1.3(i). Petitioner failed to provide an appropriate certification of the petition executed by an authorized member of the Pleasantville BOE. It's legal memorandum is de minimus, at best, and does not address the likelihood of success, or the irreparable injury other than to conclusory relate that it exists. These deficiencies could warrant the dismissal of the application. However, granting such a procedural dismissal would likely result in a new application by petitioner to be again reconsidered by the Commissioner of Education (Commissioner) and then retransmitted to this forum. This does not seem a wise use of time, I am certain this consideration, as well as others entered into the Commissioner's staff's determination to forward this emergent application to this tribunal for consideration of the merits of petitioner's claim. Accordingly, I refrain from dismissing petitioner's claim on procedural grounds.

Petitioner must meet the requirements for emergent relief set forth in N.J.A.C. 6A:3-1.6(b), and must show that the State Monitor appointed by the Commissioner acted arbitrarily, capriciously or unreasonably in refusing to approve the non-renewal of five employees recommended by the Interim Superintendent and the petitioner.

N.J.A.C. 6A:3-1.6 sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in its favor.

In March 2007, the Commissioner of Education appointed a monitor to oversee the petitioner's business operations and personnel matters pursuant to the School District Fiscal Accountability Act, N.J.S.A. 18A:7A-55 to -60.

A State-appointed monitor is empowered to:

(1) oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims;

(2) oversee the operation and fiscal management of school district facilities, including the development and implementation of recommendations for redistricting and restructuring of schools;

(3) ensure development and implementation of an acceptable plan to address the circumstances set forth in subsection a. of this section which resulted in the appointment of the State monitor. The plan shall [*3] include measurable benchmarks and specific activities to address the deficiencies of the school district;

(4) oversee all district staffing, including the ability to hire, promote, and terminate employees;

(5) have authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the State monitor shall be subject to the education, labor, and employment laws and regulations, including the "New Jersey Employer-Employee Relations Act," . . . and collective bargaining agreements entered into by the school district;

(6) attend all meetings of the board of education, including closed sessions; and

(7) meet with the board of education on at least a quarterly basis to discuss with the members of the board the past actions of the board which led to the appointment of the State monitor and to provide board members with education and training that address the deficiencies identified in board actions.

The respondent argues that the application for emergent relief should be dismissed because the petitioner cannot demonstrate any irreparable harm from the respondent's action. Respondent has certified that the budget provides sufficient sums to meet the petitioner's fiscal operations, and the non-termination would not reduce costs during the fiscal year, as in addition to replacement salaries there would be expenditures for litigation defense. In accord, the petitioner has not substantiated any irreparable loss due to the respondent's actions.

Another prong of the Crowe v. DeGioia test requires an analysis of whether the legal rights are settled. Petitioner cited only one matter of legal precedent in support of granting the relief he has requested; the case of Pleasantville, Bd. of Ed., Atlantic County, v. James Riehman, Fiscal Monitor, EDU 11454-10, Initial Decision, (May 31, 2011), rejected Comm'r., (July 31, 2011), http://njlaw.rutgers.edu/collections/oal/ however, the case specifically rejects petitioner's position. There the initial decision limited the decision of the fiscal monitor to prevent a review of a litigation settlement, the Commissioner in the final decision specifically rejected the ALJ's initial decision and concluded that the monitor specifically had the authority to reject that settlement. In accord with that decision, the law is clearly settled against the petitioner.

The final prong of the Crowe v. DeGioia test is a balancing of the equities and the interests of the parties. The respondent possesses the authority to review the fiscal considerations of all actions of the petitioner, including personnel decisions related to hiring and firing. See N.J.S.A. 18A:7A-55(b)(4). The respondent is not just a fiscal agent; rather she has served for an extensive time as a Superintendent of Education. It is for this reason this tribunal places much discretion with the respondent's expertise and judgment in this area.

Petitioner's counsel argues that respondent's determination of litigation risks is the unauthorized practice of law. Petitioner's counsel argues that it is arbitrary and capricious to reverse the decision of the Interim Administrator and the petitioner, as the petitioner did not have information that it could have reversed the Interim Administrator's non-renewal list, and accordingly this deprived the respondent of the ability to reverse the Interim Administrator's and petitioner's action. Petition relies on the limitation of N.J.S.A. 18A:27-4.1(a) which requires the petitioner to not arbitrarily or capriciously withhold approval of a chief school administrator's decision regarding hiring or termination of an employee. Both these arguments are specious. The respondent may or may not have had advice of counsel prior to her June 14, 2016, letter, does not render her decision the unauthorized practice of law. The communication merely stated her reasons for her determination to reject the five non-renewal recommendations of the Interim Administrator and the petitioner, it in no way expressed legal advice to them, rather a decision based upon her authority. The reason is neither the unauthorized practice of law, nor arbitrary and capricious. The reason is based upon her experience and expertise as a previous Superintendent of the Bordentown School District. For one to say the respondent is bound by the action of the petitioner in failing to require information before they make a decision would only compound the errors of the petitioner. The petitioner failed in its duty to obtain appropriate information prior to making a decision. Any approval of the superintendent's recommendations under this circumstance is itself arbitrary and capricious, as the petitioner did not perform its obligations.

In regard to the standard for emergent relief, petitioner has the burden of proof to show the irreparable harm, the legal right is settled, the likelihood of success and the balancing of the harm falls in petitioner's favor, petitioner has not shown any of these requirements.

Turning to the standard to reverse the actions of the respondent, the petitioner has the burden of proof to show that the respondent's actions were arbitrary, capricious or unreasonable. Petitioner has shown that respondent acted within the authority granted her under N.J.S.A. 18A:7A-55. The record is devoid of any factual support for the petitioner's argument that the respondent's decision was an abuse of discretion.

Petitioner has not shown any arbitrary, capricious or unreasonable action in the process of the respondent's determination.

## CONCLUSION

After hearing the arguments of petitioner and respondent and considering the documents submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there is no showing that petitioner will suffer irreparable harm if the requested relief is not granted, or that the law is settled in favor of petitioner, or there is a likelihood petitioner will prevail on the merits, or that the balance of harm favors the petitioner. The law is settled against the petitioner, and the balance of harm favors the respondent.

I further **CONCLUDE** that the respondent has properly acted in the exercise of its discretion to block the non-renewal of the five employees.

For the foregoing reasons, petitioner's request for emergent relief is **DENIED**. Respondent has the authority to reject the non-renewal of the five employees. She exercised her authority reasonably and not arbitrarily or capriciously regarding the fiscal management of the petitioner.

## ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED**.

It is hereby **ORDERED** that petitioner's request for relief from the actions of the New Jersey State Monitor Constance Bauer, Ed. D. is **DENIED** in all respects. This Order disposes of all issues in controversy regarding this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 28, 2016
DATE

**JOSEPH A. ASCIONE,** ALJ

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## APPENDIX

## LIST OF EXHIBITS

**For Petitioner:**

P-1 Entire package included with transmittal

**For Respondent:**

R-1 Entire package in opposition to application

State of New Jersey
Department of Education

| | | |
|---|---|---|
| In the Matter of the Tenure Charges | * | |
| against | * | ARBITRATION DECISION AND AWARD |
| HOWARD SMITH (Teacher) | * | |
| by | * | DOCKET NO. 118-4/16 |
| WAYNE TOWNSHIP BOARD OF EDUCATION | * | |

Before: Joel M. Weisblatt, Arbitrator

Appearances:

For the Teacher
Ricci, Fava & Bagley
By: Ronald J. Ricci, Esquire

For the District
Machado Law Group
By: Isabel Machado, Esquire

# D E C I S I O N

## Introduction

On April 25, 2016, the New Jersey Department of Education, Bureau of Controversies and Disputes, (the "DOE") received the tenure charges against Howard Smith (the "Respondent" or the "Teacher") filed by the Wayne Board of Education (the "Board" or the "Petitioner"). The Respondent's answer was received by the DOE on May 6, 2016. Pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L.* 2012, c. 26, the undersigned Arbitrator was appointed to serve, by the DOE, on May 16, 2016.

The arbitration hearing was initially opened on June 8, 2016. The Respondent's Motion to Dismiss was decided on June 16, 2016 when the motion was denied by issuance of a formal written Ruling. Testimony was taken on: June 28, 2016; June 30, 2016; and July 8, 2016. Both parties were afforded an opportunity to argue orally, present documentary evidence and to examine and cross-examine witnesses. An extensive evidentiary record was established and a stenographic transcript of the proceedings was created. Both parties submitted detailed post-hearing briefs with supporting case law. The Arbitrator made a

written request for an extension of time for the issuance of the award, due to the number of days needed by the parties in order to properly present the case at hearing and to prepare and present their post-hearing briefs; the DOE approved the extension of time for the issuance of the award until August 31, 2016.

The Respondent is charged with "unbecoming conduct and other just cause" seeking the termination of his employment. In accordance with N.J.S.A. 18A:6-10 the Board bears the burden of proving that the Teacher warrants dismissal for "inefficiency, incapacity, unbecoming conduct or other just cause." The charges relate initially to one incident during the 2014-2015 school year in which the Respondent is charged with engaging in a physical altercation with a high school student. Additionally, the Teacher is charged with a series of incidents during the 2015-2016 school year involving charges of the harassment, intimidation and bullying ("HIB") of several students.

## Positions of the Parties

### Position of the Board

The Board contends that the Teacher engaged in a pattern conduct unbecoming beginning with an incident on February 18, 2015, at Wayne Valley High School. It maintains that the incident began in the Respondent's office in the boys' locker room and continued into the locker room itself. The Board stresses that the video evidence of the incident reveals that the Teacher is yelling and aggressive with his hands in the physical altercation with a high school student in his physical education class. It notes that the Teacher is significantly taller and heavier than the student. The Board emphasizes that there is no indication that the Respondent took any steps to de-escalate the situation and actually cornered the student. It is also noted that there is video evidence that the Teacher, just after the locker room incident, walked through the gym and bumped into the student with his shoulder. The Petitioner asserts that the Teacher's self-defense claim is "simply incomprehensible."

The Board further charges that the Teacher engaged in four separate improper acts of conduct in the following school year. These incidents all involved eighth grade students in a middle school health class taught be the Respondent in 2015-2016.

The first of the four incidents charged as an HIB offense involved stating to a student, "I take shits bigger than you." The Petitioner stresses that the Teacher admits to having made this statement. This statement is deemed to be a reference to the small stature of the student, adding to the inappropriate nature of the comment.

The second incident involves the charge that the Respondent told a different male student, in response to a question about vaginal discharge, that he should know what it is because he has it. This statement is deemed to suggest that the student was female and had acquired a sexually transmitted disease.

The third incident involved the charge of a statement to another student, during a video about anorexia with a female removing her sweatshirt to reveal the effects of the disease, that he would never get closer to seeing a naked

woman in his lifetime. This comment was portrayed as singling out the student and making him uncomfortable.

The fourth incident involved the charge that the Teacher suggested to a 14-year-old female student that she should be taking birth control pills. The Petitioner insists that this caused the girl to believe that the Teacher was insinuating that she was sexually active with a large number of boys.

The Board argues that "the ongoing conduct and behavior on the part of the Respondent mandates termination." It suggests that this is "habitually negative behavior" and that the Teacher has not responded to corrective measures. It points out that the Respondent received a suspension without pay, a loss of coaching responsibilities, a corrective action plan, and anger management training following the February 2015 altercation with a student. It further stresses that the Board reserved the right to bring new tenure charges if the Teacher's conduct justified such action.

The Petitioner asserts that its past efforts at progressive discipline "failed to result in any meaningful

modification to Respondent's behavior." It characterizes the Teacher's behavior as "habitual negative conduct unresponsive to intervention." The Board expresses the belief that unless the Respondent's employment is terminated, he will continue to endanger student both physically and emotionally. It seeks an award sustaining the tenure charges and his dismissal.

## Position of the Teacher

The Respondent contends that the Board has failed to meet its burden of proof with respect to the tenure charges at issue herein. He asserts that "the ultimate punishment of dismissal should not be imposed", stressing the Teacher's "long history of exemplary service for the Wayne Public School System."

The Respondent argues that the penalty imposed for the February 2015 incident was sufficiently severe for that charge. Further he maintains that the comment, "I take bigger shits than you," was adequately dealt with by the letter of the letter of reprimand issued regarding that incident. The Teacher insists that the other three incidents of misconduct charged were not proved.

With respect to the February 2015 locker room incident, the Teacher explains that he was suddenly placed in a difficult situation, confronted by an out of control student accompanied by other out of control students. The Respondent claims that he had never received training to deal with such a situation.

The Teacher suggests that the student, C.A., engaged in an assault and that the Respondent's reaction of fear of being struck by the student was a reasonable one. The Respondent characterizes the Board's view of the interaction as "one-sided", not giving any consideration to the Teacher's legitimate concern for his own safety. The Respondent believes that the Board further exaggerated the Teacher's role in the incident.

With respect to the charge that the Respondent told a student "that's the most you will see," the Teacher asserts that the Employer was unable to present consistent evidence as to who made that statement. He maintains that the testimony of three students (J.Z., S.C. and D.R.) was inconsistent as to this allegation, leaving the charge unproved. The Teacher relies upon his own testimony that he said to the class generally, "relax that's all you're

going to see" as they became unruly upon seeing the video of a female anorexic student removing her sweatshirt.

Regarding the charge that the Teacher said to D.R., in answer to a question about vaginal discharge, "you should know you have it," the Respondent dismisses D.R.'s testimony as "remarkably dishonest." The Respondent insists that the Board erred in giving credence to D.R.'s testimony. He concludes that the Employer did not prove that the Teacher told D.R. that he had vaginal discharge.

The Respondent also maintains that the Petitioner did not prove that the Teacher made an inappropriate comment to S.C. concerning birth control. While it is suggested by the Respondent that D.R. might have been intentionally dishonest, no such assertion is leveled at S.C. However, the Teacher believes that S.C. was confused about the statement.

Part of the defense presented is that "life experience" must result in a conclusion as to whether the Teacher "would say such a horrible thing to a young girl who was approximately 14 years old." The Teacher adamantly denies making the comment, noting his long experience

coaching high school girls as proof of his awareness of appropriate language. S.C.'s credibility is questioned on the basis on her inability to recall the exact words attributable to the Teacher and the delay in her coming forward to report the incident.

The Respondent admits telling A.Z. "I take shits bigger than you." The Teacher acknowledges that this was misconduct but emphasizes evidence that A.Z. was not offended by the statement. Respondent argues that the letter of reprimand placed in his personnel file is adequate disciplinary action for this incident.

The Respondent raises the legal proposition that there are limitations to the proper consequences of prior discipline with respect to new charges. It is acknowledged that prior discipline can serve as a factor in determining penalties in a future case but there must be an avoidance of re-imposing disciplinary actions for misconduct already addressed. There can be no gross distortion of the events to support the penalty imposed.

The Respondent concludes that he "has already been severely punished for the incident regarding C.A. and

received a letter of reprimand for the comment to A.Z. Appropriate discipline has already been imposed for the charges that the Respondent believes to have been established. The Teacher insists that the other allegations have not been proved are that the Employer's request for removal of the Respondent from his tenured position should be denied in its entirety.

## Discussion and Analysis

The Teacher, Howard Smith, has worked for the Wayne Township Board of Education since 1997. Through the 2014-2015 school year he was assigned to Wayne Valley High School. In 2015-2016, the Respondent was assigned to George Washington Middle School. He was a physical education teacher at both schools; he also taught driver education at the high school and health at the middle school. Exhibit R-1 presents a collection of the Respondent's observations and evaluations over the years. There is no indication among these documents that the Teacher had any deficiencies prior to the incidents at issue in these tenure charges. The Arbitrator finds that the Teacher had a long-standing good record prior to February of 2015.

The first incident relied upon by the Board occurred on February 18, 2015. The evidence reveals that several students in the Teacher's physical education class came to his office by the locker room at the early stages of the class period. The Respondent was at his desk and felt unexpectedly confronted by the group of boys. The Teacher

testified that he felt threatened for his safety. The Teacher moved the boys out of the office into the locker room and was displeased that one of the boys was making a video of the Teacher (taking video in the locker room is strictly against the rules).

Once in the locker room, the Teacher and one of the boys, C.A., engaged in a verbal and physical altercation that was captured on video. That video is in evidence in this proceeding as Exhibit B-32. It establishes, in a clear and convincing manner, that both the Teacher and C.A. engaged in very aggressive behavior both physically and in loud and inappropriate language.

The Arbitrator has carefully considered the testimony of C.A. and the Teacher; the video evidence presents a clear and convincing picture of the incident. The scene does not support the Teacher's defense that he had no option of disengagement. He continued to aggressively advance toward the student at a point where separation and de-escalation appear possible. The Arbitrator believes that the Respondent may have been initially startled, perhaps even provoked, by the confrontation but his response, as caught on video, was quite inappropriate for a

teacher; his verbal and physical interaction with the student crossed the line into unacceptable conduct.

The Teacher's conduct was clearly improper. It is quite reasonable for the Employer to expect its teachers to be able to de-escalate volatile situations. The Respondent failed to de-escalate the conflict. Indeed, he actually continued to act aggressively and as provocatively as the student. The Teacher had the opportunity to disengage from the altercation but did not. This was serious misconduct.

Additionally, several minutes after the altercation ended in the locker room, the Teacher was caught on another video [Exhibit B-31, from a school security camera] walking into the student C.A. in the gymnasium. The Teacher could have avoided the student but it appears that he intentionally bumped C.A., using his shoulder, as he crossed the gym floor. This was further indication of the aggressive and unbecoming conduct on the part of the Teacher on February 18, 2015.

The Respondent seeks to defend his conduct with respect to the February 18, 2015 incident by claiming that he was in fear of his own safety and acted reasonably.

That effort falls far short of a convincing claim. It should be noted that two students, C.A. and K.G., appeared at the tenure hearing to testify as to the incident. K.G. testified that he believed it to be the Teacher who pushed C.A. first to start the physical element of the altercation. C.A. testified that he felt threatened by the Teacher's advancement and pushing. The evidence suggests that there was aggression on both sides of this altercation. Neither party is relieved of all responsibility however, the Teacher must be held to a somewhat higher standard, responsible to reduce rather than escalate any conflict with students.

It is significant to point out that the Teacher agreed to accept a substantial set of consequences in recognition of the severe nature of his misconduct and in order to avoid tenure charges at that time. Exhibit B-11 is an *Agreement and General Release* executed by the parties with respect to the February 18, 2015 incident. The Teacher authorized his counsel to sign this document on May 21, 2015 and it presents the terms of a resolution of the issues arising from the altercation with student C.A. The Teacher testified that he did not agree to the settlement although he did authorize it to be signed on his behalf.

He does admit that he agreed to the penalties set forth in B-11 and to the Corrective Action Plan.

The May 21, 2015 agreement document sets forth a number of agreed upon actions that are clearly disciplinary in nature. Consider the following elements of the agreement:

> The Teacher's employment and adjustment increments were withheld.
>
> The Teacher lost all coaching assignments.
>
> The Teacher was required to comply with a Corrective Action Plan for the 2015-2016 school year.
>
> The Teacher served an unpaid leave of absence for June of 2015 through the first day of school in September of 2015.
>
> The Teacher forfeited 30 accumulated sick days.
>
> The Teacher was transferred to the middle school assignment.
>
> The Teacher was required to attend anger management training.

The document expressly points out that the terms are "a compromise" and further specifies that "this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by THE BOE [Board of Education] of any kind with respect to any fact, liability, unethical conduct or fault whatsoever." It is noteworthy that the non-admission

language of Exhibit B-11 applies only to the Board and not to the Respondent.

The disciplinary penalties imposed by the parties' agreement relating to the February 18, 2015 incident are quite substantial. This reflects the fact that both parties perceived that incident to be severe misconduct on the part of the Teacher. There can be no question that the disciplinary aspects of Exhibit B-11, agreed to by the Teacher, serve to place the Respondent on clear notice that further unbecoming conduct would have the most severe consequences. The substantive elements of the terms of Exhibit B-11 cannot be construed in any other way. The existence and resolution of the February 18, 2015 misconduct provides a most significant context for the 2015-2016 incidents set forth in the charges herein.

There are four incidents that occurred in the 2015-2016 school year that the Board alleged to be misconduct falling within the harassment, intimidation and bullying prohibition. Each involved the charge that the Grievant acted inappropriately in interaction with one or more students. Three former eighth grade students from the

Respondent's health class appeared at the tenure hearing to testify. The allegations involve four separate incidents.

One of the incidents is undisputed by the Respondent. He admits to saying to A.Z., "I take shits bigger than you." Exhibit B-14 documents the incident that occurred on January 5, 2016. This document is a letter of reprimand written by Principal Jack Leonard of the Washington Middle School. The letter reflects the Teacher's admission to making the statement and defense that it made in jest and not threatening nor intimidating. The Teacher was placed on notice that the students should not be engaged in this manner and of the importance of professional behavior in all conversations and interactions.

It is significant to note that the Teacher testified that he made the "I take shits bigger than you" comment to A.Z. He described the incident as a "slip of the tongue" and believed that A.Z. was the only one who heard it. The Teacher testified that he thought the Principal's letter was "a strongly written letter." He testified that the interaction was more playful and not upsetting to the student.

The second allegation of the Teacher's misconduct in health class was presented through the testimony of student D.R., who appeared at the tenure hearing. D.R. testified that the Teacher, during a class addressing sexually transmitted diseases, uttered an insulting comment in response to a question about vaginal discharge. The student testified that the Teacher stated, in response to this question, "I thought you would know because you have it."

It is significant to note that the Teacher adamantly denies making this statement. The Respondent attacks the witness' credibility, noting that the complaint only came to light after the Teacher disciplined D.R. for a separate incident of student misconduct. The Arbitrator finds that the cross-examination of D.R. raised some issues relating to the consistency of his testimony but his general credibility withstood a skilled cross-examination. The Arbitrator believes that the statement about vaginal discharge was made as claimed by D.R.

The statement about vaginal discharge, made to a then 13 year-old student, is another instance of inappropriate conduct on the part of the Respondent. It flies in the

face of the concept of professional behavior in all conversations and interactions with students. The January 2016 comment to D.R. was unbecoming conduct by the Teacher.

The nature of the third allegation of unbecoming conduct is less clear than the others. The scenario involved a video about eating disorders shown in class. An anorexic girl is shown in the video removing her sweatshirt and this caused the already unruly class to become boisterous. Student J.Z. testified that when another student, A.Z., began to hoot and holler about the girl undressing, the Teacher said to A.Z., "that's the most you'll ever see." On cross-examination, J.Z. indicated that the Teacher was "talking in the general direction of A.Z." This witness took the incident to be directed at A.Z. rather than the class generally.

The Respondent testified that he never directed a comment to any single student in response to the unruliness when the girl removed her sweatshirt in the class video on anorexia. He believes that he may have made a general statement to the class when they began to hoot and holler to the effect of "easy boys that's all you're going to see." The key to the context of this allegation is whether

the statement was directed toward a single student and whether it included the word "ever." The connotation of "that's all you're ever going to see" is quite different than "that's all you're going to see." The former, if directed toward a single student is intimidating and improper. One can easily understand the latter comment among a group of hooting and hollering 13 and 14 year old boys and girls.

The Arbitrator finds that the evidence is not sufficiently convincing to prove the allegations about this third incident. It is the Board's burden to prove the charges by a preponderance of the evidence and this particular element of the charges was not adequately supported by credible evidence. That aspect of the charges relating to the allegation that the Respondent stated to a student "that's all you're ever going to see" is dismissed as unproven.

The fourth charge of unbecoming conduct in the 2015-2016 school year involves the claim that the Teacher made inappropriate comments to a female student, S.C, concerning birth control. The testimony of this 14 year old

eighth grade girl was quite compelling. She testified that she did not recall the exact wording but did unequivocally state that the Teacher expressed the belief that S.C. should be on birth control. The student testified that her initial reaction to this was that it was funny but then she understood the comment to imply that she would be with many boys and it made her feel uncomfortable.

S.C. explained that the health class was unruly and did not show adequate respect for the Teacher. She acknowledged that this was not appropriate and revealed the understanding that she played a certain role in the class' misbehavior. S.C. described the moment of the comment indicating that she was not paying attention and that she was engaged in discussion with other students. The scenario suggests that a teacher might be frustrated by the lack of proper attention, however, it in no way provides a valid basis to make a comment as inappropriate as the one that S.C. attributes to the Teacher. Such a comment is inexcusable as it raises issues of sexual harassment and intimidation to a student in a very vulnerable setting.

S.C. was a most credible witness. Her description of the incident appears true and accurate. The fact that she

does not recall the exact wording used by the Respondent does not necessarily diminish the validity of her recollection. The delayed reaction to the statement is also not a factor requiring the testimony to be discounted. Her demeanor and presentation were absolutely consistent with a witness telling the truth. There appeared to be no basis to believe that she would manufacture this charge. The Arbitrator makes a factual finding that the Teacher made a comment to student S.C. to the effect that she should be on birth control. This was unbecoming conduct of a serious nature on the part of the Respondent.

* * *

It is important to reiterate that this arbitration proceeding is a trial de novo. No prior finding, for example the various HIB investigative reports, was given independent probative value. Only those witnesses who testified at hearing, providing Respondent with an opportunity to cross-examine, were considered as evidence with regard to the tenure charges at issue herein.

* * *

The evidence must be analyzed in accordance with the legal standard under N.J.S.A. 18A:6-10 that a tenured teacher may not be dismissed "except for inefficiency, incapacity, unbecoming conduct, or other just cause." It

is understood that teachers work in a sensitive environment in our society. It is well-settled:

> That the school authorities have the right and duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as part of ordered society cannot be doubted. Adler v. Bd. of Educ. of the City of N.Y. 342 U.S. 485 (1952)

With respect to the tenure statute at issue herein, this concept has been repeatedly expressed, consider In re Grossman 127 N.J. Super 13 (App. Div. 1974) noting that the touchstone is whether fitness to discharge a teacher's duties and functions is compromised. Unbecoming conduct is generally recognized as behavior adversely affecting morale or weakening respect for the employees or the public services [see Karins v. Atl. City 152 N.J. 532 (1998)].

In the case at hand, the Board has met its burden of proving, by a preponderance of the evidence, a sequence of separate events that constitute unbecoming conduct. The context for the misconduct is dominated by the serious incident of February 18, 2015, when the Teacher engaged in a verbal and physical altercation with one of his students. Even if the Teacher had been initially provoked by or become fearful of the student, the evidence clearly reveals that the Teacher remained overly aggressive and failed to

take reasonable steps to disengage with the student. This is problematic conduct for a teacher entrusted with the care and education of students.

The Respondent accepted a set of disciplinary penalties in relation to that incident that cannot be viewed as anything other than the most stern of warnings that any further unbecoming conduct could not be tolerated and would lead to the filing of tenure charges. The Teacher was on notice that his employment was at the edge of a precipice requiring the most careful attention to his conduct. In essence, the Board engaged in progressive discipline by providing warning and notice in response to the February 18, 2015 misconduct.

In the context of the February 18, 2015 altercation and the responding disciplinary penalties, the Teacher's acts of misconduct during the 2015-2016 school year are most troubling. They appear to establish a pattern of a loss of control over the need for the teacher to conduct himself within the bounds of reasonable expectations for the position. Three transgressions of inappropriate conduct were proved on the record. While standing alone, it is debatable as whether these might warrant dismissal,

in the context of a teacher on notice due to a most serious prior diversion from acceptable conduct, they form the basis to accept the dismissal of employment sought by the Board. Efforts at progressive discipline did not appear to be effective.

In conclusion, it is determined that the Board has met its burden of proving the tenure charges brought against the Respondent. Specifically, it proved conduct unbecoming in relation to the incident of February 18, 2015 and three incidents during the 2015-2016 school year. This pattern of unbecoming conduct, including serious transgressions, also establishes just cause for the dismissal of the Respondent from his position as a tenured teacher.

**A W A R D**

For the reasons set forth in the Decision herein IT IS HEREBY DETERMINED that the Board has met its burden of proving the tenure charges of unbecoming conduct and other just cause brought against the Respondent. IT IS HEREBY ORDERED that the Respondent be dismissed from his position as a tenured teacher.

Dated: August 26, 2016

Skillman, N.J.

Joel M. Weisblatt, Arbitrator

On this 26th day of August 2016, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law

317-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

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In the Matter of the Tenure Arbitration Hearing of:

**Luz Ravines, State Operated School District of the City of Newark**

---

Before: Thomas D. Hartigan, Arbitrator

Agency Docket No. 91-3/16

Appearances:

For the District: Robert M. Tosti, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless, LLC

For Respondent: Kathleen Naprstek Cerisano, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

## AWARD

The parties have entered into a Stipulation of Settlement (copy enclosed) in resolution of the above referenced matter. I have reviewed the Settlement Agreement and found it to be in compliance with N.J.A.C. 6A:3-5.6. As indicated in Item 1 of the Agreement, page two, "the District shall and hereby does withdraw the instant tenure charges."

The Settlement Agreement came about after two (2) days of hearing at which the Respondent was present and at which the nature of the charges were fully presented and known to her. This matter appeared to be a borderline charge with the possibility of a lesser penalty and it is in the best interest of both parties for this matter to be resolved under the terms of the "Stipulation of Settlement." Both parties have freely entered into this Agreement and both have signed the Agreement. As noted on page

nine (9) of the Agreement, Ms. Ravines acknowledged her understanding of the agreement which had been negotiated by her attorney with her knowledge and consent. Both parties have acknowledged, page two (2) of the Agreement, and I find that the settlement is in the public interest.

Thomas D. Hartigan, Arbitrator
August 29, 2016

PURCELL MULCAHY HAWKINS FLANAGAN & LAWLESS, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
School District of the City of Newark
File No. 650-10193

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF LUZ RAVINES<br><br>and the<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | AGENCY REF. NO. 91-3/16<br><br><br><br>**STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Luz Ravines, residing at ~~99~~ 196 Edgewood Road, Elizabeth, NJ 07208 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Luz Ravines, State-Operated School District of the City of Newark, Essex County* ("Tenure Charges"), primarily based upon allegations of a classroom incident on January 21, 2015 at the Rafael Hernandez Renew School; and

**WHEREAS**, the charges were ultimately assigned to Thomas Hartigan for hearing; and hearings were conducted before him on June 16 and June 21, 2016; and

**WHEREAS**, the District is an *Abbott* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration the Parties wish to resolve this matter in accordance with the terms set forth herein rather than continue with arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public by establishing certainty of result and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE**, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to refile and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same.

2. In consideration of the withdrawal of the charges, the Respondent Luz Ravines agrees to submit a binding and irrevocable resignation from all employment with the Newark Public Schools, in a form attached hereto as Exhibit A. The resignation is based upon Ms. Ravines receiving 90 days salary up to and including June 23, 2016. In addition, Ms. Ravines will remain on the health insurance plan of the Newark Public School until June 30, 2016. Other than salary

and insurance, Ms. Ravines waives all other payment, benefits or emoluments of employment with the Newark Public Schools.

3. Except as noted above, Respondent waives all claims of any nature against the District with regard to her employment with the District including fees, or other monetary relief, with the exception of workers' compensation claims for the term of her prior employment until the date of this Agreement. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective June 30, 2016, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employee or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation. The District will not oppose any application by Respondent for unemployment benefits.

4. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to the date of this Agreement. It specifically includes, without limitation, all claims which

Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment, including but not limited to any claim for back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers' compensation claims.

5. Notwithstanding the terms of paragraph 9 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

6. Notwithstanding the terms of paragraph 9 of this Stipulation, Respondent does not hereby waive any right she may have to workers compensation benefits or pension benefits.

7. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

8. This Agreement shall not constitute a precedent in any matters involving other District employees.

9. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that she will inform the person to whom she is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

10. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

11. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

12. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

13. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

14. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

15. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

16. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

17. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

18. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: 8/22/16

Luz Ravines
LUZ RAVINES

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: _____

By: CHRISTOPHER CERF
State District Superintendent

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 8-24-16

Robert M. Tosti
Attorney for State-operated School District
of the City of Newark

**APPROVED:**

Dated: 8-29-16

Thomas Hartigan, Arbitrator

## CERTIFICATION

I, Luz Ravines, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 8/22/16

Luz Ravines

# EXHIBIT A

August 22
~~July~~ ___, 2016

Christopher Cerf, State District Superintendent
NEWARK PUBLIC SCHOOLS
2 Cedar Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Charges Against Luz Ravines
Agency Ref. No. 91-3/16

Dear Superintendent Cerf:

In accordance with our agreement, I hereby submit my resignation from employment as a Newark Public School teacher effective June 30, 2016.

Very truly yours,

Luz Ravines

Luz Ravines

/lr

322-16

BARBARA GARRITY,

COMPLAINANT,

V.

ANA M. VANDER WOUDE, DENNIS PAVLIK, AND PHYLLIS PASCUCCI, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

RESPONDENTS,

AND

BARBARA DUNCAN,

COMPLAINANT,

V.

ANA M. VANDER WOUDE, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

RESPONDENT,

AND

BARBARA DUNCAN,

COMPLAINANT,

V.

DENNIS PAVLIK, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY.

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

These consolidated cases involve allegations that, in 2012, two Holmdel School Board members – Ana Vander Woude and Dennis Pavlik – violated the ethical rules governing the conduct of board members, *N.J.S.A.* 18A:12-24.1(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members (Code) when they sought to determine whether the school district's Director of Special Services was engaging in inappropriate conduct by working for another school district at the same time she was employed by Holmdel. Following a March 10, 2016 hearing at the OAL, the ALJ issued an Initial Decision concluding that the conduct of the respondents violated sections (c), (d), (e), (g), (i), and (j) of the Code, and recommended the penalty of Censure. The School Ethics Commission (SEC) reviewed the record and the Initial Decision at its June 21, 2016 meeting, at which time the SEC adopted the conclusions of the ALJ for the reasons expressed in his decision.

Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondents shall be censured as school officials found to have violated the School Ethics Act.

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

Issued 9/12/16

AGENCY DKT. NO. 203-7/16
SEC DKT. NOS. C50-12, C51-12 AND C52-12 (CONSOLIDATED)

BARBARA GARRITY,

COMPLAINANT,

V.

ANA M. VANDER WOUDE, DENNIS PAVLIK, AND PHYLLIS PASCUCCI, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

RESPONDENTS,

AND

BARBARA DUNCAN,

COMPLAINANT,

V.

ANA M. VANDER WOUDE, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

RESPONDENT,

AND

BARBARA DUNCAN,

COMPLAINANT,

V.

DENNIS PAVLIK, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY.

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Initial Decision of the Office of Administrative Law and the decision of the School Ethics Commission – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty – have been reviewed. Respondents

Ana Vander Woude and Dennis Pavlik[1] did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Accordingly, respondents Vander Woude and Pavlik shall each be censured as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/12/16

Date of Mailing: 9/12/16

[1] Respondent Phyllis Pascucci was dismissed from this case.

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

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| **BARBARA GARRITY** | : | **BEFORE THE SCHOOL ETHICS COMMISSION** |
| **V.** | : | **OAL DKT. NO. EEC 7004-13** |
| | : | **SEC DKT. NO. C50-12** |
| **ANA M. VANDER WOUDE, DENNIS PAVLIK, AND PHYLLIS PASCUCCI** [1] | : | |
| ***HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY*** | : | |
| **AND** | : | |
| **BARBARA DUNCAN** | : | |
| **V.** | : | **OAL DKT. NO. EEC 7005-13** |
| | : | **SEC DKT. NO. C51-12** |
| **ANA M. VANDER WOUDE,** ***HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY*** | : | |
| **AND** | : | |
| **BARBARA DUNCAN** | : | |
| **V.** | : | **OAL DKT. NO. EEC 7009-13** |
| | : | **SEC DKT. NO. C52-12** |
| **DENNIS PAVLIK** ***HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY*** | : | **CONSOLIDATED** |
| | : | **FINAL DECISION** |

## PROCEDURAL HISTORY

These matters arise from three complaints, one Complaint filed on December 6, 2012 by Complainant, Barbara Garrity, then Board President of the Holmdel Board of Education, against Board members Ana M. Vander Woude, Dennis Pavlik, and Phyllis Pascucci, and two other

[1] The matter against then Board Member Phyllis Pascucci was withdrawn and she was not included as a Respondent in the ALJ's findings, conclusions or recommended penalty. Accordingly, there was no determination that Ms. Pascucci violated the School Ethics Act and the penalty does not apply to her.

Complaints filed on December 13, 2012 by Superintendent Barbara Duncan against Board members Ana M. Vander Woude and Dennis Pavlik, individually, alleging that the Respondents violated N.J.S.A. 18A:12-24.1.(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members (Code).

After review on May 1, 2013, the Commission transmitted the matters to the Office of Administrative Law for plenary hearings in accordance with N.J.S.A. 18A:12-29(b). These matters were consolidated, and the Administrative Law Judge (ALJ) conducted a hearing on March 10, 2016. He closed the record on April 21, 2016. The Initial Decision of the ALJ was rendered on June 3, 2016, and the School Ethics Commission acknowledged receipt of the Decision on the same day; therefore, the 45-day statutory period for issuing a final decision expires on July 18, 2016. Prior to that date, the School Ethics Commission requested a 45-day extension of time for issuing its decision so as to allow the Commission, which meets only one day each month, to receive and review the full record of the matter, including exceptions and reply arguments. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8 and for good cause shown, the Commission was granted an extension of time in which to issue its Final Decision in this matter. The extension of time was granted until September 1, 2016.

The ALJ concluded in his Initial Decision that the conduct of Respondent Vander Woude and Respondent Pavlik constituted violations of N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i), and (j) of the Code and recommended the sanction of Censure in relation thereto. The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Respondents subject to the penalty of Censure did not file exceptions to the Initial Decision.

The Commission reviewed the record of this matter and the Initial Decision of the ALJ at its June 21, 2016 meeting at which time the Commission adopted the conclusions of the ALJ for the reasons expressed in his Initial Decision.

**ANALYSIS**

Upon careful and independent review of the record, the Commission finds that the record supports the ALJ's factual findings, based on the credible evidence before him, as well as the legal conclusion that Respondents Ana M. Vander Woude and Dennis Pavlik did violate N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i), and (j) of the Code.

The Commission concurs that the Respondents' actions establish that they violated N.J.S.A. 18A:12-24.1(c), by failing to limit their board action to policy making, planning, and appraisal, and solely helping to frame policies and plans only after the board has consulted those who will be affected by them. Instead, these Respondents exceeded their authority as Board members and failed to consult with the other Board members to ensure that a proper investigation had been conducted. Here, the ALJ concluded that Respondents Vander Woude and Pavlik pursued an investigation, determined guilt and sought punishment without waiting for the results of a proper investigation.

The Commission also accepts the ALJ's factual findings that the Respondents violated N.J.S.A. 18A:12-24.1(d) when they failed to report information received from a constituent to

the Superintendent for her to investigate rather than concluding prematurely on their own that some criminal wrongdoing had occurred. Such responsibility to review complaints is part of the day-to-day function of the Superintendent and not within the authority of a Board member to resolve.

The Commission also accepts the ALJ's factual findings that the Respondents violated N.J.S.A. 18A:12-24.1(e) having taken action beyond the scope of their authority as Board members when, after the Board as a whole accepted the results of the investigation that nothing untoward occurred, Respondents Vander Woude and Pavlik brought their baseless accusations to the Monmouth County Prosecutor for investigation. In doing so, these Respondents failed to recognize that authority rests with the Board, and that they as members, should avoid any action that would compromise the Board.

The Commission also accepts the ALJ's factual findings that the Respondents violated N.J.S.A. 18A:12-24.1(g) by providing "false information and false impressions to the public about the Board and its handling of a confidential personnel matter" (Initial Decision at 21), that led the public to believe that some criminality had occurred, and that the Administration had dealt with the matter inappropriately. The specter of criminality or negligence had been dispelled, and Board counsel had sufficiently cautioned the Respondents that they could face serious consequences for prematurely condemning school personnel. Here, the Respondents chose to speak publicly about the allegations even after the investigation demonstrated that they were unfounded.

Similarly, based on the foregoing discussion of Respondents' conduct, the Commission also accepts the ALJ's factual findings that the Respondents violated N.J.S.A. 18A:12-24.1(i) by taking deliberate action, which undermined and compromised school personnel in the proper performance of their duties. The ALJ concluded that "without a scintilla of evidence" (ID, p.11), these Respondents accused a school employee and the Superintendent of criminal conduct in some degree, and without any actual evidence voiced their concerns to other Board members. Moreover, the ALJ determined that "as if to compound their mischief" (ID, p.12), the Respondents aired their accusations during the November 2012 Board meeting, using references to an unrelated child abuse scandal, which raised public anxiety needlessly as the investigation had already demonstrated that no crime had been perpetrated nor had the public been defrauded. Such abuse of the Respondents' office undermined and compromised the public confidence and trust in the Superintendent and School personnel in the proper performance of their respective duties.

Finally, the Commission also accepts the ALJ's factual findings that the Respondents violated N.J.S.A. 18A:12-24.1(j) by attempting to resolve a constituent's complaint prior to referral to the Superintendent and prior to the failure of the Administration to fashion a solution. The ALJ concluded that even if these Respondents believed that reporting their concerns to the Superintendent would have tainted the investigation because of her alleged involvement, they should have consulted with the Board as a whole and with Board counsel for advice and direction and then waited for the facts to develop in the normal course of a proper investigation.

In accepting the ALJ's findings, the Commission recognizes that these are matters that turn on the credibility of witnesses. In this regard, the Commission must give deference to the credibility determinations of the ALJ. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility." In the Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), certif. denied, 121 N.J. 615 (1989). Upon review of the record, the Commission hereby concludes that the ALJ's credibility determinations in this matter must be given deference and his findings based on those determinations cannot be disturbed.

The Commission, therefore, determines that the findings issued by the ALJ provide a sufficient basis for his conclusions and recommendations. In this connection, the Commission recognizes that "the ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." State, Dept. of Health v. Tegnazian, 194 N.J. Super. 435 at 442, 443. Here, the Commission finds that the ALJ fairly summarizes the testimony and evidence. Because the Commission determines that the ALJ's factual findings provide a reasonable basis for his conclusions and recommendation, the Commission accepts the ALJ's Initial Decision as the Final Decision in this matter.

**DECISION**

For the foregoing reasons, the Commission accepts the findings of fact and the conclusions of law as set forth in Initial Decision of the ALJ that Respondent Ana M. Vander Woude and Respondent Dennis Pavlik violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i), and (j) of the Code of Ethics for School Board Members.

**PENALTY**

The Commission further adopts the ALJ's recommended penalty of **Censure** for these violations.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4, et seq. within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender
Chairperson

Mailing Date: July 27, 2016

## Resolution Adopting Decision
## C50-12, C51-12, and C52-12 (Consolidated)

**Whereas**, the Commission voted to transmit these matters to the Office of Administrative Law for a plenary hearing; and

**Whereas**, the Administrative Law Judge concluded in his Initial Decision that there is good cause for the Commission to determine that the conduct of Respondents Vander Woude and Pavlik constituted a violation of N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i), and (j) of the Code of Ethics for School Board Members and recommended a sanction of Censure in relation thereto; and

**Whereas,** at its meeting on June 21, 2016, the Commission fully considered the entire record and accepts the findings of fact and conclusions of the ALJ; and

**Whereas**, at its meeting of July 26, 2016, the Commission recommended that the Commissioner of Education impose a sanction of Censure of Respondents Vander Woude and Pavlik; and

**Now Therefore Be It Resolved,** that the Commission hereby adopts the proposed Initial Decision referenced as its Final Decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Robert W. Bender, Chairperson

I hereby certify that the School
Ethics Commission adopted
this decision at its public meeting
on July 26, 2016.

Kathryn A. Whalen
Acting Executive Director
School Ethics Commission

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**BARBARA GARRITY,**
Complainant,
v.
**ANA M. VANDER WOUDE, DENNIS PAVLIK AND PHYLLIS PASCUCCI, HOLMDEL TOWNSHIP BOARD OF EDUCATION,**
Respondents,
And
**BARBARA DUNCAN,**
Complainant,
v.
**ANA VANDER WOUDE, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,**
Respondents,
And
**BARBARA DUNCAN,**
Petitioner,
**DENNIS PAVLIK, HOLMDEL TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,**
Respondents.

OAL DKT. NO. EEC 7004-13
AGENCY DKT. NO. C50-12
**(CONSOLIDATED)**

OAL DKT. NO. EEC 7005-13
AGENCY DKT. NO. C51-12

OAL DKT. NO. EEC 7009-13
AGENCY DKT. NO. C52-12

**Kerry E. Higgins**, Esq., for complainant Barbara J. Garrity (McKenna, DuPont, Higgins and Stone, attorneys)

**Barbara Duncan**, complainant, pro se

**Loryn M. Lawson**, for respondents, Ana Vander Woude, Dennis Pavlik, Phyllis Pascucci and the Holmdel Township Board of Education (Byrnes, O'Hern and Heugle, LLC, attorneys)

Record Closed: April 21, 2016 Decided: June 3, 2016

BEFORE **JEFF S. MASIN,** ALJ t/a:

These consolidated contested cases involve alleged violations, by Holmdel School Board members Ana Vander Woude and Dennis Pavlik, of the ethical rules governing their conduct as Board members, standards that are embodied at N.J.S.A. 18A:24. The charging parties are the District's school superintendent, Barbara Duncan, and Barbara Garrity, who was the Board's president in 2012, when the incidents giving rise to the charges occurred. Ms. Garrity filed her Complaint against Ms. Vander Woude, Mr. Pavlik, and a third respondent, Phyllis Pascucci, on December 6, 2012. Ms. Pascucci was later dismissed from the case. Ms. Duncan filed her complaints against Ms. Vander Woude and Mr. Pavlik on December 13, 2012. The respondents filed answers and the contested cases were transferred to the Office of Administrative Law on May 13, 2013. The then assigned administrative law judge did not conduct a hearing prior to his appointment to the Superior Court and the cases were then assigned to this judge, serving on recall, on December 17, 2015. After an unsuccessful attempt to resolve the matter in a conference held on January 6, 2016, a hearing was held on March 10, 2016. The parties filed briefs and the record closed on April 21, 2016.

In essence, the specific charges made by the complainants, which will be detailed later in this decision, arise from a situation in which respondents Vander Woude and Pavlik sought

to determine whether a school employee and administrator, Meryl Gill, who was the District's Director of Special Services, was engaging in some inappropriate conduct by working for another school district at the same time that she was employed by Holmdel, a situation that, if it existed, might involve improper so-called, "double dipping." In addition, as their concern regarding Gill was first raised to other Board members and to the District's administration in October of 2012, questions were also raised about Superintendent Duncan's knowledge, if any, of any such other employment by Gill. The first approach by the respondents to any school official or Board members about their concerns regarding Ms. Gill occurred on October 22, 2012, when they spoke to Duncan, Gill, Board attorney Martin Barger and Board Business Administrator/Board Secretary Michael Petrizzi, in Superintendent Duncan's office. Further events relevant to the controversy occurred at a Board executive session on October 24; at another executive session on November 14; at the executive and public sessions on November 28, 2012; and then in the days and weeks after that meeting. Each of these will be discussed below.

As noted, Vander Woude and Pavlik first "came forward" about Ms. Gill on October 22. But as the record discloses, according to Vander Woude and Pavlik, prior to that date concerns had been expressed to them by constituents about Gill and they did some research that indicated that Gill was indeed listed as an employee of the Beverly City School District. Vander Woude and Pavlik then requested to meet with Superintendent Duncan, who recalled that her secretary told her on October 19, that Vander Woude had called and requested to meet with her and would be bringing Pavlik and Pascucci to the meeting. Since three Board members would be coming, Duncan felt that the Board president, Garrity, should also be present. According to Duncan, when the three Board members met with her on the October 22, they asked that Petrizzi be present. Vander Woude also asked that Board attorney Barger, or the Board's labor counsel, Michael Gross, be involved and Barger joined the meeting, by telephone.

At least a part of the basis for the complainants' concern about the respondents' conduct in this entire matter stems from their account of the details of this October 22 meeting and the exact manner in which the respondents addressed their concern about Ms. Gill and, in turn, about Ms. Duncan. According to Duncan, once the meeting was underway, Vander Woude "did most of the talking, using a prepared statement." She said that she had

some information and "was alerting me that she knew that Meryl Gill was guilty of criminal fraud because she was double-dipping and she had a job in another district." She displayed the Beverly District website that showed that Gill had been appointed as a Special Education Director in that district. Claiming that she felt "deceived" by Gill, who "had made requests to the Board that she needed help but here she was, she was holding another job . . . this was duplicitous and . . . she really didn't need help." Vander Woude then requested of Garrity that Gill be given a Rice notice ("Riced").[1] Duncan testified that Vander Woude expressly stated that Gill should receive this notice because "she is guilty of criminal fraud." Vander Woude then added that Duncan should also receive a Rice notice, because, "she is guilty of criminal fraud or criminal negligence." Duncan explained that these allegations were "stunning . . . to say the least." In part, Duncan explained that this was because prior to these statements, Vander Woude had not:

> ask[ed] me or she didn't alert me to tell me that she had concerns and would I look into it. She had already declared this employee guilty and then went ahead without offering any proof - - at least she had something to show me regarding Meryl, but there was no evidence to indicate that I had knowledge or I knew that Meryl was involved in something that would hurt the District.

Duncan explained that she then pointed out that if someone had a complaint, as a matter of policy and in accordance with Duncan's contract, the proper course was to "take it to the superintendent." It was her job to look into the matter, to investigate. Duncan then spoke to Barger, saying that she had been called a criminal. While speaking to Barger in front of the others, Duncan asked Garrity if it would be alright for the Board attorney to conduct the investigation. Noting that she could not be guilty of anything if it turned out that Gill was not guilty, and that Gill had to receive due process in respect to the allegations made against her, Duncan suggested that it was premature to "Rice" her, and that such action could occur later, if indeed Gill was found to be involved in a misdeed, criminal or otherwise. This suggestion seemed to be reasonable to those assembled.

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[1] A "Rice Notice" is required to be issued by a school board to school personnel who are to be the subject of discussion regarding personnel matters relating to them. Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (1977), certification den., 76 N.J. 238 (1978)

Barbara Garrity also recalled that at the October 22 meeting, Ms. Vander Woude alleged that Gill was "perpetrating a criminal fraud." Michael Petrizzi also remembered that Vander Woude spoke of Gill in terms of a "criminal fraud." And Martin Barger, testifying over the objection of respondents who asserted that his testimony could violate attorney-client privilege, testified that she spoke of "criminal fraud" and also that the superintendent was either "Complicit" or she was "Grossly negligent."

Ana Vander Woude's recollection of the October 22 meeting differed a bit from that of the aforementioned attendees. Noting that she and her fellow Board members "went there with very heavy hearts to raise this issue of concern," she said that at the meeting she "expressed the view that we felt that a - - I'm trying to remember my exact words, but there had been a fraud or defrauding the Holmdel School District." As for Duncan, she recalled saying, "'Barbara, we don't know if you knew or you didn't know. If you did then we feel that - that she would somehow be complicit in this . . . But if you didn't, then you're seriously negligent . . . ." She acknowledged that she came to the meeting with a statement which "I proceeded to read."

After the October 22, meeting, it appears that the decision was that Mr. Barger would look into the question of Gill's employment(s) and determine what, if anything, might be improper. The complainants apparently had some qualms about the Board's attorney conducting this investigation. Nevertheless, Barger did just that.

On October 24, the Board met in executive session. According to Garrity, at that meeting Vander Woude stated her concern about Gill and Duncan. As Garrity recalled, Vander Woude had the written statement and made the same accusations as she had voiced in the October 22 meeting. Mr. Pavlik, who is a police officer, stated that he wanted to take the matter to the County Prosecutor. Garrity recalled that Mr. Barger "cautioned the two of them," reminding them, and

> "I think all of us kind of that, you know, 'These are very serious accusations and we need to be very careful how we talk about this. The people who are being spoken of have rights also and they might choose to sue for defamation or sue for malicious prosecution, so I just want you to be aware of the potential legal peril and proceed accordingly.'"

Garrity also recalled that Barger advised

> If it was determined that your activities fell outside your role as Board members you would not be covered by the Board insurance and if that were the case it's likely your homeowners insurance wouldn't cover you either."

Mr. Barger's comments to the Board members, including the respondent Board members, can well be understood as advice that he was giving to the Board as its attorney. In that regard, it might well be thought to be privileged information that he could not reveal. However, his "advice" has been portrayed by Vander Woude and Pavlik as threatening, intimidating and harassing towards them as persons who had brought the allegations about Gill and Duncan to the Board's attention. They have claimed that this influenced later public statements they made that are the subject of parts of the complainants' charge that they violated school ethics laws. As such, precisely what Barger said and what context he said it is central to understanding both their claims of having been threatened and the statements and actions that they later took, purportedly in part as a reaction to Barger's, and other Board members', supposed harassment.

Recalling the October 24 meeting, Barger explained that Vander Woude spoke of "criminal fraud" and of Duncan being "complicit" and Pavlik talked about going to the Prosecutor. Barger

> opined that he was a Police Officer and I was pretty sure that he was charged . . . That it was a pretty serious charge and that there could be consequences of those kinds of accusations and I don't know if there was any further conversation at that time.

At this meeting the Board authorized Barger to conduct an investigation.

Robin Wetmore was then the Board's vice-president. She too recalled that at the October 24 meeting, Vander Woude read a written statement and spoke of criminal fraud. Superintendent Duncan remembered that at the time of the October 24 meeting, she

opened the meeting by referring to Vander Woude having raised an issue and then telling the Board that, rather than herself summarizing the issue that Vander Woude "if she had the same statement that she read in my office, perhaps she can share this with the Board . . . ." As Duncan recalled what Vander Woude then related to the Board, she thought that Vander Woude had "modified it a bit," as instead of charging outright that Duncan was

> "guilty of either criminal fraud or criminal negligence, on October 24 she said that 'If the Superintendent is guilty of criminal fraud of criminal negligence than we should' - - which I felt had changed the tone and modified it and was not accurate and I brought that to the attention of the Board that not's what was said,"

Ms. Vander Woude testified that at the October 24 meeting she was asked to read her statement of October 22. On cross-examination she could not recall whether she had been asked during pre-hearing discovery to provide that written statement. Counsel for the respondents noted that it had been provided in responses to interrogatories supplied on the very morning of the hearing. "Attachment 1" claims to be those meeting notes, although in the form offered, it has a heading identifying the document that surely would not have been on the original notes, as also the red typeface in the sixth paragraph. At any rate, this document relates that the three Board members "cannot help but conclude that a fraud has been committed upon the . . . District." As for Duncan, it offers that she was either "complicit in the fraud" or "severely negligent." The word "criminal" does not appear in this note; however, it does state that the matter is "extremely serious" and that "it is our belief that the Monmouth County Prosecutor's should be called." Vander Woude denied that she used the word "criminal." "Absolutely not. I never - - do I call using them." Absolutely not, I never used that language." However, when questioned by this judge if the reference to the Prosecutor's Office suggested that "you thought a crime might have been committed," Vander Woude replied, "Yes sir."

As for Mr. Pavlik, he was referred to the exhibit purporting to be the October 22 and 24 statements. He was questioned about the lack of any reference in the proffered document to "criminal" fraud, and was asked, "And you heard that several people testified that the words 'Criminal fraud' were used but is that your recollection?" He replied, "A possible of a criminal fraud, yes." And Pavlik, while acknowledging that in reading her

statement, purportedly on behalf of the three Board members, Vander Woude specifically mentioned that they believed "that the Monmouth County Prosecutor's Office should be called," denied that he agreed with this part of the statement. He claimed that he "wanted to be advised by our school board attorney, Mr. Barger." He at first claimed that two days later, on October 24, Barger told him that as police officer he "should have known to take this to the prosecutor's office." But, then, Pavlik related that Barger did not say this on October 24, instead stating of Barger, "He didn't - - no. What he was saying is he wanted to stay away from the Prosecutor's Office right now until there was an investigation to be completed, that's what we were getting over the phone from him." Pavlik recalled that after October 24, and before the November 14 meeting, Barger then said to him that Pavlik should have known to bring the matter to the Prosecutor's Office.

The next series of events in this saga were affected by the arrival of Superstorm Sandy. It disrupted school district operations and postponed the next regularly scheduled Board meeting. At the November 28 meeting, Martin Barger presented the findings of his investigation. However, before that date, there was a meeting on November 14. Mr. Barger seems not to recall having attended this meeting, but at least Ms. Vander Woude claims he was there. As Garrity recalled, at that meeting Duncan was "very upset" and she "spoke of how hurt she felt and how harmful she thought this was to the functioning of the Board and the District." There was a "lot of unhappiness back and forth" and as Robin Wetmore recalled, in Garrity's words, "a very animated discussion," although she could not recall if the "decibel level got up to yelling." However, "there were certainly emphatic things said by more than one person present." She did not recall Duncan preventing others from speaking, although "sometimes we talk over each other . . ." "and sometimes" people will say, "Let me finish what I'm saying." There was "some of that" although she could not remember by whom.

Barbara Duncan testified that at the November 14 meeting, she read a statement. She was not angry and threatened no one, but she did have concerns that she felt were significant for the Board "because I saw the potential to destroy morale and to upset people who learned of this and especially Meryl who was target of this." She told the Board that she had been advised that actions could be filed for slander, defamation, and liable, against the three Board members [Pavlik, Vander Woude and Pascucci] and that other actions "are

being considered" including ethics charges by Garrity and that Duncan was herself considering "them." She also knew that Gill had consulted a lawyer.

Ana Vander Woude testified that at the November 14 meeting, Barger spoke about the lack of indemnification that might result if the three Board members were sued, and Garrity and Duncan each mentioned this; Duncan "many times."

> "This wasn't just friendly advice, it stopped being friendly advice the first time Marty said it. When we just kept repeatedly told this, that's when we started getting extremely uncomfortable about what was happening because rather than the focus be the issue under investigation, it was us for having raised this and the consequences and 'the cost' to us?"

She recalled that Duncan was "red-faced and yelling." At one point when any of the three Board members tried to counter something, Duncan, who was standing, pointed at each of the three and said "Silence, this is my night to talk, I was not allowed to talk before."

The result of Mr. Barger's investigation was that indeed Ms. Gill did work for both Holmdel and Beverly, but that such work for multiple employers was not in and of itself a violation of the law. Review of e-mails for a period of eighteen months and phone calls for ninety days (greatly expanded periods of time over the original charge from the Board due to the ease in reviewing these longer periods), revealed that there was one phone call and approximately twenty e-mails during those periods that were related to work for Beverly while Gill was on the clock for Holmdel. There was no evidence of criminality. Gill had already explained to Barger before October 24 that she did work for both districts, a fact that she had disclosed to her Association and she had filled out financial disclosures about the two jobs.

As Ms. Garrity remembered the November 28 meeting, in the executive session the consensus of the Board was that Mrs. Duncan could meet with Gill and handle the matter involving Gill's very infrequent use of Holmdel time for Beverly work. Gill would be told to just make certain that the time in which she performed any work for Beverly was kept totally separate from her work for Holmdel. Vander Woude and Pavlik expressed their dissatisfaction with this approach. Then, at the Board's public session that day, Pavlik and

Vander Woude each read statements. The Board minutes for that meeting include a recitation of what each of these public statements contained. In essence, they stated that the issue of a "sensitive personnel matter in Central Office" had been raised by them in October. They had acted in good faith for the good of the District and the public. They had been informed of the possibility that they could be sued and had been told "on multiple occasions" that the Board's indemnity policy did not cover Board members outside the scope of their duties. They had been made to feel uncomfortable, especially as they had also been told that "most homeowner's insurance policies do not cover this." Vander Woude said that she "no longer felt comfortable" airing these concerns "in executive session." They offered that in raising this uncomfortable issue as they believed it necessary as part of their "duty and obligation as Board members", "We can never forget the lessons learned from Brookdale Community College and Penn State and the failure of their Boards to act." Vander Woude noted that she and the others "have now been placed to fear that they will be held personally liable" and that she had to tell her husband that their personal assets were at risk and that ethics charges would be filed."

The minutes record that Garrity then stated that "reasonable people can have different interpretations as it relates to harassment, intimidation and bullying" and that Barger agreed with Garrity's statement.

The minutes show that in none of the statements made that day in the public session was the nature of the "sensitive personnel matter" described and the persons involved were also not identified.

According to the testimony of complainants, the references made at the public meeting to Brookdale Community College and to Penn State set off alarms in the community. For reference, there had been a financial scandal at Brookdale involving the college's president, and the reference to Penn State was to the Jerry Sandusky child abuse scandal. Barbara Garrity testified after the November 28 meeting she was made aware that parents were calling the elementary schools concerned about the physical safety of their children. She had to issue a press release in early December to assure the public that there was no sexual abuse of children or financial impropriety. Again, the exact details of what was in fact the subject of Vander Woude and Pavlik's comments could not be mentioned.

Superintendent Duncan testified that the morning after the November 28 meeting, she began receiving calls from elementary school principals asking her, "What should we do?" Parents called as well, and while she could not specify an exact number of such calls, she explained that:

> we were deluged . . . People were outraged and they were concerned that there was a scandal that was being covered up and that the two Board members were attempting to uncover the scandal they were silenced - - that we were not - - the Board and the Administration were not dealing with the scandal, the children might be in danger, we might show up on the newspapers because of financial mismanagement. The more complaints were, "Are the children safe?" and then the teachers and administrators were complaining to me because they felt at that point that if child molestation was going on, who was guilty? Because they accepted that two Board members - - elected official and one of them a police officer and for those two people to say this in public this has a lot of weight and people believed it, they wanted to know what was going on and we, as the Administrators and Barbara Garrity as the President, couldn't address it because it was confidential and we - - there wasn't a scandal . . . but we couldn't talk to it because we would be violating confidentiality.

As evidence of the publicity generated by the comments of Vander Woude and Pavlik at the November 28 meeting, the complainants offered an article from the local "Holmdel-Hazlet Patch" a local newsletter, which on November 29 reported that "Two Holmdel School Board Members Say They Are Being 'Bullied' for 'Raising an Issue.'" The report spoke of the members saying at the public meeting that they felt "intimidated," referenced the risk of ethics charges and lawsuits against them and referred to the comments about not forgetting the "lessons from Brookdale Community College and Penn State and the failure of their boards to act." The article was the subject of many comments, included here in the evidence not for their content as such, but as an example of the public response to the article.

Subsequent to the November 28 meeting and the public response to the comments made there, at some point the Monmouth County Prosecutor's Office was informed of the concern about Meryl Gill's "potential 'double-dipping.'" In a letter dated July 3, 2013, the Prosecutor's Office advised that "on separate occasions in approximately December 2012, Barbara Duncan . . . and Ana Vander Woude and Dennis Pavlik . . . brought to the attention

of the Holmdel Police Department and the Monmouth County Prosecutor's Office issues regarding" this concern. The letter notes that Gill, as well as Michael Petrizzi, had each disclosed their secondary employments to the District. Recounting the very limited amount of Beverly City School District work performed by Gill on Holmdel time, the prosecutor concluded that "it is apparent that we would be unable to prove any criminal act occurred beyond a reasonable doubt." The letter noted that a copy had been sent to the New Jersey Department of Education, Office of Compliance. That Office issued a letter, dated August 30, 2013, concluding that its examination of the conduct of Gill and Petrizzi demonstrated that there was no "material issue of noncompliance that would warrant substantiating the complaint of "double-dipping." The matter was therefore "closed."

Dennis Pavlik, who testified that he did not remember when he did go to the Prosecutor's Office, as "I really don't recollect three years ago," further testified that referring the matter to the Prosecutor's Office was "a sensitive one" for him because he was a police officer in Bergen County, serving at that time as a sergeant. However, he did mention the possibility of referring the issue to the County Prosecutor at the October 22 meeting. He explained further that these concerns "of my livelihood" prompted him to "finally go to the Prosecutor's Office . . . ." He went as an "individual," "protecting my livelihood." He recalled that at the November 14 meeting, Mr. Barger told him, "multiple times," that, as a police officer, "You should have known to go to the Prosecutor's Office." He said it "five to six times . . . that's where I started getting my concern about my livelihood." He also expressed how "nervous" he became when his homeowner's insurance was mentioned.

Pavlik denied that he had brought up Mr. Petrizzi's name to the Prosecutor's Office as another person possibly involved in possibly criminal conduct due to another employment. The Prosecutor's Office letter specified that that name was brought to its attention by Duncan, Vander Woude and Pavlik, without any details as to exactly when, how and in what specific manner each did so. Pavlik claimed he was told by "one of the sergeants" that Duncan "exposed Michael Petrizzi and Meryl Gill . . . ." The letter's attribution of her as having mentioned Petrizzi as a possible "double dipp[er]" was "possibly" a mistake.

N.J.S.A. 18A-12-24

The complainants contend that Ana Vander Woude and Dennis Pavlik's actions in regard to the issue of Meryl Gill's alleged "double-dipping" involved violations of the Board members' ethical obligations. N.J.S.A. 18A:12-24 is the Code of Ethics governing members of local school boards. It requires that

> A school board member shall abide by the following Code of Ethics for School Board Members:
>
> a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.
>
> b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.
>
> c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.
>
> d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
>
> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.
>
> g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.
>
> h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.
>
> i. I will support and protect school personnel in proper performance of their duties.

j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

## Discussion

The two complaining parties contend that the respondents violated several sections of the Code. Ms. Garrity claims several actions violated subsection d., i., and g. Superintendent Duncan also claims that section g. and i. was violated, but adds that the respondents also violated subsections c. and j.

Barbara Garrity's complaint accuses the respondents of violating subparagraph d. by improperly acting to "administer the schools." She contends that rather than consult with the Board leadership or the Board attorney or refer the issue of concerns about Ms. Gill to the superintendent directly, the respondents undertook their own investigation and then "pre-judged the evidence." This is based upon the claim that when the respondents met with Garrity, Duncan, Board attorney Barger and Business Administrator Petrizzi on October 22, they improperly declared Gill to be guilty of "criminal fraud" and, as counsel puts in her brief, "directed the superintendent to suspend Gill, freeze her District accounts and issue a 'Rice' notice." This action was "clearly outside their jurisdiction" and amounted to their administering the schools and its personnel.

In order to assess this claim, it is first necessary to decide exactly what the respondents said to the others present at this meeting. While Garrity, Duncan, Petrizzi and Barger all recall that Vander Woude, when reading her statement, specifically referenced Gill as having committed "criminal fraud" and also specifically stating that depending upon the state of her knowledge of Gill's outside employment, Duncan was either complicit in this "criminal fraud" or was "criminally negligent," Vander Woude appears to distance herself from having used such a highly pejorative and conclusory term. This issue also requires consideration of the exhibit purporting to be the notes read at the October 24 meeting, where Vander Woude read from a written statement that was, at least was understood to be, the same statement she had read from the October 22 meeting. As we have seen, the exhibit does not reflect that she used the term "criminal," only referring to "fraud." Thus, Vander

Woude would have us believe that she never told those assembled at either meeting that the fraud that she, Pavlik and Pascucci had, as they expressed it, already concluded had occurred, was "criminal." But the greater weight of the credible evidence does not support her version. Instead, the recollections of Garrity, Duncan, Petrizzi and Barger, as well as that of the Board's then vice-president, Robin Wetmore, who had not been at the October 22 meeting, are more convincing and worthy of belief. Even Dennis Pavlik acknowledged that the word "criminal" was spoken, although he seemed to couch its use as a mention that "criminal fraud" was "possible." And clearly when she attended each of these meetings, Ms. Vander Woude had already concluded that criminal fraud had occurred, as she acknowledged in response to this judge's question, about the reference to the Prosecutor's Office, "you thought a crime might have been committed," Vander Woude replied, "Yes sir."

I am persuaded that the exhibit produced on the day of the hearing as the note from which Vander Woude read on October 22 and 24 was not the original note, which it certainly does not appear to be, and was not in fact an exact reproduction of the words spoken in those two meetings, with only limited post-meeting editorial comments While for the most part accurate, I **FIND** that the word "criminal" has been left out of the proffered text. The sense of the evidence strongly supports the conclusion that that word was in fact voiced by Vander Woude at both meetings, at the very least in regard to Gill. Given the discussion on October 22 as to the premature nature of any conclusions about Duncan prior to determining whether Gill had actually committed any wrongdoing, it is possible that Vander Woude did not relate any claim of criminality in respect to Duncan on October 24, but I **FIND** that she did on October 22.

This finding highlights what must be seen as the fundamental error made by the respondents and the genesis of all that followed. Accepting that their curiosity had been roused by whatever information they had received from constituents regarding Gill's employment status, and having determined by Googling her name that it appeared on Beverly's letterhead and that she appeared to have some employment in that district, the respondents, rather than simply referring the question of whether Gill had other employment to the superintendent for her to explore, instead jumped to the conclusion that the employment was improper, that Gill was somehow cheating the Holmdel District, that she was defrauding the district, and that indeed the level of misconduct involved not merely an

administrative issue or some type of civil wrong, but was criminal in nature, with all that implies as far as the type of charges and possible punishment that might arise from a determination that a crime had been committed. It appears that as they arrived at the meeting of October 22, these respondents had not contemplated that there might be a very simple, perfectly legitimate explanation as to what Gill was doing, that a mere inquiry of the superintendent might illuminate the situation before any conclusions were drawn. Whether they even knew that multiple employment was legal so long as certain proprieties were observed, is unclear. But at the meeting Vander Woude and Pavlik appear to have already judged Gill to be criminally guilty, and to have concluded that at best Superintendent Duncan was not merely negligent, but indeed criminally so, and at worst was a knowing enabler of Gill's "criminal" behavior and thus complicit in her criminal behavior. Suffice it to say these two engaged in a "rush to judgment," voicing their finding of guilt at both the October 22 and, at least as to Gill, the October 24 meeting. While they did agree on October 22 to have Barger investigate, when asked to read her statement on October 24, Vander Woude, who as noted did call Gill's alleged fraud "criminal" on October 22, could have said that she did not want to speak the same words as she had on October 22. She could have explained that she only was concerned as to what the facts were and supported having Barger investigate. But she chose to read the statement, again concluding, prior to that investigation being completed, that Gill had committed "criminal fraud." Given what had occurred on October 22, Vander Woude should certainly have realized that it was entirely premature to conclude anything at all. Unfortunately, she did not exercise discretion, either on October 22 or 24.

N.J.S.A. 6A:28-6.4 provides

> 4. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school.

In this instance, Superintendent Duncan was advised that several Board members wanted to meet with her. It was her decision to ask that President Garrity attend this meeting, the subject of which she had not been informed prior to the start of the meeting on October 22. In the meeting, three members of the Board directly accused a school district employee of

criminal wrongdoing and sought to direct the superintendent to issue a Rice notice and to suspend the employee's accounts. To the extent that these members had concerns about Gill, and for that matter, about the superintendent, their obligation was to bring their concern to the superintendent without any direction on how she should carry out her function to look into the matter as the chief school administrator, or any direction as to what personnel action, such as issuing a Rice notice, she should take. If they truly were concerned that exposing their concerns to Duncan was unwise, as she herself might actually be guilty of some wrongdoing, then the members could have raised the issue with the Board as a whole seeking its direction, or most likely with the Board's counsel, in order to determine the proper course to take to determine whether Duncan was involved in some misconduct. But the job of ascertaining the facts about the employment that Gill might have, whether she had disclosed this employment and filed any necessary paperwork, and whether there was evidence of any overlap between the employments, was part of the day-to-day administrative function of the superintendent and the school administration, and certainly not of the Board members. As such, I **CONCLUDE** that they overstepped their rightful bounds and violated N.J.S.A. 18A:12-24(d).

Garrity and Duncan also accuse the respondents of having violated subsection c. by failing to confine themselves to "policy making, planning, and appraisal" and "help[ing] to frame policies and plans only after the board has consulted those who will be affected by them." N.J.A.C. 6:28-6.4(a)3 provides

> 3. Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting those affected by such policies and plans, or took action that was unrelated to the respondent's duty to:
>
> i. Develop the general rules and principles that guide the management of the school district or charter school;
>
> ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
>
> iii. Ascertain the value or liability of a policy.

Again, as described above, the actions of the respondents did go beyond their role as Board members. It is not so much that they Googled Ms. Gill's name and found her listed on the

Beverly letterhead. This minimal amount of "investigation" would seem a natural first response to information that they received that Gill was employed elsewhere. But having ascertained that her name was listed, it was then not the responsibility of the respondents to determine her guilt, seek her suspension, seek to have her "Riced," and accuse her of criminal conduct, all before giving the administration the opportunity to do its job of day-to-day management, which includes dealing with personnel matters. Nothing here involved the scope of matters described in N.J.A.C. 6:28-4(1)3 as properly within the Board members' responsibilities. They were not to serve as investigators. Ultimately, it might have been necessary for the Board to deal with the results of a proper investigation of the Gill, and perhaps the Duncan, situations, but at the time that the respondents acted on October 22 and 24, that time had not come. Indeed, given the result of the investigation that demonstrated no wrongdoing of anything resembling significance, there was likely no need for the Board to have ever been involved in any formal capacity. I **CONCLUDE** that the respondents' actions violated N.J.S.A. 18A:12-24(c).

N.J.S.A. 18A:12-24j. states that board members "will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution. N.J.A.C. 6A:24-4(a)10 provides that evidence supportive of a violation of this section "shall include evidence that the respondent(s) acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint:

> i. Prior to referral to the chief administrative officer; or
>
> ii. At a time or place other than a public meeting and prior to the failure of an administrative solution.

As noted, I do not fault the respondents for initially using Google to see if Ms. Gill's name appeared. It is the rush to judgment that followed that was so inappropriate. This provision makes it abundantly clear that board members are not to be investigators. Again, if due to concerns about the conduct of the chief administrative officer, a board member believes that referring a concern to that individual may compromise any necessary investigation, it is not the job of board members to then usurp the role of investigators. Instead referral to the full board and/or board attorney for advice and direction would be appropriate. As for the need to refrain from acting prior to the "failure of an administrative solution," here the allegation of

guilt of criminal fraud, complicity in such fraud, itself then criminal conduct, and/or criminal negligence, was made prior to any attempt to even ascertain the true facts, much less determine whether the matter was resolvable by an appropriate administrative solution or whether it required some more serious means of resolution, such as referral to the police, prosecutor or perhaps, if a civil wrong had occurred, the Board's attorney for legal action, or perhaps, the Attorney General.

I **CONCLUDE** that the respondents violated N.J.S.A. 18A:12-24j.

N.J.S.A. 18A:12-24i. requires that Board members "support and protect school personnel in proper performance of their duties." Evidence supportive of proof of violation of this provision "shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties." N.J.A.C. 6A:24-4(a)9.

The record demonstrates that the respondents took actions that definitely had the potential to undermine and compromise school personnel. First, they accused Ms. Gill of criminal conduct in regard to her employment relationship with the District, concluding, without any proper basis, that she engaged in criminal conduct that defrauded Holmdel. Second, again without a scintilla of evidence, they accused the superintendent of either being criminally negligent or complicit in criminal conduct. Given the lack of any actual evidence, even an accusation of "simple" negligence, not criminal in nature, would have been the kind of accusation that threatened the proper functioning of Superintendent Duncan in her capacity as the District's chief operating officer. The respondents voiced their conclusions about these employees' guilt to other Board members both October 22 and 24. And then, as if to compound their mischief, even after the investigation had demonstrated that there was certainly no crime, and really very little in the way of even, no doubt, thoughtless overlapping of time between Gill's two jobs, the respondents decided that they should air their frankly overwrought complaints in public at the November 28 meeting, using references that caused public concern and anguish and threatened to undermine the public's confidence in the District's employees and administrators. This despite the fact that it had already been decided that the superintendent would, in fact already had, spoken to Ms. Gill to make sure

Gill understood the need to separate entirely her work time for Holmdel from that provided for Beverly.

The respondents have made much about how upset and nervous they were, how they felt intimidated, harassed and threatened, by Mr. Barger and others, telling them "numerous times" that their allegations could result in their being sued and possibly having to face such suits without either Board insurance or homeowner's insurance coverage. Of course, when they made their premature, unsupported and, frankly, rash, charges that Gill and Duncan were guilty of criminal conduct, they did not seem concerned that the objects of their conclusory damnations might themselves feel threatened. Faced with members of the Board he represented who were throwing around such serious and, frankly, premature condemnations of school personnel, Mr. Barger, who I recognize from long experience to be one of the most experienced school attorneys in this State, rightfully cautioned the respondents that they were on perilous ground and could face serious consequences if their charges and voiced conclusions that these persons were criminals, proved to be incorrect. I am entirely unimpressed by the respondents' complaints about how they felt after being so advised, and if they heard it more than a few times, that does not gain them any sympathy. As for their public statements at the November 28 meeting, after having been presented with the result of Barger's investigation, and with apparently no information or evidence to suggest that there was anything more to the matter of Gill's employments or Duncan's supervision than that investigation had revealed, rather than simply accept that they had wrongly accused the victims by their rash judgments and let the matter die, they chose to speak publicly. In voicing their rather absurd allegations that they had been wrongly treated for raising as a factual certainty of criminal conduct what should have been at first no more than a rather mundane administrative inquiry, they invoked references to a local college financial scandal that must have been well known in the area and to one of the most widely known and disturbing incidents of child abuse that has emerged over the past several years. While it might well be true that in those incidents there was some, possibly even egregious, failure of proper oversight by governing bodies, to suggest that there was some untoward pressure here against the respondents is simply not true. Nor can it be fairly said that this Board failed to act in the face of the information that an employee might be employed outside of the District in some fashion that might be improper. Using these analogies merely served to inflame public anxiety for no good reason whatsoever.

I **FIND** that the respondents' conduct did, at the time, have both the potential for and did to a degree undermine, compromise and harm school personnel. Thus, I **CONCLUDE** that they violated subsection (i).

Similarly, their actions can be understood to have provided the public with the false impression that the Board, aware of some "sensitive" personnel matter in the Central Office, a matter that somehow raised the spectre of Brookdale and Penn State, had been ignored, covered up or otherwise improperly dealt with by the Board, when in fact the Board had properly investigated the matter, determined that absolutely no criminality or serious civil wrong was involved, and that at most it involved only a only minor deviation from proper conduct. N.J.S.A. 18A:12-24 g. requires that a board member:

> hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

N.J.A.C. 6A:18(a)7 reads:

> "Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances."

It may have been the respondents' personal opinion that they had been intimidated by Barger and others on the Board. But given the outcome of the investigation and the absurdity of invoking the scandals at Brookdale and Penn State as some sort of claim to the righteousness of the respondents vis a vis those they claimed were intimidating them, I **CONCLUDE** that the respondents did provide false information and false impressions to the public about the Board and its handling of a confidential personnel matter, and did so in a

manner that, due to that very confidentiality, made it very difficult for the Board and administration to properly counter the adverse inferences about them that the respondents' comments caused to arise. And lest there be any doubt, despite the respondents' claims of a lack of evidence to support that the public, and for that matter the school staff, were upset by these comments, I **FIND** that the credible evidence from Superintendent Duncan and Ms. Garrity supports that the public and staff were indeed upset and placed on edge. I **CONCLUDE** that the conduct of the respondents violated N.J.S.A. 18A:12-24 g.

Finally, Ms. Duncan charges that the respondents violated N.J.S.A. 18:12-24 (e). This provides

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

Evidence supporting such an allegation,

> "5. . . . shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board."

It appears that the focus of this allegation is the action of the respondents in going to the Monmouth County Prosecutor "as individuals rather than Board members" concerning Ms. Gill's employment situation, doing so after the Board had properly determined from the Barger investigation that the matter involved nothing more than a minor infringement on Holmdel District time and could be readily resolved by an administrative-level discussion and verbal reprimand to caution Ms. Gill as to her future conduct, without any suggestion that her employment with the Beverly School District involved any illegality. I **FIND** that the respondents did not recognize that the Board had properly exercised its authority to resolve the Gill issue and that driven by their overwrought personal reactions to the rightful cautions expressed in regard to their premature and unsupported claims of serious legal misdeeds, the respondents chose to bring the matter to the attention of the Prosecutor's Office without seeking Board approval to do so and without any evidence to support any claim that the Board had not properly dealt with the matter. Such action was "beyond the scope of their duties" and cannot be justified by some vague and unrealistic reference to the sort of

scandalous misconduct and neglect that appears to have been involved in the Brookdale and Penn State incidents. As such, I **CONCLUDE** that the respondents violated N.J.S.A. 18:12-24 (e)

Sanctions

N.J.S.A. 18A:12-24-29 provides for sanctions that the Commission may impose upon its finding that a member of a school board has violated the Code of Ethics.

> c. . . . If a violation is found, the commission shall, by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act, or in the case of a board member, this act or the code of ethics. The commission shall state in writing its findings of fact and conclusions of law. The commissioner shall then act on the commission's recommendation regarding the sanction.

I **CONCLUDE** that the complainants have proven by a fair preponderance of the evidence that each respondent violated several sections of the Code of Ethics. These respondents acted in a precipitous manner, accused Board employees of criminal conduct without good cause, and then, after the Board had properly investigated and determined that there had been no more than a minor infraction by Ms. Gill properly warranting a verbal reprimand and words of caution to assure that no further such infraction would occur, they took it upon themselves to publicly air comments that were inflammatory, ambiguous, and about a subject that they had to know could not be easily cleared up for the public due to the confidentiality surrounding the personnel action taken against Ms. Gill. Additionally, without cause and in violation of their responsibility to accord to the Board the rightful recognition of its authority, they acted to involve the County Prosecutor in what had already been determined to involve nothing more than a rather minor administrative matter. Their conduct had definite, albeit short-lasting consequences unnecessarily raising public anxiety and concern when the actual matter of Ms. Gill's secondary employment gave absolutely no cause for any public concern whatsoever. In the longer term, it has no doubt poisoned the atmosphere in the District due to the appropriate need to pursue ethics charges against these respondents. In sum, the actions of the respondents, while not involving conduct that requires their removal, require a strong

condemnation. Given the passage of so much time, suspensions appear unwarranted. Therefore, considering the nature and the extent of these violations, I **CONCLUDE** that Ana Vander Woude and Dennis Pavlik should each be **CENSURED** for their conduct.

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION**. Pursuant to N.J.S.A. 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION, DEPARTMENT OF EDUCATION, PO Box 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 3, 2016
DATE

**JEFF S. MASIN**, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

## LIST OF WITNESSES:

**For complainants:**

Barbara Garrity
Barbara Duncan
Martin Barger, Esq.
Michael Petrizzi
Robin Wetmore

**For respondents:**

Ana Vander Woude
Dennis Pavlik

## LIST OF EXHIBITS:

**For complainant Garrity:**

G-1 Regular Board Meeting Minutes, November 28, 2012
G-2 Prosecutor's office letter to Duncan
G-3 Vander Woude Meeting Notes of October 22, 2012, meeting
G-4 Patch Article, November 29, 2012

**For complainant Duncan:**

D-1 New Jersey Department of Education letter to Duncan, August 30, 2013
D-2 Duncan Statement to Board, November 14, 2012

**For respondents:**

R-1 Regulation 321.3, Consulting Outside the District

R-2 Vander Woude Docs/Pavlik Statement

R-3 Vander Woude Statement, November 28, 2012

R-4 Pavlik Statement, November 28, 2012

323-16

OAL DKT. NO. EDU 04043-16
AGENCY DKT. NO. 50-2/16

| | | |
|---|---|---|
| T.M., ON BEHALF OF MINOR CHILD, T.M., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

In this matter, the petitioner is challenging the Hackensack Board of Education's (Board) refusal to expunge from the permanent record of T.M. the two-day suspension he received on May 19, 2015. After the matter was transmitted to the Office of Administrative Law (OAL), the parties proposed a settlement which the Administrative Law Judge sent to the Commissioner of Education with a recommendation for approval. Upon review of the terms of the proposed Settlement Agreement (Agreement), the Commissioner rejects same because the Board does not have the authority to agree to one of the provisions contained in the Agreement.

Paragraph 2 of the Agreement states:

> Should, at any time, during the 2016-2017 school year, the minor child, T.M. withdraws [sic] as a student in the Hackensack Public School System, the two-day suspension imposed upon said child shall be expunged from his student record at the time of such withdrawal provided that another suspension, as described above, has not been imposed upon him.

Under *N.J.A.C.* 6A:32-7.8(b), a board of education is permitted to destroy student records which are no longer educationally relevant while the student is still enrolled in a district. However – under *N.J.A.C.* 6A:32-7.8(c)(2) – upon graduation or permanent departure from the school district, student

records may only be disposed of in accordance with the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.* [1]

If T.M. withdraws as a student from the Hackensack School District (District), the Board would not be authorized to remove the May 19, 2015 suspension from T.M.'s record. Instead, the Board would be required to follow the document retention schedule for student disciplinary records.[2] Further, the Board must be mindful that if T.M. withdraws from the District and enrolls in another public school, the Board would be required to provide the disciplinary file to the receiving public school district within two weeks, pursuant to *N.J.A.C.* 6A:16-7.8(a). Should T.M. withdraw from the District and enroll in a private school, and the new school requests T.M.'s disciplinary file, the Board must also provide it pursuant to *N.J.A.C.* 6A:16-7.8(b).

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/12/16

Date of Mailing: 9/12/16

[1] Pursuant to *N.J.S.A.* 47:3-19, the Bureau of Records Management places all public records on Records Retention Schedules that list the minimum time periods they must be retained by State and local governmental and educational agencies.

[2] Student disciplinary files must be maintained by the school district between 1 and 100 years after graduation, depending on the nature of the disciplinary action. http://www.state.nj.us/treasury/revenue/rms/pdf/m700106_001.pdf

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 4043-16
AGENCY DKT. NO. 50-2/16

**T.M. ON BEHALF OF MINOR CHILD, T.M.,**
Petitioners,
v.
**CITY OF HACKENSACK**
**BOARD OF EDUCATION,**
Respondent.

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**Gale B. Weinberg,** Esq. for petitioners (Weinberg and Cooper, attorneys)

**Richard E. Salkin**, Esq. for respondent (Law Office of Richard E. Salkin, attorney)

Record Closed: July 26, 2016 Decided: August 1, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 15, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

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

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

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

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

August 1, 2016
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: 8-2-16

Mailed to Parties: AUG 2 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

T.M., on behalf of minor child, T.M. –vs- City of Hackensack BOE, Bergen County

AOL Docket No.: EDU 04043-2016N Agency Ref. No. 50-2/16

**STIPULATION OF SETTLEMENT**

The parties hereto hereby agree as follows:

1. The two-day suspension imposed upon minor child, T.M., on May 19, 2015, by the Respondent shall be expunged from his student records on or about the last day of school during the 2016-2017 school year pursuant to N.J.A.C. 6A:32-7.7 **provided** that, during the 2016-2017 school year, the minor child, T.M., shall not initiate against or cause intentional physical harm to a student or staff member (excluded from this category is a fight wherein the minor child, T.M., and the other participant have engaged in mutual combat where it is impossible to conclude who was the aggressor or T.M. reasonably engaged in self-defense].

2. Should, at any time, during the 2016-2017 school year, the minor child, T.M. withdraws as a student in the Hackensack Public School System, the two-day suspension imposed upon said child shall be expunged from his student record at the time of such withdrawal **provided** that another suspension, as described above, has not been imposed upon him.

T.M., on behalf of the
minor child, T.M.

Richard E. Salkin, Esq.
Attorney for the City of Hackensack BOE,
Bergen County

Weinberg & Cooper, LLC
Attorneys for T.M., on
behalf of the minor child, T.M.

By: _____
Gale B. Weinberg, Esq.

324-16

| | | |
|---|---|---|
| FREDERICK CHATMAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

Petitioner – employed by the respondent school district as a vice principal – asserted that his tenure, seniority, and/or preferred eligibility rights were violated when he was not appointed to the position of principal at the Harriet Tubman School after serving as acting principal in an un-appointed capacity from December 2011 to August 2012 and, subsequently served as interim principal from August 2012 to June 2014. The respondent district disputed petitioner's claim to the tenured position of principal.

The ALJ found, *inter alia,* that: the Tenure Act, *N.J.S.A.* 18A:28-1 to -18, defines the conditions under which teaching staff members are entitled to tenure, and the precise conditions enunciated in the applicable statute must be met; the triggering date for purposes of tenure acquisition is the date the employee begins to perform a service; in the instant matter, that triggering date is November 30, 2011 – the date when petitioner began his position as acting principal, performing the duties of principal in an un-appointed capacity; an employee serving in an interim capacity may tack on the period of time spent as "interim" to the period of time spent in an appointed capacity for purposes of tenure acquisition; here, the petitioner served as an acting principal once the principal position was vacated, effective December 1, 2011; for all intents and purposes, petitioner was continually referred to as "principal" in all communications from school officials; the evidence shows that petitioner functioned as principal for the remainder of the 2011-2012 school year and was then appointed interim principal; and these combined periods of time should be included in determining tenure and seniority rights. Accordingly, the ALJ concluded that *N.J.S.A.* 18A:28-6 applies in this instance since petitioner was promoted to the position of principal from another tenure-eligible position in the district, thereby satisfying the two-year service requirement for the acquisition of tenure as principal. The ALJ ordered that the relief sought by petitioner be granted.

Upon review, the Commissioner concurred with the respondent district that TEACHNJ and its attendant changes in evaluation requirements was adopted in August 2012, before petitioner was officially promoted from vice principal to interim principal, and therefore *N.J.S.A.* 18A:28-6(b) governs this matter rather than *N.J.S.A.* 18A:28-6(a); under Subsection B, petitioner herein does not satisfy the requirements to attain tenure because he received ratings of "partially effective" and "ineffective" for the 2012-2014 school years, when he was required to obtain evaluations of "effective" or "highly effective" in two annual summative evaluations in the first three years of employment. The Commissioner determined that petitioner is ineligible for tenure under the principal title; accordingly, the Initial Decision was rejected and the petition was dismissed.

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

September 12, 2016

OAL DKT. NO. EDU 15123-14
AGENCY DKT. NO. 283-9/14

| | | |
|---|---|---|
| FREDERICK CHATMAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board and the petitioner's reply thereto.

In its exceptions, the Board argues that the Administrative Law Judge (ALJ) erred in finding that the "triggering date for tenure purposes is November 30, 2011." (Board's exceptions at 8) The Board contends that the ALJ ignored that TEACHNJ was adopted on August 6, 2012, which in this context means that *N.J.S.A.* 18A:28-6(b) went into effect on that same day. As such, the Board explains that this matter is governed by *N.J.S.A.* 18A:28-6(b) rather than *N.J.S.A.* 18A:28-6(a). Under Subsection B, the Board maintains that petitioner does not satisfy the requirements to attain tenure because he received low ratings after being appointed as interim principal – partially effective and ineffective for the 2012-13 school year, and ineffective for the 2013-14 school year.

The Board further contends that the ALJ erred in finding that petitioner achieved tenure in the position of principal. The Board denies that petitioner was ever promoted to the

position of principal from vice principal during the 2011-12 school year. Instead, petitioner first was appointed as interim principal for the 2012-13 school year. Accordingly, he has not served in the position of principal for the requisite amount of time to accrue tenure, pursuant to *N.J.S.A.* 18A:28-6(b). Moreover, the Board argues that petitioner also could not have earned tenure because he received annual evaluations of partially effective and ineffective – short of the effective or highly effective rating necessary to obtain tenure.

In reply, petitioner argues that the ALJ's decision should be adopted because petitioner worked as principal for more than the two years required by *N.J.S.A.* 18A:28-6(a), from December 2011 to June 30, 2014. Petitioner contends that the ALJ properly found that petitioner assumed the role of principal in an un-appointed capacity during a vacancy in the position from December 2011 through June 30, 2012, after he was verbally told by an Assistant Superintendant that he was the acting principal. Thereafter, he was officially appointed as interim principal (and later principal) for the 2012-13 and 2013-14 school years.

Petitioner contends that it is well-settled that a principal is able to earn tenure credit when serving as an acting or interim principal during a vacancy, but not during periods serving in that capacity during the principal's temporary absence. Petitioner argues that the ALJ properly found that he assumed the role of principal during the actual vacancy that was created when the prior principal retired. Petitioner maintains that as he was the only administrator in the building, he adopted the duties of the principal position and, therefore, the time from December 2011 until he was appointed as interim principal in August 2012 should count toward earning tenure. As such, the ALJ appropriately found that – counting the time served in an un-appointed capacity, plus the two school years when he was appointed as interim principal – petitioner served the necessary amount of time to earn tenure as a principal.

Upon review, the Commissioner agrees with the District that *N.J.S.A.* 18A:28-6(b) – rather than *N.J.S.A.* 18A:28-6(a) – applies to this case. TEACHNJ went into effect on August 6, 2012. *See Teacher Effectiveness and Accountability for the Children of New Jersey Act*, P.L. 2012, Ch. 26, *N.J.SA.* 18A:6-117, et seq. *N.J.S.A.* 18A:28-6(b) indicates that "Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after the effective date of [TEACHNJ], shall not obtain tenure in the new position until after" certain conditions are met. The Department has explained this to mean that the date upon which a teaching staff member is approved by the board is the relevant date for determining whether new tenure rules established pursuant to TEACHNJ, or previous tenure rules, apply. *See Guide to TEACHNJ Act*, at 4, http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuide.pdf ("Any teaching staff member hired (board approved) after the August 6, 2012 signing of TEACHNJ is eligible to earn tenure after four years. There is no longer board discretion for earlier tenure. Teaching staff members hired prior to August 6, 2012 are grandfathered into the previous three-year tenure eligibility process."). In the instant matter, petitioner was officially promoted from vice principal to interim principal on August 22, 2012, which is after August 6, 2012. As such, *N.J.S.A.* 18A:28-6(b) applies because petitioner was promoted subsequent to the effective date of TEACHNJ.

*N.J.S.A.* 18A:28-6(b) provides that a teaching staff member who is promoted after the effective date of TEACHNJ shall not obtain tenure until after:

> (1) the expiration of a period of employment of two consecutive calendar years in the new position; or
>
> (2) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(3) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

In order to receive tenure pursuant to this subsection, a teacher, principal, assistant principal, and vice-principal shall be evaluated as effective or highly effective in two annual summative evaluations within the first three years of employment in the new position.

For purposes of this subsection, "effective" or "highly effective" means the employee has received an annual summative evaluation rating of "effective" or "highly effective" based on the performance standards for his position established through the evaluation rubric adopted by the board of education and approved by the commissioner.

With respect to this matter, petitioner is unable to earn tenure in the position of principal because he received annual ratings of "partially effective" and "ineffective" for the 2012-13 and 2013-14 school years. Petitioner was required to obtain evaluations of "effective" or "highly effective" in two annual summative evaluations in the first three years of employment, and his evaluation scores fell short of those required by *N.J.S.A.* 18A:28-6(b). The Commissioner need not reach the issue of whether petitioner assumed the duties and responsibilities of the principal and served as acting principal in an un-appointed capacity because – even if petitioner could tack on the time served as acting principal in an un-appointed

capacity toward the time required to earn tenure – he is ineligible for tenure due to his evaluations falling below the required ratings.

Accordingly, the Initial Decision of the rejected and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/12/16

Date of Mailing: 9/12/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 15123-14
AGENCY DKT. NO. 283-9/14

**FREDRICK CHATMAN,**

Petitioner,

v.

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

Respondent.

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**Dennis McKeever**, Esq. (Sciarrillo Cornell Merlino McKeever & Osborne, LLC)

**Christina Michelson,** Esq. (Scarinci Hollenbeck, LLC)

Record Closed: May 10, 2016 Decided: June 16, 2016

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Fredrick Chatman, a vice principal at the Camden Street School at the time of this petition, asserts that the respondent, the Board of Education of the City of Newark (the Board), violated his tenure, seniority, and/or preferred eligibility rights by failing to appoint him to the position of principal at the Harriet Tubman School after serving as acting principal from December 1, 2011, to August 22, 2012, and then as

interim principal from August 22, 2012, to June 30, 2014. The Board disputes petitioner's claim to the tenured position of principal.

On September 29, 2014, petitioner filed a Verified Petition with the Commissioner of Education. The Verified Petition alleges that he served in the position of principal from December 1, 2011, through June 30, 2014, thereby entitling him to tenure as principal. Petitioner avers that the Board's actions violated his tenure, seniority and/or recall rights, pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. On or about November 14, 2014, the Board filed an Answer and Affirmative Defenses.

The Commissioner of Education transmitted the matter to the Office of Administrative Law, where, on November 19, 2014, it was filed for hearing as a contested case. On January 8, 2015, the undersigned conducted a telephone conference with counsel scheduling hearing dates. The hearing was held on October 1, 2015, and February 17, 2016. Following the conclusion of testimony, the record remained open for the receipt of transcripts and post-hearing briefs. The parties submitted briefs in support of their respective positions on May 10, 2016, on which date the record closed.

## FACTUAL FINDINGS

Frederick Chatman is employed by Newark Public Schools. On February 28, 2005, Chatman accepted a vice-principal position at the Miller Street Elementary School in Newark, New Jersey. That term lasted until the end of the 2006–2007 school year. Chatman then accepted a vice-principal position at the Avon Avenue School in Newark in July 2007. He remained in that position until he was assigned as vice principal at the Maple Avenue School, effective August 16, 2010. On October 3, 2011, Chatman was transferred to the Harriet Tubman Elementary School (pre-k through sixth grade) as vice principal through November 30, 2011, and thereafter as acting principal, assuming the retiring principal's role by performing all duties as principal until June 2014. Petitioner's salary did not increase to a principal's salary until August 22, 2012, when he was appointed principal. (P-53.) (It was initially an "interim" principal title but changed to principal.) His duties included ensuring the safety of all students and staff, obtaining

grants, overseeing the operation of the building, attending to instructional and non-instructional supervision and evaluations, and disciplinary actions. He also was the direct point person for the staff, recruited teachers, attended meetings with the child study team and monthly principal meetings and presentations, and coordinated professional development for teachers. Chatman received emails from a periodical entitled "Principal Points" from different departments in the school system advising of events throughout the week that referred to him as "principal," as well as correspondence from the superintendent's office that referred to him as "principal." He was evaluated by Keith Barton, special assistant to the superintendent, in February 2012 and on June 28, 2012. Barton only performs evaluations for principals.

On or about May 25, 2012, petitioner received a letter from Human Resources advising that his position of vice principal at Harriet Tubman was being eliminated for budgetary reasons for the 2012–2013 school year and that he should seek other positions in the district using the Talent Match program, a program designed to assist personnel in the district to locate and fill other available positions. (P-41.)

After petitioner was assigned as principal at Harriet Tubman for the 2012–2013 school year, he received a "partially effective" rating in November 2012, and again in April 2013. On October 15, 2013, he was placed on a corrective-action plan for the 2013–2014 school year to improve his rating. In February 2014, assistant superintendent Mitch Center evaluated Chatman's performance as interim principal as "partially effective." By the end of that school year, Chatman received an "ineffective" rating. As a result of these ratings, petitioner was not granted the position of principal for the 2014–2015 school year, and was assigned as vice principal at the Camden Elementary School, also in Newark, in which position he remains.

## DISCUSSION

Tenure rights are statutory and not contractual. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963). The objective of tenure statutes is to protect competent and qualified employees, after a probationary period, from being removed for "unfounded, flimsy, or

political reasons." Zimmerman, supra, 38 N.J. at 71. The employee shoulders the burden of establishing entitlement to tenure protection, which ordinarily must be clearly proven. DiNapoli v. Bd. of Educ. of Verona, 434 N.J. Super. 233, 238 (App. Div. 2014).

The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teaching staff members are entitled to the security of tenure. Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982). To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met. See Picogna v. Bd. of Educ. of Cherry Hill, 143 N.J. 391, 400 (1996) (noting that "[t]enure arises only upon compliance with the precise conditions articulated in the statute"); Kletzkin v. Bd. of Educ. of Spotswood, 136 N.J. 275, 278 (1993) (noting that "[t]enure is a statutory right that depends on a teacher's satisfying specific statutory conditions"). In this regard, N.J.S.A. 18A:28-6 is to be interpreted in accordance with established principles of statutory interpretation. See Braimah v. State-Operated Sch. Dist. of Newark, EDU 1361-03, Initial Decision (January 16, 2004) (rejecting the petitioner's argument that N.J.S.A. 18A:28-6 did not contemplate a change in the employee's work year and that the statute should be liberally construed in his favor when he was employed as a principal for two academic years), adopted, Comm'r (March 1, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

N.J.S.A. 18A:28-5 (requirements for tenure) provides, in relevant part, as follows:

> a. The services of all teaching staff members employed prior to the effective date of [TEACHNJ[1]] in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during

[1] TEACHNJ took effect for the 2012–2013 school year, except section 17, which took effect immediately.

good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

(1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(3) The equivalent of more than three academic years within a period of any four consecutive academic years.

N.J.S.A. 18A:28-6 (tenure upon transfer or promotion) provides as follows:

a. Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(1) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

(2) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(3) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of

education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

b. Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after the effective date of [TEACHNJ], shall not obtain tenure in the new position until after:

(1) the expiration of a period of employment of two consecutive calendar years in the new position; or

(2) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(3) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

In order to receive tenure pursuant to this subsection, a teacher, principal, assistant principal, and vice-principal shall be evaluated as effective or highly effective in two annual summative evaluations within the first three years of employment in the new position.

For purposes of this subsection, "effective" or "highly effective" means the employee has received an annual summative evaluation rating of "effective" or "highly effective" based on the performance standards for his position established through the evaluation rubric adopted by the board of education and approved by the commissioner.

The triggering date for purposes of tenure acquisition is the date the employee begins to perform a service. In Zimmerman, the plaintiff argued that "employment," for purposes of tenure acquisition, should include the period of time between the employee's signing of a contract for employment and his first day of service. Zimmerman, supra, 38 N.J. at 73–75. The Court rejected his argument and noted that "[s]uch a reading would clearly detract from statutory purpose." Ibid. More recently, in Kletzkin, supra, 136 N.J. at 278–79, the Court reiterated this reasoning and noted that "[i]t is beyond debate that the triggering date for tenure purposes is the date of performance of service, not the date of the employee's contract or hiring."

Here, the "triggering date for tenure purposes" is November 30, 2011. On that date, petitioner began his "performance of service" in an un-appointed capacity, acting as principal at the Harriet Tubman School, filling a position left vacant by the prior principal, who retired. The record indicates that his duties, as outlined above, included ensuring the safety of all students and staff, obtaining grants, and several other responsibilities. He received emails from a periodical entitled "Principal Points" from different departments in the school system referring to him as "principal," as well as correspondence from the superintendent's office referring to him as "principal."

If an employee is serving in an "interim" capacity as a result of a vacancy created in the position, then he may tack on the period of time spent in his "interim" capacity to the period of time he spent in an appointed capacity for purposes of tenure acquisition. In Austin v. Board of Education of Willingboro, EDU 8923-05, Initial Decision (March 21, 2007), modified, Comm'r (April 26, 2007), <http://njlaw.rutgers.edu/collections/oal/>, petitioner Austin argued that he had accrued tenure based on his combined service as vice principal and principal. The board of education argued that he did not accrue sufficient time in either position. On December 1, 2000, Austin was appointed vice principal and served in that capacity until January 2, 2002, when he was appointed interim principal. However, this length of service did not count for tenure purposes because he did not have the requisite certificate. On August 27, 2002, he was appointed principal. On August 18, 2005, he was "returned" to his original position of assistant principal, but he was terminated five days later. The administrative law judge

(ALJ) noted that "[Austin] filled the vacant position as interim principal for twenty-six days and continued to serve as principal in his own right for an additional thirty-five months and twenty-two days," and concluded that he was employed for a sufficient period of time to acquire tenure as a principal. Austin, supra, EDU 8923-05, Initial Decision (March 21, 2007), <http://njlaw.rutgers.edu/collections/oal/> (emphasis added). The Commissioner modified the ALJ's initial decision, but nevertheless noted that pursuant to N.J.S.A. 18A:28-6, petitioner attained tenure. Austin, supra, EDU 8923-05, Comm'r (April 26, 2007), <http://njlaw.rutgers.edu/collections/oal/>.

Here, petitioner relies on N.J.S.A. 18A:28-6(a), arguing that the period of time between November 30, 2011, when he took over the retiring principal's duties, and August 22, 2012, when he was appointed interim principal, should be tacked onto the period of time between August 22, 2012, and June 30, 2014, for purposes of acquiring tenure.

The relevant case law suggests that an employee who performs services in an un-appointed or "acting" capacity to cover a vacant position may combine the period of time spent in the un-appointed or "acting" capacity with the time spent in an appointed capacity for purposes of tenure acquisition.

In order for service in an un-appointed capacity to count toward tenure acquisition, the position in which the employee serves in an un-appointed capacity must be vacant. In Walton v. Board of Education of Newton, EDU 7628-06, Initial Decision (May 10, 2007), adopted, Comm'r (August 8, 2007), <http://njlaw.rutgers.edu/collections/oal/>, the issue was whether petitioner Walton's service as interim principal counted toward his acquisition of tenure. There, Walton argued that he qualified for tenure as a principal, while the board of education argued that he did not serve enough time to acquire tenure. Walton was a tenured assistant principal when the principal of the school resigned. He was appointed interim principal for the period between April 13, 2004, and June 30, 2004. On June 30, 2006, he was terminated. The ALJ concluded that Walton's time as interim principal could not count towards tenure because the principal's employment was not officially severed until the

effective date of his resignation, and no vacancy occurred. The Commissioner, in his final decision, dismissed Walton's challenge.

Here, the prior principal of Harriet Tubman School retired and petitioner assumed her duties, in an un-appointed capacity, as acting principal of the school. The position was vacant when he assumed those duties. The distinction between Walton and the present matter is that while the interim principal in Walton was appointed, here, petitioner spent approximately eight months in an un-appointed capacity before he was appointed principal. However, the available case law on this issue does not appear to differentiate between appointed and un-appointed status. Indeed, the case that is most similar to the facts here suggests that the period of time spent in an un-appointed capacity may be counted toward tenure acquisition.

In Donnelly v. Board of Education of Hasbrouck Heights, EDU 7770-99, Initial Decision (October 29, 2001), rejected, Comm'r (December 17, 2001), <http://njlaw.rutgers.edu/collections/oal/>, petitioner Donnelly relied on N.J.S.A. 18A:28-6(c) and argued that the period of time he spent as acting principal should be credited for purposes of tenure acquisition as principal. Donnelly became acting principal when the principal of the school retired and was removed from the district's payroll on May 1, 1996. Consequently, the ALJ found that Donnelly filled "a vacancy occasioned by retirement of the former principal and, therefore, [he was] entitled to tenure in that position." The ALJ relied on case law that distinguished between an employee covering another employee's absence and a vacancy in the position, and concluded that given the factual circumstances, Donnelly could "count toward tenure all of his service as acting principal." The Commissioner rejected the ALJ's initial decision, because petitioner's tenure claim should have been analyzed under N.J.S.A. 18A:28-6(a) instead of N.J.S.A. 18A:28-6(c).

The ALJ's initial decision in Donnelly did not explain the significance of the term "acting," nor did it differentiate between being "appointed" to a position and serving in an "acting" capacity. However, the Commissioner's final decision noted that "notwithstanding the outcome herein, [the Commissioner] affirms the ALJ's finding that [Donnelly's] service as an 'acting' principal, upon the occasion of a true vacancy in the

District, is properly credited toward acquisition of tenure as a principal." Donnelly, supra, EDU 7770-99, Comm'r (December 17, 2001), <http://njlaw.rutgers.edu/collections/oal/>, at n.3. Thus, the period of time spent in an "acting" capacity, which in the present matter is likely equivalent to petitioner's serving in an un-appointed capacity, may be counted toward tenure acquisition.

Here, petitioner served as an acting principal at Harriet Tubman once the principal position was vacated, effective December 1, 2011. There were no other administrators appointed. For all intents and purposes, petitioner was continually referred to as "principal" through emails and correspondence from school officials. Accordingly, this time should be tacked onto the time he served as interim principal, since the position of principal was actually vacant as of December 1, 2011. The evidence shows that petitioner functioned as principal for the remainder of that school year and was then appointed interim principal. The combined time periods of both should be included in determining tenure and seniority rights, and I so **CONCLUDE**.

Based upon the foregoing, N.J.S.A. 18A:28-6 applies in this instance since petitioner was promoted to the position of principal from another tenure-eligible position in the district, satisfying the two-year service for acquisition of tenure. He worked as if he were principal at Harriet Tubman from December 2011 through June 2012, before being officially assigned as principal for the 2012–2013 and 2013–2014 school years.

## ORDER

For the foregoing reasons, it is **ORDERED** that the relief sought by petitioner be and is hereby **GRANTED** consistent with this initial decision.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 16, 2016
DATE

**JOANN LASALA CANDIDO**, ALAJ

Date Received at Agency:

Date Mailed to Parties: JUN 20 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## WITNESSES

For petitioner:

Deborah Terrell
Fredrick Chatman

For respondent:

Homere Breton
Keith Barton
Mitch Center

## EXHIBITS

For petitioner:

P-1 1/20/05 letter from Rita R. Salley, Executive Director, to F. Chatman re: appointment as Vice Principal, Miller Street School

P-2 6/17/11, Extra Curricular and Co-Curricular School-Based Summary

P-3 10/13/11 email from Legretha Wingo to Principals and Department Heads to advise of changes to the NJ State Pension Funds

P-4 12/8/11 e-mail from Julian Hines to Fred Chatman regarding elementary basketball league

P-5 12/2/11 email from Michael Carrigan re: Superintendent's Principals Leadership Institute Schedule; forwarding the schedule to Fred Chatman

P-6 12/8/11 emails between F. Chatman, Brad Haggerty and Jeff Anderson; adding Fred Chatman to the list for receiving Principal Points

P-7 12/8/11–12/12/11 emails between Joseph DeRisi, Third-Grade Teacher, Genevieve Murray, Supervisor K–3 Language Arts Literacy, re: DRA training; Fred Chatman is being asked to arrange the teachers from his building who were to attend the training

P-8 12/9/11 and 12/12/11 emails, Sarah O'Leary, Education Coordinator City Bloom re: Whole Foods school garden grant; Fred Chatman is being

asked to talk about the grant application for Harriet Tubman for a school garden

P-9 12/12/11–12/13/11 emails, Valerie Wilson, and Carol Faulkner re: budget; Fred Chatman, as Interim Principal, is requesting to purchase postage and for the budget line to be opened to 100%

P-10 12/13/11 email from Caryn Henning, Children's Literacy Initiative, to Principals re: Principal meeting cancelled; email is addressed to "Principals"

P-11 1/3/12 email from Keith Barton, Special Assistant, to Principals re: K. Barton designated as the Central Office Point Person

P-12 1/3/12 email from Genevieve Murray, Supervisor K-3 Language Arts Literacy, re: CLI (i3) Reading workshops; email addressed to principals who are participating in the program

P-13 1/3/12 email from Caryn Henning re: Model Classroom selections; Requesting Fred Chatman provide his Kindergarten and First-Grade Model Classroom recommendations

P-14 1/4/12 and 1/31/12 emails from Maribel James and Michael Carrigan to Principals and VPs re: Non-Instructional Evaluations 7/2011 through 12/2011; email is reminding that non-instructional evaluations are due by February 3, 2012

P-15 Employee Performance Evaluation Forms

P-16 1/4/12 email from Natalie Lewis re: School Report Card Narratives due date

P-17 1/4/12 email from Cindy Osuji re: PIRT training; email is confirming a meeting with the PIRT teacher and the parent

P-18 Internship Placement Request forms; Fred Chatman is listed as "School Principal"

P-19 1/6/12 email from Michael Carrigan to Principals re: email attachment for textbook certification in Principal Points; email is addressed to Principals and Vice Principals

P-20 1/12/12 Newark Public Schools Principal Points (by Cami Anderson), emailed by Jeff Anderson to Fred Chatman

P-21 1/12/12 and 1/13/12 emails from Genevieve Murray re: CLI Training documents; email is addressed to Principals

P-22 1/13/12 from Caryn Henning, Children's Literacy Initiative, to Principals re: i3 Model Teachers; email is addressed to Principals

P-23 1/17/12 email from Susan Munro re: Study Island; email is to meet with Fred Chatman to get him to use Study Island at Harriet Tubman.

P-24 1/19/12 email from Newark CAP to Fred Chatman re: New Jersey CAP grant money for Harriet Tubman

P-25 1/19/12–2/1/12 emails Tonya Riggins, Director, Food & Nutrition Services, Frank Masalla, Kathy Wise, Deputy Director, Food & Nutrition Services, Allan Liloia and F. Chatman re: maintenance issues at Harriet Tubman; Fred Chatman taking care of the boiler-maintenance problem at Harriet Tubman

P-26 1/24/12 email from Barbara Waddell re: Harriet Tubman Principal's Program, delivering snacks to the school

P-27 2/1/12 email from Arlene Lackowitz, Master Teacher, Office of Language Arts Literacy, to Fred Chatman re: Observation Survey-Midyear Recording Forms for Chatman to complete and return

P-28 2/3/12 email from James Sheeley, Jr., Director, Office of Academic Services, re: participation in a Spring Semester Artist in Residence with the Newark Museum; email to Fred Chatman and others regarding the schools' participation

P-29 2/3/12 emails from Ted Lind, Deputy Director for Education, Newark Museum; email is addressed to Principal Chatman, requesting a video be forwarded to Debbie Terrell

P-30 2/7/12 email from Genevieve Murray, Supervisor K-3 Language Arts Literacy, to Principals re: CLI events for February 2012; email to Fred Chatman to share information with his teachers

P-31 2/7/12 email from Jack Helfgott to Fred Chatman and others re: Naviance Training for 2/15/12; email is addressed to Middle School Principals for staff who are interested in attending the training

P-32 2/8/12 email from Tina Powell, Director of Mathematics, re: Principal Points; Principals are advised that Principal Points for that week contains

information to be shared with the teachers about attending a professional development session

P-33 2/9/12 emails from Tina Powell and Paul Oliveira re: professional development; email is sent to Fred Chatman to register his teachers for the workshop

P-34 2/16/12 email from Caryn Henning, Children's Literacy Initiative, to "Principals" about the new Model Teachers

P-35 2/21/12 email from Keith Barton, Special Assistant to Principals, to schedule Mid-Year Check-ins; email to Fred Chatman and others about the mid-year check-in conversations to be scheduled and specific areas to be discussed. Keith Barton evaluated Fred Chatman as a Principal in February 2012

P-36 Fred Chatman as Principal, letters and email regarding discipline and/or correction of employee behavior

P-37 3/5/12 correspondence from F. Chatman to R. Bolden regarding tardies and early departures

P-38 3/8/12 e-mail exchange between Jennifer Scott and F. Chatman regarding disciplinary hearing

P-39 Teacher Observations, March 2012

P-40 4/27/12 letter from Chatman to Cami Anderson re: continuing as Principal at Harriet Tubman; letterhead says "Frederick Chatman Principal"; Fred Chatman refers to himself as the Principal of Harriet Tubman and expresses his desire to continue in that role

P-41 5/25/12 letter from H. Breton to F. Chatman, regarding nonrenewal

P-42 Teacher Annual Performance Evaluations, done by Fred Chatman "Supervisor," signed Fred Chatman "Principal"

P-43 June 2012 School Office Personnel Summer and Home Addresses and Phone Numbers; Fred Chatman is listed as "Principal," the "Vice Principal" spots are blank

P-44 June 2012 Identification of Storage Area; Fred Chatman is listed as "Principal"

P-45 6/7/12 Curriculum Assessment and Instruction meeting minutes; Fred Chatman is listed as "Interim Principal," the document contains in

"Leadership" that Fred Chatman met with the community to discuss the proposed budget and in "Teacher Quality" that instructional staff are to submit their report cards to Fred Chatman for his review

P-46 6/13/12 Transfer Agreement re: Rhonda Norwood; shows job responsibility for Principal

P-47 6/18/12 letter from Fred Chatman to "Parent/Guardian" re: eight students who were not promoted; Fred Chatman signed as Principal, letterhead says Principal

P-48 6/18/12 Guidance Curriculum Year-End Report form signed by F. Chatman, Principal

P-49 6/18/12 Guidance Curriculum and 6/21/12 Security Drill Form; Fred Chatman signed as "Principal"

P-50 June 2012 blank NPS Employee Exit Checklist; Fred Chatman is listed as "Interim Principal"

P-51 6/28/12 Summative analysis for Principal's Evaluation, evaluator Keith Barton, Special Assistant; Keith Barton evaluated Fred Chatman as a Principal

P-52 6/29/12 Validation Form for Receipt of Documents; Fred Chatman is listed as "Principal"

P-53 9/24/12 letter from Homere Breton, Interim Executive Director, to F. Chatman advising of promotion to "Interim Elementary Principal at Harriet Tubman," effective 8/22/12, The Summary of Personnel Actions report lists Fred Chatman as being promoted from "VP Elementary" to "Principal Elementary"

For respondent:

R-1 Chatman Petition of Appeal, September 24, 2014

R-2 District's Answer to Chatman's Petitioner, November 14, 2014

R-3 Correspondence from R. Salley to Chatman re: offer of employment as Vice Principal at Miller Street Academy, December 23, 2004

R-4 Employment Contract, May 2005

R-5 Correspondence from R. Salley to Chatman re: Offer of Employment for 2006–2007 school year, May 5, 2006; Employment Contract, May 2006; correspondence from R. Salley to Chatman re: salary step, June 15, 2006

R-6 Correspondence from C. Wildy to Chatman re: Reassignment, July 14, 2007; Memorandum from M. Bolden to R. Salley re: Recommendation for Vice Principal, August 10, 2007

R-7 Correspondence from A. Miller to Chatman re: Reassignment, July 1, 2010; Correspondence from A. Miller to Chatman re: Reassignment, August 5, 2010

R-8 Correspondence from A. Miller to Chatman re: DYFS allegations, March 2, 2011

R-9 Screen shot of employee work location, October 3, 2011

R-10 Correspondence from H. Breton to Chatman re: Elimination of position, May 25, 2012

R-11 Correspondence from H. Breton to Chatman; Employment Contract, August 29, 2012

R-12 Screenshot of employee work location, July 1, 2014

R-13 New Jersey Leaders to Leaders

R-14 Not admitted

R-15 NPS School Visit Feedback Form completed by Mitch Center, October 15, 2012; NPS School Visit Feedback Form completed by Mitch Center, November 30, 2012; Formal Observation Summary form, November 30, 2012; email correspondence from M. Center to Chatman re: Tubman Visit, January 14, 2013

R-16 Formal Observation Summary Form, April 16, 2013; Mid-Year Summary Form

R-17 Principal Annual Evaluation Form, June 26, 2013

R-18 Email correspondence from M. Center to Chatman re: Feedback on Action Plan, September 24, 2013; Corrective Action Plan, October 15, 2013

R-19 Mid-Year Review—Principals, September 25, 2015

R-20 Annual Evaluation Summary Form—Principals, June 18, 2014

R-21 New Jersey Report Card for Harriet Tubman School 2012–14

R-22 Summative Analysis for Principal Evaluation, June 28, 2012

325-16

STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION

BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of Tenure Hearing of Michelle Gates:

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**THE STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON**

Case No. 144-5/16

and

Ruling on
Motion for Judgement

**MICHELLE GATES**

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Before:

Edmund Gerber, Arbitrator

Appearances:

For the Paterson City School District:
Joseph L. Roselle, Esq.
Schenck Price Smith & King, LLP

For the Respondent:
Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, LLC

Tenure charges were brought against Michelle Gates, a teacher employed by the State Operated School District of the City of Paterson. These charges all stem from her alleged actions of knowingly and improperly providing answers and assisting with word definitions to students during the

New Jersey Assessment of Skills and Knowledge ("NJ ASK") test on five (5) days in May of 2012.

At the hearing, the District's witnesses testified that the Office of Fiscal Accountability and Compliance ("OFAC") of the New Jersey Department of Education was alerted by Measurement Incorporated, the company which administers the NJ ASK testing program, of an irregularity in the test papers of students who took the test supervised by the Respondent in 2012. An erasure analysis of the tests revealed a high number of wrong to right erasures. That is, a significant number of students had erased wrong answers and filled in right answers. This triggered an investigation by OFAC.

Two OFAC investigators testified that they interviewed approximately twenty-seven (27) students who took the 2012 NJ ASK exam under the Respondent's supervision. Seventeen (17) of the students said that the Respondent assisted them directly during the test or witnessed the Respondent helping other students with the test. Audio recordings were made of the student interviews. The recordings and transcripts of the recordings were admitted into evidence. The students who were interviewed were not under oath and neither the Respondent nor her representative were present during these interviews and had no opportunity to cross-examine the students.

Jazmin Rotger de Parra, the District's Testing Coordinator, testified as to the protocol for maintaining test security, and specifically about the training the Respondent underwent regarding these tests and that the Respondent signed documentation attesting to the fact that she maintained test security and did not assist students on the exam at issue. After reviewing the reports of the OFAC investigators and the recordings and transcripts of the interviews of the students involved, Rotger de Parra initiated the instant tenure charges against the Respondent.

The District rested its case without ever calling any of the twenty-seven (27) students that were interviewed by the District. The Respondent thereupon moved to dismiss the charges contending that all of the evidence presented by the District constituted hearsay evidence and such evidence

was not supported by a residuum of competent, admissible non-hearsay evidence.

The undersigned reserved ruling on the motion at that time and asked the parties to file written submissions on the Motion[1].

## ARGUMENT

### Respondent

The Respondent argues that N.J.S.A. 18A:6-17.1(c), provides:

> The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

No specific provisions exist in Title 18 as to admissibility of evidence. Accordingly, the American Arbitration Association rules as to admissibility and relevance of evidence apply here. AAA Labor Arbitration Rule #27 states in pertinent part:

> The arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary.

Consequently, the arbitrator maintains wide latitude in determining admissibility and relevance of evidence. Nevertheless, determinations must be made with consideration of fundamental fairness. In Dolan v. East Orange, 287 N.J. SUPER 136, the Appellate Division held that Dolan, a public employee, was denied administrative due process when he was not provided an opportunity to cross-examine the witness accusing him of

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[1] As it was early in the day and the Respondent had a potential witness available, I asked the Respondent to begin its case pending my determination on the motion. The Respondent called one of the students as a witness. Given that I herein grant the Respondent's motion I have not considered the testimony of said witness.

wrongdoing which resulted in his termination. The Court noted that while hearsay evidence is admissible in an administrative proceeding, there must be a residuum of competent, non-hearsay evidence to form the basis for the findings against the public employee. The same principles have been applied in the tenure hearing context. *See* In re Tenure Hearing of Cowan, 224 N.J. SUPER 737 (App. Div. 1988). Also, In the Tenure Hearing of Morimo Okundaye and the Newark School District, Arbitrator Timothy Brown received into evidence a videotape of the Respondent interacting with a student. However, the arbitrator determined that the videotape standing alone, without direct evidence of how, when and under what circumstances the recording was made , was hearsay evidence and held that it would violate the rules of fundamental fairness to rely solely on the video to establish the truth of the tenure charges and dismissed said charges.

In State Operated School District of Paterson v. Richard Vincenti, Arbitrator Howard Edelman effectively applied the residuum rule finding that while hearsay evidence was admissible, it cannot, standing alone, form the basis to terminate an employee's employment. Arbitrator Edelman acknowledged that fundamental fairness dictates that an employee have the ability to confront his or her accusers with cross-examination.

According to Rule 801, hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." The oral statements of the students made on the audio recording admitted into evidence here were hearsay statements and do not fall into one of the recognized exceptions to the rules precluding the admissibility of hearsay.

Rule 803 does permit the admission of a prior witness but that individual must be a witness at the instant hearing. In the present matter, none of the students interviewed were called as witnesses by the District. Thus, the out of court recorded statements to not fall under the prior exception to the hearsay rule.

In certain circumstances, hearsay will be admissible if the declarant is unavailable to testify. The Board of Education here has not even asserted

let alone proven that the students were not available. There has been no evidence presented that the relevant students were unavailable nor was the testimony taken at a prior trial. Most significantly, the Respondent has never had an opportunity to cross-examine these witnesses. The out of court statements of the students who did not testify are hearsay evidence that would not be admissible in a court proceeding. It is inappropriate to admit these statements or the truth of the matters asserted without an additional residuum of competent, admissible, non-hearsay evidence to support the assertions for which the hearsay is offered.

Counsel orally moved to dismiss the charges against the Respondent. However, pursuant to R4:6-2, when a judge considers a motion at the end of the presentation of an opponent's case, such a motion is considered a motion for judgment pursuant to R4:40-1. A motion to dismiss pursuant to R4:6-2 would be a motion on the face of the pleadings. Thus, the motion presented herein by the Respondent after the presentation of the Board's case is essentially a motion for a judgment dismissing the tenure charges against the Respondent with prejudice.

Whenever the significant rights of an individual may be affected in any type of legal proceeding, the rules of fundamental fairness have been applied by judges, administrative hearing officers and arbitrators. The law uniformly requires that for a proceeding to be fair, an employee must have the ability to cross-examine his or her accuser and testimony must be taken under oath. Here, all the evidence presented by the District constituted hearsay evidence. There was not one piece of direct, non-hearsay evidence that in May 2012, Respondent provided assistance to students on the NJ ASK test. Accordingly, this arbitrator must enter a judgment in favor of Respondent and dismiss the charges against her with prejudice.

## The District

As conceded by Respondent in her brief, hearsay evidence is admissible in this proceeding. It is well settled that an arbitrator has wide latitude to determine the admissibility and relevance of evidence. The choice of accepting or rejecting a witness' testimony or credibility rests with the

arbitrator as a finder of fact. Freud v. Davis, 64 N.J. SUPER 242, 246 (App. Div. 1960).

The New Jersey Administrative Code permits the use of hearsay in administrative proceedings such as this. N.J.A.C. 1:1-15.5(a) provides in relevant part:

> "Hearsay evidence shall be admissible in a trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate, taking into account the nature, character and scope of the evidence, the circumstances of its creation and production and generally its reliability. While generally, in order to accord hearsay evidence its full weight, there must be a residuum of legally competent evidence to support each ultimate finding of fact, known as residuum rule." N.J.A.C. 1:1-15.5(b)

Thus, to the extent the recordings at issue were hearsay, they are admissible and have been admitted into the record. The arbitrator may therefore rely upon them as he sees fit. Contrary to the Respondent's arguments, the recordings have been supported by a residuum of evidence and thus the rule is satisfied. The Respondent relies upon Dolan, *Supra*, however, in Dolan, the entire allegation was based solely upon an unsigned, unsworn letter allegedly submitted by a fellow employee stating that Dolan instigated a fight. The City presented no other evidence and did not call the letter writer as a witness in the hearing.

Here, unlike Dolan, the District introduced a significant amount of documentary and testimony evidence, including recordings of the student interviews, the testimony of both OFAC investigators, an OFAC supervisor and a District employee, all of whom testified that Respondent's conduct was unbecoming and improper and the reasons why the OFAC witnesses made such a determination. In addition, the District introduced a document signed by the Respondent herself indicating that she maintained test security which live testimony at the hearing unequivocally disputed. Thus, a residuum of evidence was provided by the District, far more than the student records as

the Respondent would have the arbitrator believe, which allows the arbitrator to consider the content of those recordings when viewed in relation to the other evidence submitted. Furthermore, the Respondent had the opportunity to confront her accusers. The tenure charges were filed by Ms. Rotger de Parra who testified competently and credibility as to why she took such action. The charges themselves were based on the investigation conducted by OFAC which concluded that Respondent breached testing security and protocol. Both of the OFAC investigators testified as well as their superior. All of those witnesses were Respondent's accusers and were cross-examined by Respondent's counsel at the hearing.

The students were not the accusers. They did not report Respondent's wrongdoing on their own volition or independently submit a complaint about her conduct. The students' recollection of Respondent's conduct comprised but one part of the OFAC investigation and the related documents involved in the same should be given full weight by the arbitrator, along with other evidence in the record. Accordingly, the residuum rule is satisfied.

The District cites I/M/O Tenure Hearing of Cowan, 224 N.J. SUPER 737 (App. Div. 1988) where the Appellate Division affirmed the dismissal of a tenured teacher who is accused of various acts of misconduct, including an alleged assault conducted by the teacher. Evidence of the incident consisted of the testimony of the high school principal and his memorandum of the incident which included facts the principal had learned about from alleged eyewitnesses. The principal was not a witness to the event. The student who was the victim of the assault did not testify at the hearing, nor was there any other direct or eyewitness evidence of the assault. The Appellate Division upheld the Commissioner's finding of unbecoming conduct based on this incident noting that "the application of the residuum rule does not require that hearsay evidence of the assault be ignored." Id. at 750. The Court held that there "need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the combined probative force of the relevant hearsay and relevant competent evidence" sustains the Commission's finding of unbecoming conduct." Id. At 71. As with the principal in Cowan, the investigators based their findings here in part on student statements but the student statements were not the

sole basis for the finding. See also Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 358-59 where an employee's termination was upheld even though no direct witness to the altercation at issue testified. Rather, only the individual who prepared the report of the incident testified.

The District also cites I/M/O the Tenure Hearing of Manuel Santiago, OAL Dkt. No. EDU-7135-99. The Board of Education filed tenure charges against a school custodian who had been arrested for possession of drugs. At the hearing, the testimony of a police officer who did not witness the alleged conduct as well as an unsworn statement of an unidentified, paid confidential informant that Santiago was involved in the distribution of narcotics. The ALJ found that Santiago had committed the conduct at issue and that he be dismissed from his position. The Commissioner found that the witness offering the hearsay evidence was reliable and that "the recommended decision does not rely solely on hearsay testimony" and therefore the introduction of hearsay evidence was proper and any reliance upon it was appropriate. In I/M/O Stephen Fox, OAL Dkt. No. EDU-7955-04 (Cmm'r 2004) the Commissioner rejected Fox's argument that hearsay evidence and statements provided to investigators and other individuals who did not testify was inadmissible because the teacher's own testimony and that of an administrator was also in the record. I/M/O Woodbridge Township Board of Education v. John Radzik, Dkt. No. 368-12/12 (Licata, 2013) a board of education filed tenure charges against a third grade teacher due to his actions against the administration of the 2010 and 2011 NJ ASK examinations. Arbitrator Licata sustained the tenure charges and ordered that Radzik be dismissed from his positon. The arbitrator relied on several pieces of hearsay evidence including the OFAC report which concluded that Radzik breached testing protocol. No student who allegedly received test answers or inappropriate assistance testified. Nevertheless, Arbitrator Licata concluded that termination was appropriate based on evidence in the record.

In this matter, the lack of bias or motive on the part of the students who were in the fourth grade at the time of the NJ ASK tests and their proximity in time to the test when they gave their statements establishes the reliability

of the interviews as well as a probative value when examined in light of the residuum of other evidence produced by the District at hearing.

Even if the recorded interviews at issue are not supported by a residuum of competent evidence, they are nevertheless admissible and fully probative for their evidentiary value under an exception to the hearsay rule. N.J.R.E. 803(c) that hearsay evidence may be admitted into evidence and fully relied upon by a fact finder regardless of whether the declarant is able to testify. These include:

- Present sense impression - a statement of observation, description or explanation of an event made while or immediately after declarant was perceiving the event without the opportunity to deliberate or fabricate;
- A recorded recollection - a statement about which the witness is unable to testify about fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record;
- Records of regularly conducted activity - that is a record kept in the normal course of business and the person making that recording had actual knowledge of the event or was based upon information from a person with such actual knowledge;
- Public records, reports and findings- a statement made in writing made by a public official or not a condition or observed by the official.

The student recordings at issue meet one or all of these tests, or at least in their spirit and intent. The recordings were made several years prior to the hearing, much closer to the time of the Respondent's misconduct than the current date. Moreover, the student statements to the OFAC investigators are clearly recorded recollections of the students' accounts of the alleged conduct. The recordings were made by OFAC investigators in the regular course of their business. They were made part of OFAC's investigation file in this case. It is further submitted that the OFAC investigation reports and the evidence relied upon by the investigators are

analogous to a police report which have long been admissible into evidence pursuant to this exception.

The OFAC report and the conclusions therein constitute a public record which is defined as "a statement contained in writing made by a public official of an act done by the official or an act, condition or event observed by the official if it was in the scope of the official's duty either to perform the act recorded or to observe the act or event recorded or make the written statement. N.J.R.E. 803(c)(8). The OFAC investigators are public employees and are charged as part of their official duties to investigate testing irregularities and teacher misconduct. These reports were part of the job responsibilities and thus are admissible into evidence under this hearsay exception, regardless of whether a residuum of competent, credible evidence exists. The District requests that the Respondent's motion be dismissed and denied with prejudice.

## Respondent's Reply

The Respondent submitted a response to issues raised in the Petitioner's brief.

The Respondent contends that the student recordings do not fall within an exception to the hearsay rule.

The audiotapes were not present sense impressions. A present sense impression statement must be made "while or immediately after the declarant was perceiving the event ... without opportunity to deliberate or fabricate." The statements made by the students to the investigators were made more than two years after the NJ ASK test. They are hardly present sense impression statements. The law requires that the present sense impression statement be made a very brief time between the observation and the statement.

The Petitioner misrepresents the recorded recollection exception to the hearsay rule. This exception requires that the witness be unable to testify from memory about the incident at issue. Here, we have no idea whether these students could testify from memory or not since they did not testify.

The rule requires that during the testimony at hearing or trial, the lack of memory must be established. No student testified on behalf of the District, thus the condition precedent to admissibility under this exception has not been met.

The exception for records of regularly recorded activity and business records similarly does not apply. The Petitioner opines incorrectly that the students' statements within the recordings are admissible under these exceptions similar to a police report that would be admissible as a record of regularly recorded activity. However, the rule clearly requires that any hearsay within hearsay is only admissible if it meets an additional exception to the hearsay rule. Konop v. Rosen, 425 N.J. SUPER 391 (2012).

Respondent submits that since student statements do not meet any other exception to the hearsay rule, they are inadmissible hearsay statements and must be excluded from evidence. See also Rurode, *Supra*.

Respondent also argues that the decisional law cited by the Petitioner is inapplicable to the present matter. In every tenure case cited by the Petitioner, there was testimony from direct witnesses to the events in question or the respondent admitted his or her conduct. This is simply not the case in this matter. In Razdik before Arbitrator Licata, multiple eyewitnesses actually testified. The arbitrator considered hearsay testimony and relied upon it but only because direct admissible of the incident was also presented. In Fox, Mr. Fox admitted to kissing a student. Such a statement is direct evidence which satisfied the residuum rule.

In the present matter, the hearsay statements made by students in the recordings are not admissible under any exception to the hearsay rule. The Rudroe case cited by the Petitioner actually supports the position that out of court statements of the student witnesses are inadmissible hearsay.

> Much of the evidence submitted on behalf of the Borough came in the form of written documents, unsupported by any oral testimony. Although the statements from Egbert, Ruales, and Simpson were admitted during the hearing as documents appended to the internal investigative report, the statements

> themselves remained hearsay. See *State v. Lungsford*, 167 N.J. Super. 296, 310, 400 A.2d 843 (App. Div. 1979) (explaining that witness statements embedded in police report are not admissible under business record exception to hearsay rule even though report itself may be admissible). As hearsay, they could be used to corroborate competent evidence, but they could not provide the residuum of competent evidence that must support a fact material to the determination of a charge. See *Weston, supra, 60 N.J.* at 51, 286 A.2d 43. It is the duty of the finder of fact, no matter the forum chosen for a police disciplinary proceeding, to point to the competent evidence in the record supporting his or her ultimate fact-findings and conclusions drawn therefrom. The record before the hearing officer in this matter should have been scrutinized in that manner.

The Petitioner conflates the admissibility of the OFAC report with the admissibility of the recorded student statements. The OFAC report is admissible as a report prepared by the investigators who testified at the hearing. However, like Rurode, the hearsay statements contained within that report are not admissible unless they fall under a recognized exception to the hearsay rule. Here, the student statements were not made under oath and no one, let alone the Respondent, had an opportunity to cross-examine them or judge their credibility and simply do not meet any exception whatever to the hearsay rule.

The Petitioner argues that Ms. Rotger de Parra and the investigators are the Respondent's accusers and not the students and therefore Respondent has no right to cross-examine the students. However, Rotger De Parra and the investigators never observed the Respondent administer the test in question, they were not present in the testing room and they have absolutely no firsthand knowledge on which to competently base an accusation. The charges against Respondent must be dismissed in their entirety.

## DISCUSSION

This arbitrator has always followed and applied the Residuum Rule. As stated in Cowan, *Supra*:

> In our State, a fact finding or a legal determination cannot be based upon hearsay evidence alone. Hearsay may be employed to corroborate competent proof or competent proof maybe supported or given added probative force by hearsay testimony. But in the final analysis, for a court to sustain an administrative decision which affects the substantial rights of a party, there must be a residuum of competent, credible evidence in the record to support it.

In other words, a case cannot turn on hearsay.

In every case relied upon by the Petitioner, be it court decision, administrative determination or arbitration, it was acknowledged that the case cannot turn on hearsay alone. There must be a finding that there is a residuum of competent, credible evidence before sustaining a tenure charge. In Cowan, although there was only hearsay evidence of one offense which occurred in 1974, there was competent credible evidence of incidents in 1975, 1980, 1982 and 1984 and ample competent credible evidence to sustain the tenure charges. As the Respondent pointed out in Rurode, Rurode admitted that an altercation took place. This admission constituted a residuum of credible evidence. Accordingly, hearsay evidence was properly considered in assessing the respondent's degree of culpability. In Radzik, before Arbitrator Licata, there were two witnesses who testified on behalf of the Petitioner and Arbitrator Licata identified such witness testimony as "threshold testimony", clearly implying that such testimony constituted a residuum of competent, credible evidence. There is no such threshold testimony here.

The District argues the fact that the Respondent signed a document acknowledging that she supervised the test constitutes the residuum of competent, credible evidence. However, unlike Rurode, this document does not acknowledge any misconduct at all. A "residuum of direct

evidence" means some identifiable amount of direct evidence, although perhaps quite small, in support of the allegation of misconduct. Also, N.J.A.C. 1:1-15.5(b) requires that each ultimate finding of fact be supported by direct evidence.

I am satisfied that, as argued by the Respondent, the students' recordings do not fall within any exception to the hearsay rule. They are not a present sense impression statements, do not fall within the recorded recollection exception and are not records kept in the normal course of business. Although the reports of the investigators may fall within the records of regularly conducted activity exception, the hearsay statements contained within that report, i.e. the statements and recordings of the students, as hearsay documents are hearsay and not admissible, Rurode.

The audio recordings in the matter at hand are the sole reason these charges were brought against the Respondent. The investigators conclusion that Respondent impermissibly interacted with students during the taking of the NJ ASK test, is based solely upon the interviews with these students. Similarly, Rotger de Parra's decision to accuse the Respondent and bring tenure charges rests entirely upon the student interviews. But as in Rurode those portions of the investigators reports and testimony relating to the students statements is hearsay and without a residuum of direct evidence cannot be grounds to make an affirmative finding that the Respondent engaged in the alleged activity. The fact that Rotger do Parra, not the students is the Respondents accuser, is of no moment. She has no direct knowledge of Respondent's misconduct. She acted and relied upon on hearsay statements and those statements that are subject to the residuum rule.

The Petitioner did not produce a residuum of competent, credible evidence that Michelle Gates engaged in misconduct in administering the NJ ASK test in May 2012

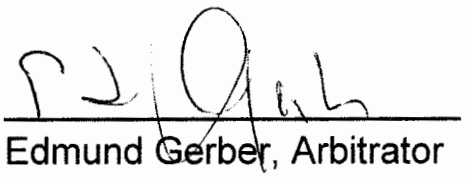
Under these circumstances, it would be fundamentally unfair to sustain the charges against the Respondent without her ever having an

opportunity to cross- examine the only witnesses to her alleged improper conduct – the students.,

Accordingly, I am compelled to grant the Motion.[2] All tenure charges against Michelle Gates are hereby dismissed.

## AWARD

The tenure charges against Michelle Gates brought by the State Operated School District of the City of Paterson, Passaic County, Docket No. 144-5/16, are dismissed. Michelle Gates shall be reinstated by the State Operated School District of the City of Paterson to her teaching position retroactively to the date of her suspension and she shall be entitled to all back salary and benefits as if she were steadily employed from that date.



Edmund Gerber, Arbitrator
September 8, 2016

[2] In its brief the Petitioner states that, due to a scheduling problem caused by a last minute adjournment of an earlier hearing date, its student witnesses were not available. In an effort not to burden the record and given the time constraints involved, the petitioner chose to rest its case without calling any students. However no mention of why the students were not called as witnesses was made to this Arbitrator at the hearing. The issue was first raised in its brief and is untimely.

326-16

OAL DKT. NO. EDU 4274-16
AGENCY DKT. NO. 46-2/16

| | | |
|---|---|---|
| MEGGAN MULA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/12/16

Date of Mailing: 9/13/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 04274-16
AGENCY DKT. NO. 46-2/16

**MEGGAN MULA,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY**
Respondent.

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**Randi Doner April**, Esq. for petitioner (Oxfeld Cohen, attorneys)

**Stephen M. Bacigalupo II**, Esq. for respondent (Schwartz Simon Edelstein & Celso, attorneys)

Record Closed: August 3, 2016 Decided: August 10, 2016

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

This matter was transmitted to the Office of Administrative Law for determination as a contested case on March 18, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release and Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

8/10/16
DATE

**KELLY J. KIRK**, ALJ

Date Received at Agency:

8-15-16

Date Mailed to Parties: AUG 15 2016

dlc

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for the
Jamesburg Board of Education

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| | |
|---|---|
| MEGGAN MULA,<br><br>Petitioner,<br><br>v.<br><br>JAMESBURG<br>BOARD OF EDUCATION,<br><br>Respondent. | BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY<br>DEPARTMENT OF EDUCATION<br><br>OAL DOCKET NO.: EDU 04274-2016 N<br>AGENCY DOCKET NO.: 46-2/16<br><br>**SETTLEMENT AGREEMENT AND RELEASE** |

**WHEREAS**, on or about February 19, 2016, Petitioner, Meggan Mula, filed a Verified Petition of Appeal with the Commissioner of Education asserting that the Jamesburg Board of Education (hereinafter referred to as the "Board") improperly charged her with sick leave on days the Jamesburg Public School District (hereinafter referred to as the "District") was closed; namely, Petitioner alleged that she was improperly charged with sick leave on November 26, 2015; November 27, 2015; as well as the week of December 28, 2015;

**WHEREAS**, on or about March 16, 2016, the Board filed an Answer to the Verified Petition of Appeal with Affirmative Defenses; and

**WHEREAS**, the parties desire to avoid the expense and uncertainty of further litigation; and

**WHEREAS**, the parties have amicably resolved their differences, with the understanding that the terms of this Settlement Agreement and Release are subject to formal approval by the Jamesburg Board of Education; and

**WHEREAS**, the parties have negotiated in good faith and have a desire to settle any and all claims raised or which could have been raised in the underlying lawsuit, in an amicable way by entering into this Settlement Agreement and Release (hereinafter referred to as the "Agreement") without admitting liability or any violation of law by either party; and

**NOW, THEREFORE**, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

## 1. SICK DAYS

Within thirty (30) days of the execution and approval of this Agreement by the Board, the Board shall restore sick leave charged to Petitioner on days the District was closed; namely, November 5, 2015; November 6, 2015; November 26, 2015; and November 27, 2015. Petitioner acknowledges that she was not improperly charged with sick leave during the week of December 28, 2015 or at any other time.

## 2. NO ADMISSION

This Agreement is entered into solely for the purpose of resolving certain issues related to Petitioner's employment, and that neither the execution, delivery, nor performance of this Agreement shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by any of the parties. The parties further agree that this Agreement and Release shall not be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

## 3. RELEASE

In exchange for the above consideration, Petitioner, her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

## 4. CONFIDENTIALITY

Confidentiality of this Agreement and the substance of it, along with the circumstances surrounding the negotiations which resulted in its execution, shall not be disclosed by any party, agent or employee thereof to any third person or entity other than required by law. However, nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies.

## 5. ASSENT TO TERMS

The parties acknowledge that they entered into this Agreement freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each party's choosing and option. Petitioner did consult with counsel, Randi Doner April, Esq., of Oxfeld Cohen, P.C., and the Board did consult with counsel, Stephen M. Bacigalupo, II, Esq. of Schwartz Simon Edelstein & Celso, LLC. The parties acknowledge that they were represented by competent counsel; that they understood the contents of this Agreement; and that each party hereto shall bear the costs of their own attorneys' fees and costs.

## 6. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

## 7. PUBLIC INTEREST

This proposed settlement will serve the public interest as the Board will not have to engage in litigation related to the instant matter.

## 8. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

## 9. SEVERABILITY

If any non-material portion of this Agreement shall be determined by any court agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall be null and void, *ab initio*.

## 10. COUNTERPARTS

This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

## 11. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

## 12. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

**IN WITNESS WHEREOF,** the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Witness:

_____ _____

MEGGAN MULA

Dated: Dated:

**For the Jamesburg Board of Education:**

Witness:

_____ _____

ELLIOTT STROUL
Board President

Dated: 7/28/16 Dated: 7/25/16

## 9. SEVERABILITY

If any non-material portion of this Agreement shall be determined by any court agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall be null and void, *ab initio*.

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This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

## 12. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

**IN WITNESS WHEREOF,** the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Meggan Mula
MEGGAN MULA

Dated: 7/25/16

Witness:

Dated: 7/25/16

**For the Jamesburg Board of Education:**

ELLIOTT STROUL
Board President

Dated:

Witness:

Dated:

**JAMESBURG BOARD OF EDUCATION**
**13 AUGUSTA STREET**
**JAMESBURG, NEW JERSEY 08831**

On Thursday July 28, 2016 at a regular Board of Education meeting the following motion was made by Mr. Brucato and seconded by Mr. Hansen that the Jamesburg Board of Education herby and approves the negotiated Settlement Agreement and Release (the "Agreement") by and between the Jamesburg Board of Education and Meggan Mula in the matter entitled Meggan Mula v. Jamesburg Board of Education, OAL Docket No. EDU 04274-2016 N; Agency Reference No. 46-2/16, subject to the terms and conditions set forth therein; and that the Jamesburg Board of Education authorizes the Board President and School Business Administrator/Board Secretary to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within settlement and carry out this action of the Board.

ROLL CALL VOTE: VOTING (5) AYES (5) NAYS (0)

Mr. Brucato
Mrs. Newton
Mr. Rutsky
Mr. Hansen
Mr. Stroul

I, Beth Brooks, Board Secretary of the Jamesburg Board of Education, in the county of Middlesex, State of New Jersey, HEREBY CERTIFY that the above extract from the minutes of a meeting of the Board of Education duly called and held on July 28, 2016 has been recorded in my office in the Minute Book of the governing body and is true, complete and correct copy thereof and of the subject matters referred to in the extract.

IN WITNESS THEREOF, I have hereunto set my hand and affixed the corporate seal of the Jamesburg Board of Education this 1st day of August 2016.

Beth Brooks

Beth Brooks, Board Secretary

328-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

***In the Matter of the Tenure Hearing of:***

**TARA TRONGONE,**
**SCHOOL DISTRICT OF THE CITY OF GLOUCESTER CITY,**
**CAMDEN COUNTY**

**Agency Docket No. 173-6/16**

**Walt De Treux, Esq., Arbitrator**

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

*Decision Date: 9/12/16*

## Introduction and Statement of Relevant Facts

Respondent Tara Trongone is a tenured teacher most recently assigned to the 6th grade at Mary Ethel Costello School in the Gloucester City School District. In early January 2016, a 6th grade parent called Assistant Principal Kristin Little to report that Trongone "gave the class 10-15 answers on their SGO test" and did the same in another class. The next day, Little interviewed the caller's son, who confirmed that Trongone "walked around and gave us answers individually" and "would give about ten (10) correct answers in a row by reading out the correct letter choices."

Little and Principal William O'Kane conducted an investigation, interviewing 26 students from Trongone's classes, 12 of who supported the allegation that Trongone provided answers to the SGO test. On January 22, 2016, the District suspended Trongone with pay pending a discussion of the matter by the Board of Education.

On May 3, 2016, Joseph Rafferty, Superintendent of Schools, notified Trongone by letter that her employment would be discussed at an upcoming Board of Education meeting. Attached to the letter was a five-page document titled "Evidence In Support of Unbecoming Conduct," which included a narrative description of the allegations against her and Supt. Rafferty's recommendation to the Board to certify tenure charges against Trongone. Supt. Rafferty offered Trongone the opportunity to submit a written statement of position and evidence. By letter dated May 16, 2016, Trongone responded through counsel in a "Statement of Position In Opposition to 'Tenure Charges.'" Trongone alleged, *inter alia,* that the "charges, and service of said charges, are not in compliance with New Jersey statutes and regulations that set forth the tenure charge process under the TEACHNJ Act..."

On June 9, 2016, the Board of Education voted to certify tenure charges against Trongone, found the charges were sufficient, if credited, to warrant her dismissal, and suspended her without pay. On June 21, 2016, Supt. Rafferty forwarded the charges to the Commissioner of Education. The charges were served on Respondent on June 23, 2016.

On July 7, 2016, Trongone, through counsel, responded to the charges with a Motion To Dismiss Tenure Charges In Lieu of an Answer. Respondent alleged that the District failed to provide her with adequate notice and due process by certifying and filing tenure charges different than those initially served on her; failed to serve on her sworn statements related to those initial tenure charges; provided an insufficient sworn statement with the second set of charges premised on "rank hearsay" rather than personal knowledge; and violated her due process rights by

failing to comply with the regulations regarding tenure charges and depriving her of the opportunity to respond to the charges. On July 21, 2016, the District filed a letter brief in opposition to the Motion To Dismiss, and Respondent filed a reply letter brief a week later.

On August 8, 2016, the Department appointed the undersigned to hear and decide the tenure matter and forwarded the complete file to the Arbitrator. Accordingly, Respondent's Motion To Dismiss is ripe for decision.

## Issue

*Should Respondent's Motion To Dismiss Tenure Charges be granted?*

## Analysis and Decision

An unsigned, unsworn document titled "Evidence in Support of Unbecoming Conduct," outlining in narrative form the allegations against Respondent, was attached to a May 3, 2016 letter from Superintendent Rafferty to Trongone advising her that the Board of Education "will discuss your employment" at an upcoming meeting. The letter requested Trongone's written statement of position and evidence.

On June 9, 2016, Superintendent Rafferty submitted to the Board of Education a document titled "Statement of Tenure Charges," which included 15 numbered paragraphs outlining the allegations against Respondent and certified as true and correct by the Superintendent and Assistant Principal Kristin Little. The Board voted to certify the Tenure Charges to the Commissioner of Education.

Superintendent Rafferty forwarded the charges to the Commissioner on June 21, 2016, and they were served on Respondent on June 23, 2016.

Respondent argues that the tenure charges certified by the Board of Education and submitted to the Commissioner of Education were procedurally deficient in that the charges initially served on Respondent were "completely different" than the second set of charges, thereby depriving Trongone of the opportunity to respond to the allegations in the second version of tenure charges. The District maintains that Respondent was provided adequate notice and due process in that the first set of charges were substantively identical to the second set of charges, which only added a minor procedural fact ("that the Board determined, through a majority vote of its full membership and after consideration the submissions of both Superintendent Rafferty and Trongone, that probable cause existed and the charges, if credited, are sufficient to warrant a dismissal or reduction in salary.")

The District's assertion that the substantively identical charges provide Trongone with adequate notice and due process clearly ignores the terms of TEACHNJ and undermines the notice and due process requirements of the Act. Respondent was initially served with a 5-page narrative that included unsworn allegations that she provided students with answers on the SGO test. She was asked to respond to those unsworn allegations. The tenure charges reviewed and approved by the Board and certified to the Commissioner were clearly labeled "Statement of Tenure Charges," with the allegations in numbered paragraph form, certified as true and correct by Superintendent Rafferty and Assistant Principal

Rafferty, and included a signed Statement of Evidence by Superintendent Rafferty. It also included the 5-page narrative initially served on Respondent, with a certification signed by the Superintendent that was not included in the document served on Respondent.

*N.J.S.A.* 18A:6-11 states in relevant part,

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto..."

The clear language of the statute anticipates that Respondent will have the opportunity to respond to the same charges filed with the Board when it requires the Board to provide the employee with a copy of *the* charge, i.e., the same charge filed with the Board secretary. It is not "adequate" to provide Respondent with charges that approximate the content and format of the charges filed and considered by the Board. The District should not expect Respondent, the Commissioner, or an arbitrator to parse through charges served on Respondent and the actual charges filed with the Board to determine whether they are similar or dissimilar. Notice and due process requires that the charges served on Respondent be the same charges in content and form as the charges filed with the Board. Respondent was not given an opportunity to respond to the exact charges that were filed with the Board. Moreover, and on a very practical level, Respondent can more

effectively answer a sworn charge set out in numbered paragraphs than an unsworn narrative. *See N.J.A.C.* 6A:3-5.3(a), (b).[1]

The mere fact that Respondent was served with charges that differed in format, content (to a small degree), and sworn certifications from the charged reviewed and certified by the Board of Education and filed with the Commissioner of Education provide a basis for granting Respondent's Motion To Dismiss. It is a fundamental violation of TEACHNJ's notice and due process requirements to serve one set of charges on Respondent and a modified version (no matter how minor) of charges to the Board of Education and the Commissioner. By the very terms of the Act, Respondent must be given the opportunity to submit a written statement of position and a written statement of evidence to the charges that are filed with the Board. Respondent is entitled to *clear and unambiguous* notice of all the charges or potential charges that may arise at hearing. See *In re Tenure Hearing of Gilbert Alvarez, School District of the Township of Lakewood, Ocean County (Comm'r Decision),* Agency Docket No. 36-2/09, OAL Docket No. EDU 10067-09, 2009 *WL* 5624392 (N.J. Admin June 3, 2010). Respondent in this case was not given clear and unambiguous notice of all the charges or potential charges because she was not served with the same version of charges filed with the Board.

Moreover, the charges filed with Board included a "Certification," signed by Superintendent Rafferty and Assistant Principal Little, that the Statement of Tenure

[1] "(a) The answer shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the allegations of the petitions. (b) Respondent(s) may not generally deny all the allegations, but shall make specific denials which meet the substance of designated allegations or paragraphs of the petition."

Charges is true and correct. It also included a certification, signed by Superintendent Rafferty, that the information contained in the Statement of Evidence is true and correct. The District explains in its brief that Assistant Principal Little was one of two administrators who conducted the investigation by talking with parents and interviewing students. The other administrator, Principal William O'Kane, did not certify the charges or the Statement of Evidence.

TEACHNJ regulations, *N.J.A.C.* 6A:3-5.1(b)(1), require in relevant part,

> 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which will be executed under oath by the person(s) instituting such charges.

In a recent case, *In the Matter of Tenure Hearing of Kevin Karp, Board of Education of the Township of Barnegat, Ocean County,* Agency Docket #102-4/16 (May 26, 2016), Arbitrator Edmund Gerber dismissed tenure charges against the Respondent because the Superintendent swearing to the Statement of Evidence and certifying the tenure charges did not directly participate in the investigation of the allegations, but instead, relied on unsigned documents from school administrators who conducted the investigation and acted without signed statements from complaining students and parents. He rejected the charges because they were "certified on the basis of double hearsay," citing the ALJ decision *In the Matter of the Tenure Hearing of Edwards, East Orange Board of Education,* 1982 S.L.D. (2011).

As in *Edwards* and *Karp,* Superintendent Rafferty did not directly participate in the investigation of Trongone, relied on unsworn information from school administrators O'Kane and Little, and did not have signed statements from the complaining parent(s) or the students subjected to interviews. Superintendent

Rafferty cannot certify the information contained in the Statement of Evidence as "true and correct to the best of [his] knowledge" without any participation in the investigation. At a minimum, he would have to have sworn statements from O'Kane and Little. In the charges filed with the Board, Little certifies that the information contained in the Statement of Tenure Charges is true and correct. However, Little was one of two investigators. Absent an affidavit affirming those facts to which she can attest, it is not clear how Little can certify all the allegations in the tenure charges without any supporting statement from O'Kane.

In short, the sworn Statement of Evidence by Superintendent Rafferty is inadequate as he had no direct knowledge or participation in the investigation. And the certification by Little is inadequate without an accompanying affidavit explaining her role in the investigation and the basis of her knowledge and a similar affidavit and/or sworn certification by Principal O'Kane.

For all these reasons, I find that the tenure charges filed with the Board of Education and the Commissioner of Education are procedurally deficient and must be dismissed.

Respondent argues that the District's "unlawful pattern of conduct" should preclude any opportunity to amend the tenure charges. Respondent cites the decision in *Edwards,* in which the ALJ found the Board of Education "failed substantially to comply with its statutory obligations" and denied its request to amend the charges. The ALJ emphasized the Legislature and Commissioner's articulation of the procedure Boards must follow in bringing tenure charges and

found no basis to allow the Board to "fill in these gaping holes by way of amendment."

The facts in the present matter do not demonstrate an "unlawful pattern of conduct;" but rather, an imprecise and stumbling attempt to properly bring tenure charges without correcting the procedural deficiencies . While the charges do not comply with statutory obligations, it is a stretch to state the non-compliance was a substantial failure, as in *Edwards,* or that there were "gaping holes" in the charges. It should also be noted that Arbitrator Gerber dismissed "without prejudice" the tenure charges in *Karp,* a case similar to the present one as it relates to certification and the sworn statement of evidence.

For these reasons, the tenure charges will be dismissed without prejudice.

**Award and Remedy**

Respondent's Motion To Dismiss Tenure Charges is granted. The tenure charges are dismissed without prejudice. As remedy, the District is ordered to immediately reinstate Respondent Tara Trongone to her former position with full backpay, benefits, and all emoluments associated therewith, as required by law and consistent with the operative collective bargaining agreement.

WALT De TREUX

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**

***In the Matter of the Tenure Hearing of:***

**TARA TRONGONE,**
**SCHOOL DISTRICT OF THE CITY OF GLOUCESTER CITY,**
**CAMDEN COUNTY**

**Agency Docket No. 173-6/16**

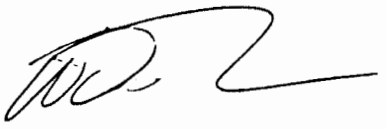
**Walt De Treux, Esq., Arbitrator**

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

*Decision Date: 9/12/16*

**Affirmation**

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX

329-16M

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State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

September 14, 2016

Stephen D. Farsiou, Esq.
Trinity & Farsiou
47 Maple Ave, Suite 7
Flemington, New Jersey 08822

John B. Comegno, II, Esq.
Comegno Law Group
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Re: *Stephen Gibble v. Board of Education of the Hunterdon Central Regional School District, Hunterdon County*, Commissioner Decision No. 254-16, Agency Dkt. No. 20-2/15

Dear Counsel:

I have reviewed the materials filed in connection with petitioner, Stephen Gibble's Motion to Stay the July 13, 2016 decision ordering the Board of Education to provide the petitioner with a hearing before the Board on the Harassment, Intimidation and Bullying (HIB) allegations, pending appeal.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the petitioner has failed to meet the standard required for a stay of the July 13, 2016 decision. Most notably, the petitioner has not established a likelihood of success on the merits. In his papers, the petitioner argues that the untimely and prejudicial effect of a hearing before the Board at this juncture is substantial and does not meet the legal requirements for due process. The petitioner stresses that the issue of whether a hearing is proper should be decided on appeal before the petitioner is forced to spend time and money protecting his reputation before a hostile Board. The petitioner also maintains that the July 13, 2016 decision contradicts the decision in *Edward Sadloch, et al. v. Board of*

*Education of the Township of Cedar Grove, Bergen County*, Commissioner Decision No. 216-15, decided June 23, 2015, and the established case law.

In the July 13, 2016 decision, the Commissioner determined that staff members who are accused of committing an act of HIB are entitled to the due process guaranteed by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, including the right to a hearing before the board of education. Despite the fact that the Board did not provide the petitioner with a hearing in this case, the Board did conduct an investigation concerning the HIB allegations. As was stated in the July 13, 2016 decision, the procedures followed by the Board in this case are not analogous to the lack of any meaningful investigation conducted in *Sadloch*, *supra*. Therefore, the appropriate disposition under these circumstances is to afford the petitioner with an opportunity to have a hearing before the Board instead of simply removing all references to HIB from his record. In his motion papers, the petitioner generally reiterated the arguments previously made before the Commissioner that were fully considered before the July 13, 2016 decision was issued. As a result, the petitioner has failed to demonstrate a likelihood of success on the merits or that he would be unduly prejudiced if he were to appear at a hearing before the Board.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for a stay of the July 13, 2016 decision is hereby DENIED.[1]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

332-16

OAL DKT. NO. EDU 12252-16
AGENCY DKT. NO. 214-8/16

| | | |
|---|---|---|
| BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL CENTER, CUMBERLAND COUNTY | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY AND BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Dait

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/16
Date of Mailing: 9/20/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 12252-16
AGENCY DKT. NO. 214-8/16

**BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY,**

**And**

**BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,**

Respondents.

---

**Mitchell H. Kizner**, Esq., appearing for petitioner Board of Education of the Cumberland County Technical Education Center (Flaster Greenberg, attorneys)

**John G. Geppert, Jr.**, Esq., appearing for respondent Board of Education of the Cumberland County Regional High School District, Cumberland County (Schwartz Simon Edelstein & Celso, attorneys)

**Arnold Robinson**, Esq., appearing for respondent Board of Education of the City of Millville, Cumberland County (Robinson and Robinson, attorneys)

BEFORE **SUSAN M. SCAROLA**, ALJ:

## STATEMENT OF THE CASE

The petitioner Board of Education of the Cumberland County Technical Education Center, Cumberland County, (CCTEC) seeks an emergent order compelling the respondents, the Board of Education of the Cumberland County Regional High School District (CCRHSD) and the Board of Education of the City of Millville (Millville BOE), to permit its full-time students who reside within those districts to participate in their athletic programs effective with the 2016–2017 school year. Each party filed a letter brief with supporting certifications. Oral argument was heard on August 22, 2016.

## PROCEDURAL HISTORY

On August 11, 2016, the petitioner filed a Petition for Emergent Relief arguing that respondents' decision not to allow petitioner's full-time students to participate in respondents' athletic programs was arbitrary, capricious, and unreasonable.

## FACTUAL DISCUSSION

Petitioner operates one of the five public high schools in Cumberland County. (Petition for Emergent Relief at 1.) In September 2016 petitioner will begin a full-time program consisting of both vocational and academic courses for ninth-graders.[1] (Id. at

[1] Students in grades ten, eleven and twelve will continue their part-time program until graduation, as the new full-time program is phased in.

2.) Within four years, all of petitioner's students from ninth through twelfth grade will be full-time students. (Ibid.)

The petitioner will not presently be offering an athletic program to its students. (Ibid.) The respondents claim that no representative from petitioner contacted respondents' superintendents or principals to meaningfully discuss the possibility of an agreement to allow petitioner's students to participate in respondents' athletic programs. (Certification of CCRHSD Superintendent Steven W. Price at 1–2.)

In November 2015 residents of Millville became aware that the Millville BOE would not admit CCTEC students into its athletic program. In April 2016 the superintendent of the CCRHSD sent a letter to all eighth-grade students stating that if they chose to attend petitioner's school, they would be unable to participate in its athletic programs. (Petition for Emergent Relief at 2.)

On August 11, 2016, petitioner filed a Petition for Emergent Relief arguing that respondents' decision not to allow petitioner's full-time students to participate in respondents' athletic programs was arbitrary, capricious, and unreasonable. (Id. at 3.)

## LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on its motion. See Crowe, supra, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

**1. Whether petitioner will suffer irreparable harm if its students are not permitted to participate in respondents' athletic programs.**

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioners. Crowe, supra, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, supra, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

"[T]he Commissioner has repeatedly held that students do not suffer irreparable harm if they are prohibited from participating in extracurricular activity, including sport activities." S.L. ex rel A.L. v. Bd. of Educ. of W. Orange, EDU 1729-03 (Mar. 11, 2003), adopted, Comm'r (April 15, 2003), <http://njlaw.rutgers.edu/collections/oal/>; Bd. of

Educ. of Trenton v. N.J.S.I.A.A., 91 N.J.A.R.2d (EDU) 158; Elmwood Park Bd. of Educ. v. N.J.S.I.A.A., 94 N.J.A.R.2d (EDU) 106. "Indeed it has been held that participation in an extracurricular activity is not a fundamental right under the federal or state constitution." S.L. v. W. Orange, supra, EDU 1729-03 (Mar. 11, 2003), <http://njlaw.rutgers.edu/collections/oal/>; Camden Co. Bd. of Educ. v. N.J.S.I.A.A., No. A-2802-91T2 (App. Div. February 18, 1992) (unpublished decision). "While the importance of sports cannot be lost on the education process, there is no evidence that irreparable harm will be suffered." S.L. v. W. Orange, supra, EDU 1729-03 (Mar. 11, 2003), <http://njlaw.rutgers.edu/collections/oal/>.

Here, petitioner claims that it will suffer irreparable harm because "it is likely that some students will not attend" petitioner's school if the students cannot participate in their home district's athletic programs. (Emergency Petition of Cumberland County Board of Vocational Education at 1.)

Petitioner has not shown that this harm is substantial or immediate. Petitioner's claim that it will suffer harm because some students will likely not attend is not immediate because this harm is based on an event that may or may not occur. There has been no allegation that students have declined to enroll in the CCTEC because they cannot participate in respondents' athletic programs. No particular student has alleged individual harm. Indeed, it appears that potential students from the two affected districts were well aware that athletic participation would not be an option for them. Thus, there is no evidence that petitioner will suffer immediate harm if its students cannot participate in respondents' athletic programs.

Petitioner also has not shown that the harm will be significant, because it has not stated the number of students who may have decided not to enroll because of the lack of athletic participation, or shown that the failure of the ninth-graders to participate in athletic activities would have a negative effect on the school. And, as in S.L. v. W. Orange, the students will not suffer irreparable harm if they are prohibited from participating in extracurricular activities.

The necessity for emergent relief is belied by the fact that the petitioner was well aware of the respondents' position with regard to enrolling CCTEC students in their athletic programs, and yet made no application for relief until August 16, 2016, alleging that it had become an emergency because the school year was about to start. Respondents claim that the athletic programs in their schools have already gotten underway, and that the budgeted expense for these programs was determined in the spring, and that the petitioner should not be able to create an emergency when the emergency is the result of its own inaction.

**2. Whether the legal right underlying petitioner's claim is well settled.**

Petitioner claims that the legal right underlying its claim is well settled because the Commissioner of Education, in G.W.S. ex rel A.F.S. v. Petrino and Rahway Bd. of Educ., Union Cnty., EDU 09797-99, Final Decision, Comm'r (Nov. 29, 1999), <http://njlaw.rutgers.edu/collections/oal/>, determined that the blanket exclusion of a vocational student from Rahway's athletic program was arbitrary and unreasonable. Petitioner claims that this matter is similar to Rahway.

However, Rahway concerned a school policy that allowed tenth-, eleventh-, and twelfth-graders at a vocational school to participate in Rahway's athletic programs, but excluded ninth-grade students from participating. The Commissioner found that the NJSIAA allows for full-time vocational students to participate in interscholastic activities at their local high school upon agreement of both principals, NJSIAA, Article V, Section 4(G), CL3, and that Rahway's blanket policy excluding ninth-graders precluded Rahway's principal from entering such an agreement. Rahway, supra, EDU 09797-99, Final Decision (Nov. 29, 1999), <http://njlaw.rutgers.edu/collections/oal/>.

Here, there is no blanket policy in respondents' districts precluding their principals (and school superintendents) from entering into an agreement with petitioner to allow petitioner's students to participate in respondents' athletic programs. Participation in interscholastic sports is discretionary and subject to the agreement of both principals. Rahway, supra, EDU 09797-99, Final Decision (Nov. 29, 1999),

<http://njlaw.rutgers.edu/collections/oal/>. Thus, the legal right underlying petitioner's claim is not well settled.

**3. Whether petitioner is likely to be successful on the merits of its claim.**

Petitioner claims that it is likely to succeed on the merits because the Commissioner's decision in Rahway compels the conclusion that petitioner's students must be permitted to participate in respondents' athletic programs. However, as discussed above, this matter is distinguishable from Rahway because respondents do not have a policy precluding their principals from entering into an agreement allowing petitioner's students to participate in respondents' athletic program.

Under NJSIAA, Article V, Section 4(G), CL3, "[i]f a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her sending school upon agreement of both principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy. Thus, it is within the respondents' principals discretion whether to enter into an agreement to allow petitioner's full-time students to participate in its athletic programs.[2]

This "discretionary authority must be reasonably exercised based on *bona fide*, legitimate considerations." Rahway, supra, EDU 09797-99, Final Decision (Nov. 29, 1999), <http://njlaw.rutgers.edu/collections/oal/>.

Here, there has been no agreement between petitioner's and respondents' principals to allow petitioner's students to participate in respondents' athletic programs for the 2016–17 school year. Both respondents claim that their principals were never contacted to discuss such an agreement, and petitioner does not allege that it attempted to arrange such an agreement. Both CCRHSD and Millville claim that the schools would have to consider their budgetary constraints and their ability to ensure the eligibility of petitioner's students to participate in their athletic programs to avoid

[2] Presumably this means with superintendent and board approval.

being penalized by the NJSIAA. These appear to be legitimate considerations that should be analyzed by the respective parties before entering any agreement that allows petitioner's students to participate in respondents' athletic programs.

Because there was no agreement between petitioner's and respondents' principals, and because respondents' principals are reasonably exercising discretionary authority, petitioner is not likely to be successful on the merits. Thus, petitioner has not satisfied this element for emergent relief.

**4. Whether petitioner will suffer greater harm than respondents if its students are not permitted to participate in respondents' athletic programs.**

Petitioner claims that it will suffer greater harm than respondents if the requested relief is not granted. However, as discussed above, petitioner does not state the extent of its expected harm or when this harm may occur. No student has alleged harm. Moreover, it appears that students and their parents were aware as early as November (Millville) or April (CCRHSD) that they would not be permitted to participate in their district's athletic programs.

Conversely, respondents claim that if they are forced to accept petitioner's students into their athletic programs, they will "incur more administrative costs and be vulnerable to penalties from the NJSIAA." (Respondents' Brief in Opposition to Motion for Emergent Relief at 15.) Therefore, it is likely that the balance of interests tips in favor of respondents.

The petitioner also alleges that the respondents' decision to bar the students from athletic activates is not due to the financial cost, but because they "are in competition with the CCTEC for prospective students." The respondents contend that if CCTEC students are permitted to participate in their athletic programs, the CCTEC will never develop such programs for its students, but will instead rely on the students'

districts to fund the cost of athletic activities to the districts' financial detriment. Clearly these are issues that cannot be resolved at an emergent hearing.[3]

As petitioner has not shown that it will suffer a greater harm than respondents if its requested relief is not granted, it has not satisfied this element for emergent relief.

## CONCLUSION

Petitioner has not satisfied the four prongs required to obtain emergent relief. It has not shown that it will suffer irreparable harm, that the legal right underlying its claim is well settled, that it is likely to be successful on the merits, or that it will suffer greater harm than respondents if the requested relief is not granted.

## ORDER

Having failed to meet the four-prong test, the application for emergent relief is **DENIED**.

The matter shall be scheduled for a telephone conference so that a hearing date may be set. In the interim, the parties are urged to enter into meaningful settlement discussions as to how best to advance the interests of all the students of Cumberland County.

[3] The more this becomes a "tug of war" between districts, the greater the impact on all of the county's students.

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 23, 2016
DATE

Susan Scarola
**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: August 23, 2016

Date Mailed to Parties: August 23, 2016

## APPENDIX

## WITNESSES

**For petitioner:**

None

**For respondent:**

None

## EXHIBITS

**For petitioner:**

Brief

**For respondent Board of Education of the Cumberland County Regional High School District:**

Brief

**For respondent Board of Education of the City of Millville**

Brief

**Berdecia, Christina**

| | |
|---|---|
| **From:** | Berdecia, Christina |
| **Sent:** | Tuesday, August 23, 2016 3:20 PM |
| **To:** | Bloom, Randye; 'Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)'; Greco, Margaret; 'Heredia Cris (cris.heredia@doe.state.nj.us)' |
| **Subject:** | EDU 12252-16 BOE of the Cumberland County Technical Education Ctr. v. BOE of the Cumberland Reg. High School District and BOE of the City of Millville (Order - Emergent Relief) |
| **Attachments:** | EDU 12252-16 Cumberland Tech v. Cumberland Regional & Millville BOEs.docx |
| **Importance:** | High |

**Tracking:**

| Recipient | Delivery |
|---|---|
| Bloom, Randye | |
| 'Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)' | |
| Greco, Margaret | Delivered: 8/23/2016 3:14 PM |
| 'Heredia Cris (cris.heredia@doe.state.nj.us)' | |

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Sincerely,

*Christina A. Berdecia* Judicial Assistant 1
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619
Telephone No. (609) 689-4062
Fax No. (609) 689-4100

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**Berdecia, Christina**

| | |
|---|---|
| **From:** | Berdecia, Christina |
| **Sent:** | Tuesday, August 23, 2016 3:24 PM |
| **To:** | 'arobinson@robinsonlawllc.com'; 'mitchell.kizner@flastergreenberg.com'; 'jgeppert@sseclaw.com' |
| **Subject:** | EDU 12252-16 BOE of the Cumberland County Technical Education Ctr. v. BOE of the Cumberland Reg. High School District and BOE of the City of Millville (Order - Emergent Relief) |
| **Attachments:** | EDU 12252-16 Cumberland Tech v. Cumberland Regional & Millville BOEs.docx |
| **Importance:** | High |

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Sincerely,

*Christina A. Berdecia* Judicial Assistant 1
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619
Telephone No. (609) 689-4062
Fax No. (609) 689-4100

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353-16

OAL DKT. NO. EDU 00120-16
(EDU 14713-13 ON REMAND)
AGENCY DKT. NO. 229-9/13

| | | |
|---|---|---|
| J.B., on behalf of minor child, E.B., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY, | : | DECISION ON REMAND |
| RESPONDENT. | : | |

The record, proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Acting Commissioner's December 28, 2015 decision to remand the matter for determination of the period of ineligible enrollment and calculation of tuition. Subsequently, the petitioner and the Board entered into a settlement agreement resolving the issues pertaining to the above-captioned matter.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/16
Date of Mailing: 9/20/16

# State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 00120-16

AGENCY DKT. NO. 229-9/13

**(ON REMAND EDU 14713-13)**

**J.B. ON BEHALF OF MINOR CHILD, E.B.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY, AGENCY**

Respondent.

---

**Frederic H. Pearson**, Esq., on behalf of petitioner

**Kerri Wright**, Esq. for respondent (Porzio, Bromberg & Newman, P.C.)

Record Closed: August 5, 2016 Decided: August 5, 2016

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 31, 2015, on remand, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. This matter was initially assigned to ALJ Sandra Robinson under OAL Docket Number EDU 14713-13. The Commissioner of

Education remanded this matter to the OAL for clarification of the decision issued by ALJ Robinson who retired in December of 2015. The remanded matter was assigned to the undersigned and a hearing date was scheduled. Prior to the hearing date respondent's counsel submitted a fully executed settlement agreement and Board Resolution, which is attached hereto for reference.

Having reviewed the contents of the Commissioner's Order and Settlement Agreement, I **FIND**:

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

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

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

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

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

August 5, 2016
DATE

**JOANN LASALA CANDIDO**, ALAJ

Date Received at Agency:

8-10-16

Date Mailed to Parties: AUG 10 2016
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EXTRACT OF THE MINUTES OF A MEETING OF
THE BOARD OF EDUCATION OF
THE TOWNSHIP OF SPRINGFIELD
COUNTY OF UNION, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Springfield, in the County of Union, New Jersey, convened in Regular Session on March 21, 2016 at 7:05 PM.

The following members of the Board of Education were present:
Present: Mrs. Robin Cornelison, Mr. Scott Donner, Mr. Marc Miller, Mr. Hector Munoz, Mrs. Jacqueline Shanes, Mr. Scott Silverstein, Mrs. Patricia Venezia, Mrs. Elissa Zylbershlag, Mr. Steven Wolcott

The following resolution was offered by Mr. Silverstein, seconded by Mr. Miller, and adopted by the Board of Education by the Roll Call vote as indicated.

**TITLE:** RESIDENCY SETTLEMENT AGREEMENT EB

**RESOLVED :**

At the recommendation of the Superintendent, I move the following resolution approving settlement of petition of appeal:

**RESOLUTION APPROVING SETTLEMENT OF PETITION OF APPEAL**

WHEREAS, the Board was the respondent/cross-petitioner in a petition of appeal regarding a residency matter, bearing OAL docket number EDU 14713-2013 N; and

WHEREAS, the Board attorney and the Superintendent, have recommended resolution of this matter pursuant to the terms set forth in a Settlement Agreement; and

WHEREAS, the salient terms of the Settlement Agreement call for the dismissal of all claims and the payment to the Board by the petitioner of an amount equal to $17,500; and

WHEREAS, the Board finds that entering into a settlement pursuant to the terms set forth in the Settlement Agreement, subject to final review by the Board attorney, is in the best interest of the district; and

NOW, THEREFORE, BE IT RESOLVED by the Springfield Board of Education that it hereby approves the terms of the Settlement Agreement, subject to final review by the Board attorney, in this matter and hereby authorizes the Board Secretary and Board attorney to take all action necessary to effectuate the terms of the Settlement Agreement.

**ROLL CALL:**

Yeas: Unanimous by all Members present. MOTION CARRIED

STATE OF NEW JERSEY)
)
COUNTY OF UNION )

I, Matthew A. Clarke, Business Administrator/Board Secretary of the Township of Springfield in the County of Union, State of New Jersey, hereby, certify that the foregoing extract from the minutes of the meeting of the Board of Education of said District duly called and held on March 21, 2016 has been compared by me with the original minutes as officially recorded in my Office in the Minute Book of said Township of Springfield Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relates to the subject matter referred to on said extract. In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this 22nd day of March 2016.

SEAL

Matthew A. Clarke/Business Administrator/Board Secretary

# SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") made
by and between

Springfield Board of Education
(Hereinafter referred to as "Springfield")

AND

J.B. o/b/o E.B.
(Hereinafter referred to as "J.B.")

## WITNESSETH:

**WHEREAS,** Springfield is duly organized as a public school district under the laws of the State of New Jersey; and

**WHEREAS,** J.B. was found by Springfield to have enrolled his daughter in Springfield Public Schools, despite not being domiciled in Springfield; and

**WHEREAS,** J.B. appealed that decision to the Commissioner of Education under the following docket numbers: Agency Docket Number 229-9/13; OAL Docket Number 14713-13; and

**WHEREAS,** a hearing was held before the Office of Administrative Law and a decision issued; and

**WHEREAS,** the Commissioner of Education issued a decision, Acting Commissioner Decision No. 412-15, remanding the matter back to the Office of Administrative Law for further proceedings; and

**WHEREAS,** the parties wish to avoid the expense of further litigation and enter into a settlement;

**NOW, THEREFORE,** in consideration of the mutual covenants and promises hereinafter set forth, the parties desire to enter into the within Settlement Agreement (the "Agreement") as follows:

1. **Payment:** J.B. shall pay the total sum of seventeen thousand five hundred dollars ($17,500.00) to Springfield. Payment shall be made by J.B. to Springfield as follows:

   (a) On or before the end of the school day of March 11, 2016, J.B. shall pay Springfield the amount of five thousand dollars ($5,000.00);

   (b) Beginning May 1, 2016, on or before the first day of every month, J.B. shall pay Springfield the amount of one thousand dollars ($1,000.00) until the total payment of $17,500 is paid in full;

   (c) Each of the aforementioned payments shall be made by check or money order made out to the following: "Springfield Board of Education;"

   (d) If J.B. choses to mail any of the aforementioned payments, he shall ensure that it is received by Springfield before the end of the school day on the dates designated above. The payments may be mailed to Mathew Clarke, Business Administrator, Springfield Board of Education, 139 Mountain Avenue, Springfield, New Jersey 07081.

   (e) If J.B. choses to hand deliver any of the aforementioned payments, he shall ensure that it is delivered by the end of the school day on the dates designated above. The payments may be hand delivered to a member of the business office of the Springfield Board of Education, second floor, Jonathan Dayton High School Building, 139 Mountain Avenue, Springfield, New Jersey 07081. If it is handed to any person other than

Mathew Clarke or Sharon Corigliano, J.B. shall request a signed and dated receipt.

(f) In the event that J.B. fails to make a timely payment hereunder, and such default is not cured within five (5) calendar days, Springfield shall be entitled to the immediate entry of a Consent Judgment by the Superior Court of New Jersey against J.B. for the amount of $35,000.00 (thirty-five thousand dollars) together with interest calculated from the date of default and reasonable attorneys' fees and costs incurred by Springfield in connection with any litigation or collection proceedings related to J.B.'s default under this Agreement. The Consent Judgment shall be signed by the Parties simultaneously upon the signing of this Agreement, and shall be held in escrow by the law firm of Porzio, Bromberg & Newman, P.C. The Consent Judgment shall be attached hereto as Exhibit "A" and incorporated into this Agreement by reference. J.B. understands that he will not receive any notice from Springfield of the requirement to make any of the above payments. JB long FHP

(g) Upon Springfield's receipt of the final payment, Ms. Wright shall forward the unfiled Consent Judgment via regular mail to Fredric H. Pearson, Esq., at Pearson & Shapiro, 1358 Morris Avenue, Union, New Jersey 07083, and said Consent Judgment shall then be null and void.

2. Withdrawal and Release. The Parties each agree to withdraw their claims and counterclaims as relate to the present matter and Agreement and not to refile same. J.B. herein releases and gives up any and all civil and administrative claims and rights he may have against

Springfield for any damages or injuries, including any civil claim for compensatory damages, punitive damages, or any damages or injuries to J.B. or E.B. arising out of the residency/domicile or education of the minor child E.B. during the time period she was attending school in the Springfield Public School District, whether known or unknown, that have taken place through the date of this Agreement.

3. **Non-Admission of Liability**. Nothing contained in this Agreement is intended, nor shall be construed: (i) to waive or release any future claim arising after the date this Agreement is signed by both parties; or (ii) to limit either party's right to enforce the terms of this Agreement. Each party acknowledges and agrees that this Agreement is a compromise of disputed claims and neither this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by either party of any kind with respect to any fact, liability, or fault.

4. **Severability.** Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

5. **Authorization.** Each individual signing this Agreement warrants and represents that he or she has the full authority and is duly authorized and empowered to execute this Agreement on behalf of the Party for which he or she signs.

6. **Jurisdiction.** This Agreement shall be governed by the laws of New Jersey, and the Superior Court of New Jersey, Union County, shall have jurisdiction over, and be the proper venue for, any disputes arising out of this Agreement.

7. **Construction.** The parties and their counsel have participated fully in the review of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

8. **Successors.** This Agreement shall inure to the benefit of the parties hereto, and their respective officers, directors, employees, attorneys, heirs, executors, administrators, successors and assigns.

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

Jeffrey Briggs, Esq
J.B.
Date: His Attorney
7/14/16
Fredric H Procaccini

S D. Wo
For Springfield Board of Education
Name:
Title:
Date:

334-16

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| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY, | : | |
| RESPONDENT. | : | |

## SYNOPSIS

The Trenton Board of Education (Trenton) appealed the Mercer County Special Services School District's (MCSSSD) refusal to allow Trenton to supply the individual aides assigned to special education students that the district places at MCSSSD. Trenton sought to compel MCSSSD to accept individual aides provided by the agency it had contracted with to provide aides and paraprofessionals for Trenton's special education students during the 2015-2016 school year, Insight Workforce Solutions. Trenton sought to make this change, as well as others, to reduce the district's operating expenses. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; it is undisputed that Trenton is the agency responsible for creating Individualized Education Plans (IEP) for children with disabilities that reside within its jurisdiction; however, MCSSD – as the receiving school – is the district responsible for implementing the IEPs; MCSSSD is a Special Services School District created by a County Board of Freeholders to provide educational and related programs for special needs children; MCSSSD has its own board of education, which is governed by Title 18A of the New Jersey statutory code; as such, MCSSSD is in charge of its own employment matters, including hiring, conduct, and compensation; as the receiving school, MCSSSD determines a yearly tuition rate for students, which is paid by Trenton; individual aides are an extraordinary service, and not included in the yearly tuition rate; Trenton's claim that it is free to provide individual aides for its students through a separate vendor because these services are charged under an agreement that is wholly distinct from its Special Education Tuition Contract Agreement with MCSSSD is without merit; although Trenton has the responsibility to ensure that MCSSSD complies with each student's IEP, it is MCSSSD's responsibility to provide the students with the required aides in its school, and MCSSSD has the right to determine how that responsibility will be fulfilled; MCSSSD could select another method for providing individual aides, but is under no obligation to do so; *N.J.A.C.* 6A:23A-17.1(e)(5)(viii) instructs that individual aides are an extraordinary service which MCSSSD may bill directly to Trenton, but there is no authority for Trenton to unilaterally force MCSSSD to accept Trenton's preferred individual aides; and Trenton has failed to raise a claim upon which relief can be granted. Accordingly, the ALJ concluded that MCSSSD is entitled to judgment as a matter of law, and is not obligated to use the individual aides recommended by Trenton. MCSSSD's motion to dismiss was granted.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein.

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

Issued 9/20/16

OAL DKT. NO. EDU 16465-15
AGENCY DKT. NO. 306-10/15

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| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,<br><br>PETITIONER,<br><br>V.<br><br>BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,<br><br>RESPONDENT. | : | COMMISSIONER OF EDUCATION<br><br>DECISION |

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

Trenton's exceptions essentially recast and reiterate the substance of its submissions at the OAL, arguing that Trenton should be permitted to supply individual aides through a contracted vendor to its students who attend MCSSSD, rather than be forced to contract with MCSSSD for the individual aides. Trenton points out that it is responsible for implementing a student's Individualized Education Plan (IEP), including providing individual aides. Trenton also contends that the ALJ erred in finding that aides provided by Trenton's contracted vendor would interfere with MCSSSD's control over its employment matters because MCSSSD would not be responsible for the aides.

Upon review, the Commissioner concurs with the ALJ that there is no authority permitting Trenton to force MCSSSD to accept Trenton's individual aides. The Commissioner finds Trenton's exceptions unpersuasive. Individual aides are "extraordinary services" for which a district board of education may bill directly, pursuant to *N.J.A.C.* 6A:23A-17.1(e)(5)(viii). As such, while Trenton and MCSSSD annually enter into a Special Education Tuition Contract Agreement for the cost of a student's placement at MCSSSD, Trenton is billed separately by MCSSSD for the cost of individual aides, using purchase orders pursuant to a personal assistant contract. (Certification of Jayne Howard, at ¶ 10)

When sending students to MCSSSD, Trenton maintains responsibility for the provision of services and ensures compliance with a student's IEP. *N.J.A.C.* 6A:14-7.1(b). However, it is MCSSSD that implements the IEP and actually provides the services. *See Frequently Asked Questions Regarding the Provision of Related Services for Students Placed by Local Education Agencies in NJ Approved Private Schools for Students with Disabilities (FAQ),* MCSSSD Reply Brief, Exhibit 1. It follows that MCSSSD would maintain some autonomy in providing the services and programs that it is charged with administering. Indeed, the legislature has given MCSSSD "the power to appoint or employ such officers, agents and employees as may be required to carry out the provisions of P.L. 1971, c.271 and to fix and determine their qualifications, duties, compensation, terms of office and all other conditions and terms of employment and retention." *N.J.S.A.* 18A:46-38.

There is no legal authority for Trenton to unilaterally require MCSSSD to use Trenton's contracted vendor for individual aides when MCSSSD is otherwise able to provide that service. As such, MCSSSD is not prohibited from providing its own individual aides.[1]

[1] The Commissioner notes that nothing prohibits Trenton and MCSSSD from agreeing upon the use of Trenton's individual aides when entering into their personal assistant contract. To the extent that the parties may dispute the

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/16

Date of Mailing: 9/20/16

terms of or compliance with the personal assistant contract for individual aides, the Commissioner would not have jurisdiction over that contract dispute because it does not arise out of New Jersey school law. *N.J.S.A.* 18A:6-9.

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

# State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT NO: EDU 16465-15

AGENCY DKT NO: 306-10/15

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

Petitioner,

v.

**BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,**

Respondent.

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**Perry L. Lattiboudere**, Esq., for petitioner (Adams, Gutierrez & Lattiboudere, L.L.C., attorneys)

**R. Taylor Ruilova**, Esq., for respondent (Comegno Law Group, P.C., attorneys)

BEFORE **DEAN J. BUONO**, ALJ:

Record Closed: June 21, 2016 Decided: August 5, 2016

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Trenton Board of Education (Trenton or the Board) appeals the refusal of the Mercer County Special Services School District's (MCSSSD) refusal to permit it to supply individual aides to special education students that Trenton places at MCSSD.

Trenton attempted to file a petition for relief on September 24, 2015, but that filing was rejected for being procedurally deficient. Trenton re-filed the petition on October 2, 2015. The matter was thereafter transmitted to the Office of Administrative Law (OAL), on October 15, 2015, for hearing and determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Telephone conferences were held on December 17, 2015, February 3, 2016, and March 17, 2016. The parties agreed that testimony was not needed and that they would submit cross motions for summary decision. Petitioner and respondent filed a Motion for Summary Decision on May 2, 2016. Petitioner and respondent filed opposition on June 1, 2016. Petitioner filed a responsive brief in opposition to respondent's motion on June 10, 2016, and respondent submitted a reply brief on June 21, 2016.

## ISSUES

1. Whether a sending school district (SSD) can force a special services school district (SSSD) to use individual aided provided by a third party agency.

2. Whether this issue is moot because the school year ended.

3. Whether the petition was filed after the ninety-day limitation period had lapsed.

4. Whether petitioner violated the Open Public Meetings Act (OPMA) when it decided to bring litigation in an executive session.

## FACTUAL DISCUSSION

This matter arises out of MCSSSD refusal to allow Trenton to supply the individual aides assigned to special education students that Trenton places at MCSSSD. Petitioner's Brief in Support of Motion for Summary Decision, 1.

Between 2015 and 2017, Trenton reduced its budget by more than $12 million due to a reduction in funding. Id. at 3. To do this, Trenton sought alternative, more cost efficient, ways to deliver services to its students. Id. at 1.

To reduce its budget, Trenton eliminated 460 full-time positions, including paraprofessionals/individual aides who are assigned to students with disabilities. Id. at 3. On March 23, 2015, the Board voted to abolish all paraprofessional positions within the district. Id. At the same meeting, the Board authorized the preparation of a request for proposal for an agency to provide aides or paraprofessionals for its special education students for the 2015-16 school year. Id. The contract was awarded to Insight Workforce Solutions (Insight). Id. For the 2015-2016 school year, all aides assigned to special education students in Trenton are supplied through Insight. Id.

Trenton also determined that cost savings could be realized if Insight provided the individual aides assigned to those Trenton students placed in out-of-district programs, rather than paying these placements separately for services of an individual aide. Id. Insight charges $132.99 per day for each aide, while MCSSSD charges $195 per day for an aide. Id. at 3-4. Also, if the student requiring an aide is absent for a day, the aide provided by Insight does not report that day and Trenton is not charged for that day. Id. at 3. MCSSSD bills Trenton regardless of whether the student is present or absent in school on a particular day. Id. at 4.

If Trenton had not paid MCSSSD for aides when a student requiring the aide was absent, Trenton would have saved $268,515 on the service of individual aides over the last three school years. Id. at 5.

Each school year Trenton and MCSSSD enter into a Special Education Tuition Contract Agreement that covers the cost of all educational services associated with each student's placement at MCSSSD, except for the cost of an individual aide. Id. Trenton is billed separately for the cost of an individual aide. Id.

On May 15, 2015, in a telephone call, Trenton requested that it be permitted to assign individual aides to its students at MCSSSD. Respondent's Brief in Support of Motion to Dismiss/Motion for Summary Decision, 7. On June 9, 2015, by email Trenton reiterated its request to assign aides provided by a third-party staffing agency. Id. On June 15, 2015, MCSSSD sent Trenton a letter denying its request, explaining that MCSSSD believes that the aides should be fully accountable to its management and that such a change would likely disrupt the learning environment, cause a crisis in employee relations, and require broad policy changes at MCSSSD. Id. at 8.

On July 6, 2015, Trenton communicated to MCSSSD its position that Trenton has the right to limit reimbursement for the costs of the aides assigned by MCSSSD to an amount equal to what Trenton would pay if it hired the aides through a third-party agency. Id. at 10. MCSSSD asserted that it alone has the right to appoint and determine the compensation of aides that are assigned to students educated at MCSSSD. Id. On July 22, 2015, MCSSSD sent a letter to Trenton stating that if Trenton sends a student to MCSSSD who requires an aide under an IEP, then Trenton is obligated to pay for the cost of the aide MCSSSD assigns to the student. Id. On July 29, 2015, MCSSSD wrote Trenton again reiterating its denial. Id. On July 30, 2015, Trenton responded stating that it understood MCSSSD's position, but maintained its disagreement with that position. Id. at 11. In August 2015, a meeting between Trenton and MCSSSD took place to discuss the disagreement. Petitioner's Opposition Brief, 7. The parties were unable to come to a resolution and, after this meeting, Trenton decided to file this petition. Id.

For the 2015-2016 school year, twenty-two of the students Trenton placed at MCSSSD require an individual aide. Id. As of September 17, 2015, Trenton maintains that it will only reimburse MCSSSD for the amount that it would have paid if it had

provided aides to those students through a third-party agency. Respondent's Brief in Support of Motion to Dismiss/Motion for Summary Decision, at 10.

Trenton has not publicly discussed, or solicited public input for, the issue of forcing MCSSSD to accept individual aides provided by a third-party agency. Id. During a Board meeting on September 21, 2015, Trenton adjourned to executive session to discuss whether to authorize the filing of the instant petition. Petitioner's Opposition Brief, 18. During this executive session Trenton authorized the filing of this petition. Id. However, Trenton did not pass a formal resolution to authorize the filing of the petition. Id.

Trenton attempted to file a petition on September 24, 2015, but that filing was rejected for being procedurally deficient. Id. Trenton re-filed this Petition on October 2, 2015. Respondent's Brief in Support of Motion to Dismiss/Motion for Summary Decision, at 10.

MCSSSD filed an answer on October 14, 2015. Id. On May 2, 2016, MCSSSD filed a Motion to Dismiss and, alternatively, a Motion for Summary Decision on the basis that: 1) Trenton failed to state a claim upon which relief can be granted; 2) the case is moot because the 2015-16 school year is over; 3) Trenton's petition is time-barred; 4) Trenton violated the OPMA; and 5) Trenton cannot show that MCSSSD's decision was arbitrary, capricious, or unreasonable. Respondent's Brief in Support of Motion to Dismiss/Motion for Summary Decision.

On May 3, 2016, Trenton filed a Motion for Summary Decision claiming that: 1) the Individuals with Disabilities Education Act ("IDEA") permits Trenton to supply individual aides to students at out-of-district placements; 2) the parties contractual agreement has no effect on Trenton's ability to supply aides; 3) the aides Trenton would supply are qualified and trained; and 4) supplying its own aides would provide Trenton significant cost savings. Petitioner's Brief in Support of Motion for Summary Decision.

## LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact, which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2 (c) of the New Jersey Court Rules. The motion judge must "consider whether competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Company of American, 142 N.J. 520, 523 (1995).

In New Jersey, under R. 4:6-2, a party may file a motion to dismiss for failure to state a claim upon which relief can be granted before filing an answer to a complaint. N.J. Court Rules, R. 4:6-2(e). If, on a motion to dismiss based on the failure to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion."

"On a motion made pursuant to R. 4:6-2(e) 'the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.'" Rieder v. State, 221 N.J. Super. 547, 552 (App.Div. 1987); P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App.Div.1962). "The court may not consider anything other than whether the complaint states a cognizable cause of action." Id. For the purpose of deciding the motion to dismiss, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Id; see also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super. 292, 299 (App.Div.1979).

Motions to dismiss should be granted in "only the rarest [of] instances." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005); (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989)). A complaint should not be dismissed under R. 4:6-2(e) "where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment." Rieder, supra, 221 N.J. Super. at 552. "However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Id.

Courts must search the complaint:

> in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation [a] [c]ourt [should not be] concerned with the ability of plaintiffs to prove the allegation contained in the complaint. . . . [P]laintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.
>
> [Banco Popular N. Am., supra, 184 N.J. at 165; quoting Printing Mart, supra, 116 N.J. at 7, 563 A.2d 31 (internal quotations and citations omitted).]

If the complaint states no basis for relief, and discovery would not provide one, dismissal is the appropriate remedy. Id. at 166.

**1. Whether Trenton may provide its own individual aides to students at MCSSSD.**

The primary purpose of the IDEA, 20 U.S.C. 1400 to 1487, is to ensure that all disabled children will be provided a FAPE. 20 U.S.C. 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. See N.J.S.A. 18A:46-1 to -46. Under the IDEA, a FAPE requires special education and related services that "(a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary, or

secondary school education in the State involved; and (d) are provided in conformity with the IEP required under Sec. 614." 20 U.S.C. 1401(9).

"At the beginning of each school year, each local educational agency, State educational agency, or other State agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an [IEP] . . . ." 20 U.S.C. 1414(d)(2)(A). The IEP is the "'centerpiece' of the IDEA's system for delivering education to disabled children." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010). The IEP ensures a student receives a "basic floor of opportunity," but not necessarily "the optimal level of services" a student could receive. Id. (quoting Holmes ex rel. Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000). "[A]t a minimum, '[t]he IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.'" Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 182 (3d Cir. 2009).

It is undisputed that Trenton is the educational agency responsible for creating IEPs for children with disabilities that reside within its jurisdiction. However, as a receiving school, MCSSSD is the entity responsible for implementing the IEP.

"Receiving schools include educational services commissions, jointure commissions, regional day schools, county special services school districts, the Marie H. Katzenbach School for the Deaf, approved private schools for students with disabilities (that may or may not provide residential services) and public college operated programs for students with disabilities." N.J.A.C. 6A:14-7.1(a). Receiving schools must be approved by the Department of Education "to provide programs for students with disabilities through contracts with district boards of education." Id. "For a student in a program operated by or under contract with the Department of Education, the district board of education retains responsibility for the provision of programs and services under this chapter." N.J.A.C. 6A:14-7.1(b). "Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the State educational agency." 34 C.F.R. 300.325(c).

While the district board of education must create an IEP for every student who is receiving special education and related services, these IEPs must be accessible to each "regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation." N.J.A.C. 6A:14-3.7(a)(1) and (2). To fulfill its responsibilities for ensuring a FAPE:

> [t]he district board of education shall inform each teacher and provider described in (a)2 above of his or her specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports to be provided for the student in accordance with the IEP. The district board of education shall maintain documentation that the teacher and provider, as applicable, has been informed of his or her specific responsibilities related to implementing the student's IEP.
>
> [N.J.A.C. 6A:14-3.7(a)(3).]

A SSSD may be created by a board of chosen freeholders of any county to provide "education and treatment of handicapped children, as such children are defined in N.J.S.A. 18A:46-1, upon its finding that the need for such county special services school district exists." N.J.S.A. 18A:46-29. These schools must "accept all eligible pupils within the county, so far as facilities permit." N.J.S.A. 18A:46-31(a).

The SSSD is governed by its own board of education. N.J.S.A. 18A:46-38. The SSSD's board:

> shall organize and operate in the manner provided by law and shall have the power to appoint or employ such officers, agents and employees as may be required to carry out the provisions of P.L.1971, c.271 and to fix and determine their qualifications, duties, compensation, terms of office and all other conditions and terms of employment and retention. In addition, the board shall have all the powers as are now or may hereafter be provided by law and applicable for other school districts, subject to the additional restrictions provided by this act.
>
> [Id.]

The Legislature passed N.J.S.A. 18A:46-38 to clarify "that employment matters of [SSSD] boards are governed by Title 18A of the New Jersey Statutes." Legislative History. The Legislature intended that SSSD boards have broad employment powers and that they possess the same powers as county vocational schools and county community colleges. Id.

Under Title 18A, a school board may "make, amend and repeal rules . . . for the employment, regulation of conduct and discharge of its employees." N.J.S.A. 18A:11-1(c). Additionally, "[e]ach board of education may make rules . . . governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district . . . ." N.J.S.A. 18A:27-4.

"Any board of education, jointure commission, or private school for the handicapped which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education." N.J.S.A. 18A:46-21. "This tuition rate may not exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." Id. Extraordinary services provided to special education students for which a district board of education may bill directly are not included in the actual cost per student for tuition purposes. N.J.A.C. 6A:23A-17.1(e)(5)(viii).

Both parties agree that a New Jersey Department of Education guidance memo on the costs for related services for students placed at approved private schools for students with disabilities ("PSSD") is instructive on this matter. Petitioner's Brief in Further Support of Motion for Summary Decision in Response to Opposition, 3; Respondent's Brief in Opposition to Petitioner's Motion for Summary Decision, Exhibit 1. This includes a memo from the Office of Special Education Programs addressing frequently asked questions regarding the provision of related services for students placed at approved private schools for students with disabilities. Frequently Asked Questions Regarding the Provision of Related Services for Students Placed by Local Education Agencies in NJ Approved Private Schools for Students with Disabilities (Feb. 9, 2016), Revised (May 3, 2016).

"Extraordinary services are defined by regulation as 'the services of a one-to-one aide for a student.'" Id. at Question 1.; See N.J.A.C. 6A:23A-18.1. "No other service qualifies as extraordinary services." Id. Related services include "counseling, occupational therapy, physical therapy, school nurse services, recreation, social work services, medical services and speech-language services" and must be provided "to a student with a disability when required for the student to benefit from the educational program." Id. at Question 2.

The PSSD charges the sending district for related services by including the cost of the services in the tuition rate. Id. at Question 3. The costs of related services required by an IEP must be included in the tuition rate unless the service required "is beyond what is typically provided during the school day, or the nature of the related services requires that it be provided beyond the school day/operating hours." Id. For these services, "the PSSD may address the costs and provision of such related services through a separate agreement with the sending district." Id. "[T]he PSSD shall include in the tuition rate the costs related to services that are typically provided during the school day, and may work with a sending district on an agreement relating to the provision of and cost(s) associated with providing [services beyond what is typically provided]." Id. "The sending district, the sending district's vendors, PSSD staff members, and/or approved clinics or agencies and/or certified individuals, can provide related services." Id. at Question 9.

Here, Trenton is responsible for creating an IEP for all students with disabilities within its jurisdiction to ensure these students receive a FAPE. When these students are sent to MCSSSD, MCSSSD becomes responsible for implementing the IEPs provided by Trenton and Trenton becomes responsible for ensuring MCSSSD complies with the IEPs.

MCSSSD is a SSSD created by a County Board of Freeholders to provide "education and treatment of handicapped children." As such, it has its own board of education, which is governed by Title 18A of the New Jersey statutory code. Under Title 18A, and as clarified by the Legislature, MCSSSD is in charge of its own employment matters including hiring, conduct, and compensation.

As a receiving school, MCSSSD determines a yearly tuition rate for its students, which is paid by Trenton. It is undisputed that individual aides are an extraordinary service and are not included in this tuition rate. Trenton claims that because these services are charged in a separate agreement, it is free to provide individual aides for its students through a separate vendor.

However, while it is Trenton's responsibility to ensure that MCSSSD complies with each student's IEP, it is MCSSSD's responsibility to provide the students with the required aides in its school. As evidenced by the Legislature granting MCSSSD control over its employment decisions, MCSSSD is free to provide aides through its own staff, Trenton, or Trenton's vendors. MCSSSD may then work with Trenton on an agreement relating to the costs of the aides. Under N.J.A.C. 6A:23A-17.1(e)(5)(viii), individual aides are an extraordinary service which MCSSSD may bill directly to Trenton. However, there is no authority that states that Trenton may unilaterally force MCSSSD to accept Trenton's preferred individual aides. Thus, Trenton has failed to raise a claim upon which relief can be granted.

**2. Whether the issue of cost of individual aides is moot because the 2015-16 school year is over.**

The Constitution limits the judiciary to the adjudication of actual cases and controversies. U.S. CONST. art III, § 2. "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3d Cir. 2003)(citing Powell v. McCormack, 395 U.S. 486, 496, 23 L. Ed. 491, 89 S. Ct. 1944 (1969)). "The court's ability to grant effective relief lies at the heart of the mootness doctrine." Id. (citation omitted).

If developments evolve during the "course of adjudication" that negate the plaintiff's interest in the outcome of a case or prevent a court from being able to give the requested relief, the suit must be dismissed as moot. Id. "This requirement that a case or controversy be 'actual [and] ongoing' extends throughout all stages of . . . judicial

proceedings . . . ." Id. (citing Khodara Envtl., Inc. v. Beckman, 237 F.3d 186, 193 (3rd Cir. 2001).

However, one exception to the mootness doctrine occurs when the issue is "capable of repetition, yet evading review." Weinstein v. Bradford, 423 U.S. 147, 149, 46 L. Ed. 2d 350, 96 S. Ct. 347 (1975) (per curiam). This exception is limited to when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Id. Conduct is capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will recur. Honig v. Doe, 484 U.S. 305 (1988).

Here, Trenton continues to send students who require individual aides to MCSSSD every school year. Thus, even though the 2015-16 school year has concluded, the issue of payment for individual aides is capable of repetition.

Litigation necessarily takes longer than a single school year. Therefore, if this matter is deemed moot at the conclusion of each school year, then Trenton would never be able to fully litigate the issue of responsibility for payment of individual aides.

Because the challenged action is too short to be fully litigated prior to its expiration, and the conduct is capable of repetition, this matter is not moot.

**3. Whether Trenton's petition was filed outside of the limitations period.**

It is undisputed that time period to file a petition in this case is 90 days. N.J.A.C. 6A:3-1.3(i):

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal. [Id.]

The limitations period does not begin to run "until [the] plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978).

Here, Trenton filed the current petition against MCSSSD on October 2, 2015. MCSSSD initially denied Trenton's request to provide its own individual aides on June 15, 2015. However, under the DOE Guidance Memo, MCSSSD may work with Trenton "on an agreement relating to the provision of and cost(s) associated with providing [services beyond what is typically provided]." Frequently Asked Questions Regarding the Provision of Related Services for Students Placed by Local Education Agencies in NJ Approved Private Schools for Students with Disabilities (Feb. 9, 2016) ,Revised (May 3, 2016) https://education.state.nj.us/broadcasts/2016/MAY/03/14893/REVISED%20FAQ%20for%20APPSDs.pdf.

Throughout July 2015, Trenton and MCSSSD clarified their positions and attempted to negotiate an arrangement for providing the aides. In August 2015, the parties met to discuss the issue and find a resolution. However, a resolution could not be reached. It is at this time that a potential cause of action arose. Before negotiations concluded there was no notice of actions that could have given rise to a cause of action. The limitations period began to run only after it became clear that a resolution would not be possible. Otherwise, the limitations period would encourage litigation before attempting to resolve the issue amicably

**4. Whether Trenton violated the OPMA by deciding to bring this petition in executive session.**

The OPMA protects "a strong tradition both in this State and in the nation favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (N.J. 1977). In the OPMA, the Legislature declared "that the right of the public to be present at all meetings of public bodies . . . is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines

the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, . . . ." N.J.S.A. 10:4-7. It also declared:

> . . . it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> [Id.]

The board may hold an executive session to discuss certain issues in private. N.J.S.A. 10:4-12(b):

> A public body may exclude the public only from that portion of a meeting at which the public body discusses any pending or anticipated litigation or contract negotiation . . . in which the public body is, or may become, a party to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;
>
> [N.J.S.A. 10:4-12(b)(7).]

"[T]he Legislature merely provided that the public could be excluded when a public body 'discusses' any of the enumerated topics." Houman v. Pompton Lakes, 155 N.J. Super. 129, 155-156 (1977). The "legislative history, when considered in conjunction with the deleted definition of 'act upon or discuss,' clearly evidences that the Legislature distinguished between meetings where final votes are taken and those where only preliminary discussions occur, and did not intend, by the use of the word 'discuss,' to incorporate into N.J.S.A. 10:4-12(b) the limitation on public access to governmental vote taking contained in N.J.S.A. 10:4-4."

Under the OPMA, if a public body takes action that does not conform to the OPMA, the actions are voidable in a proceeding in lieu of prerogative writ in the

Superior Court. N.J.S.A. 10:4-15(a). Any person may bring this action within forty-five days of when the action sought to be voided has been made public. Id.

Here, during executive session Trenton authorized the filing of this petition. Because this decision concerned anticipated litigation or contract negotiation, the public could be excluded from that portion of the meeting. However, it is unclear as to whether Trenton took the final vote on the authorization in a public session during the meeting on September 21, 2015. If Trenton never publicly authorized litigation, its action may be void under the OPMA. However, since neither MCSSSD, nor any other person, challenged Trenton's action within forty-five days, the time to initiate a proceeding to find the action void has lapsed.

## CONCLUSION

I **CONCLUDE**, that there is no genuine issue of material fact and the respondent is entitled to judgment as a matter of law. I **FURTHER CONCLUDE** that MCSSSD is not obligated to use the individual aides that Trenton recommends. Trenton has not raised a claim upon which relief can be granted and MCSSSD's Motion to Dismiss should be granted.

## ORDER

Accordingly, I hereby **ORDER** that respondent, Mercer County Special Services School District's Motion for Summary Decision is **GRANTED**. It is **FURTHER ORDERED** that petitioner, Trenton Board of Education's Motion for Summary Decision is **DENIED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

August 5, 2016
DATE

**DEAN J. BUONO**, ALJ

Date Received at Agency: August 5, 2016

Date Mailed to Parties: 8/9/16

/dm

341-16

**COMMISSIONER OF EDUCATION, State of New Jersey**

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IN THE MATTER OF THE PROCEEDING BETWEEN:

Tenured Teacher Lynderia Mansfield

**"Teacher" or "Tenured Teacher"**

and

State-Operated School District of the City of Newark, Essex County

**"Petitioner" or "District"**

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Petition: Dismissal, Tenured Teacher L. Mansfield, by Newark Board of Education
Agency Docket No: 64-2/16

# AWARD AND OPINION

| | |
|---|---|
| Hearings held, Newark, NJ | May 24, June 2, 14, 21, 2016 |
| Transcripts | July 06-12, 2016 |
| Briefs, w/ materials | July 26-28, 2016 |
| Date of Award: | September 26, 2016 |

**Arbitrator Jay David Goldstein**

## APPEARANCES

For the Newark School District
**John E. Croot, Esq.,**
Adams, Gutierrez & Lattiboudere, LLC

For Lynderia Mansfield, Tenured Teacher
**Aileen O'Driscoll, Esq.,**
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

## INTRODUCTION

The underlying dispute over this dismissal action by the Newark School District arose from multiple incidents alleged to have occurred in the Tenured Teacher's class ['Character Education'] during the 2014-15 school -year. The allegations began with a 2nd Grade student complaining to his parent and thereafter moved forward to investigation when similar complaints were heard. Investigations revealed that 'Teacher' had committed multiple infractions; thereafter resulting in charges that her behavior had been, "*inappropriate, irresponsible and unprofessional*". [Board's Brief]

In a related procedural matter, Parties' Counsel mutually reached agreement, thereafter stipulating all evidence in this proceeding would be limited to the 2014-15 School Year. Notwithstanding this limitation the Teacher testified to and her post Hearing Brief itself raises prior history of her employment at the Newark School District;

> "*She commenced employment with the NPS in 2003. 6/21/16, 8:22-24. She acquired tenure in her position with the District. In 2013, having successfully defended tenure charges brought against her by the District alleging inefficiency, absenteeism*[1] *and misconduct, Ms. Mansfield was ordered to be reinstated to a position in the NPS in February, 2013. 6/21/16, 11:6-9; See, IMO Mansfield and the State Operated School District of the City of Newark, (Arb. Gandel), 2/7/13. (J1:53-117)*" [Teacher Brief]

Further chronological background events are summarized here, but are presented in greater detail under the Background, Facts, Party Positions, below this section.

**December 3, 2013,** citing the Teacher's own testimony at arbitration of this matter, the District's Brief also refers to similar prior history (as above, Teacher's Brief); "*Mansfield's most recent assignment as a teacher for Newark Public Schools was at Miller Street School. See Transcript, Volume IV, 9:1-3. She was first assigned to teach at Miller Street School on December 3, 2013. See Transcript, Volume IV, 9:4-6; 14:5-8. Mansfield was assigned by the Principal to teach first grade; at*

[1] The 2013 charge for absenteeism was sustained, but all other charges were dismissed and she was ordered reinstated to a District position in February, 2013.

*first, as an assistant to another teacher, and then later alone. See Transcript, Volume IV, 21:24-23:3; and 68:18-69:6.*" [Board's Brief]

**February 7-20, 2014;** the 'Teacher' raises a series of concerns she had expressed after the above referenced 'reinstatement'. ["...*lack of adequate training on curriculum; not receiving teacher information booklet (2 months after returning); lack of observation opportunities; computer trainings; access to evaluation portals,* et al"] [Teacher Brief]

**June 6, 2014**; using this date for Teacher's *bona fide* leave; "...*she stopped working altogether because she had to take care of a medical issue. See Transcript, Volume IV, 10:1-7; 30:24-32.*"; the District provides no continuity *per se* to its argument(s) with the possible exception of providing a 'bridge' between Teacher's two supervising Principals at Miller School. [Board's Brief]

**2014-2015;** during this, "... *academic year Lynderia Mansfield, was employed by the Newark, NJ Board of Education ("Board" or "District") as a tenured teacher of Character Education. This matter stems from tenure charges ... filed against her for Unbecoming Conduct, Incompetence, Insubordination and Other Just Cause pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq.* [Board documents]

**September 2, 2014;** "*Apparently, she returned to work in September 2014 and was again assigned to go back to Miller Street School on..., where Principal Cepero was now principal. See Transcript, Volume IV, 10:9-11; 31:7-17, and 21:32; 70:15-71:1* " [Board's Brief]

**February 20, 2015;** the Teacher's Brief [Pg. 5.] alleges, **"...***On February 20, 2014, however, Ms. Mansfield was called to the office in response to an anonymous call made to the office of Institutional Abuse Investigations Unit (IAIU). She was transferred to the District's central offices while the investigation proceeded.* [Teacher Brief, possible typo.in date]

The District uses this 2015 date as a 'benchmark' of sorts; alleging that some two weeks prior to it there existed an, "...*anonymous complaint triggering IAIU's most recent investigation of Mansfield, she met with her former mentor and current Miller Street School Principal Cepero in February 2015 to address B.R.'s* [a Student in the Teacher's class] *complaints regarding her inappropriate yelling and treatment of*

*other students, namely two boys who sat at B.R's table during class".* [Board's Brief; referencing Transcript, Volume III, 14:1-16 ]

[Board Brief and Teacher Brief]

**December, 2015;** "*The present tenure charges commenced with the filing of a Notice of Charges on Ms. Mansfield by the District in December, 2015. A letter in lieu of a Statement of Position was timely filed by Ms. Mansfield.*" [Teacher Brief]

**February 25, 2016;** "*The District resolved to file the charges alleging conduct unbecoming on or about February 25, 2016. The charges were so certified and filed with the Commissioner of Education. An Answer was timely filed on behalf of Ms. Mansfield.* [Teacher Brief]

**March 24, 2016;** this Arbitrator is appointed to this matter by the NJ State Board of Education.

**April 7, 2016;** pre-Hearing Conference with parties' Counsel and Arbitrator held telephonically.

**May24, 2016**; first Hearing in this matter occurs at the NJ State Board offices in Trenton, NJ. As scheduled, primary purpose was to jointly review DOE records subpoenaed by Teacher.

**June 2 and 14, 2016**; Day 2 and Day 3 Hearings are held.

**June 21, 2016;** Day 4 [Final Hearing] takes place consistent with prior scheduling, earlier 'Stipulations' and is conducted by agreement [Counsel/Arbitrator]. During four (4) hearings, each side had full opportunity to present written exhibits, sworn testimony, cross-examination and rebuttal. Tenured Teacher was present during the evidentiary Hearings [#2, 3, and 4], given opportunity to and did testify in her own behalf. Each Party agreed to written closings and the terms of submission.

**July 06-12, 2016;** the transcribed record of hearing was received in several batches.

**July 22-26, 2016;** by agreed upon schedule [after Parties requested extension] to file closing submissions electronically with the Arbitrator, thereafter mailing same with cited materials to one another and the Arbitrator; both briefs [+ materials] were received between these dates.

**July 28, 2016;** additionally, a potential filing of reply briefs was anticipated and addressed, with the District (solely) requesting same in the appointed time provided. In a conference call with both Counsel present, the District's rationale for filing a Reply brief was heard. Based upon lack of good cause shown District's request was denied by Arbitrator [Teacher's Counsel requested opportunity to rebut/reply if the District were allowed, but the rebuttal request became moot]

The Hearing record was declared closed at this juncture. Prior, several calendar extensions were sought and granted by the NJ, D. of E.; due to protracted hearing schedules, delay in transcript hearing records, and extension requests.

**September 26, 2016;** decision rendered, filed with the NJ COMMISSIONER OF EDUCATION.

## ISSUE;

While the District did not stipulate *per se* to the following question posed by Teacher's Counsel, the request is deemed relevant to all proceedings, found to be coherent and thus appearing logical to inquire:

"...***whether the District has proven the tenure charges by a preponderance of the evidence sufficient to warrant termination.***" [Teacher's Brief; highlighting for emphasis]

Also, given that her Counsel posed an alternative remedy to the dismissal action taken against the Teacher, the following is a potentially viable question as well:

*'If not, what shall be the remedy?'*

## BACKGROUND, FACTS and PARTY POSITIONS

The following background/positions are deemed appropriate for consideration as gleaned from the Parties respective positions;

The District contends: *"This matter involves tenure charges of unbecoming conduct, corporal punishment, insubordination, and other just cause filed against Lynderia Mansfield (hereinafter referred to as "Mansfield"), a tenured teaching staff member employed by the Newark Public Schools (hereinafter referred to as "District"). The District respectfully seeks Mansfield's removal from employment based upon indisputable evidence presented during the arbitration hearing demonstrating Ms. Mansfield's pattern of inappropriate physical contact with her second grade students during the 2014-2015 school year, and her failure to cooperate in the District's investigative interview regarding same.* [Board's Brief]

By the Teacher: *"Lynderia Mansfield ("Ms. Mansfield"), a tenured employee of Petitioner, the State-Operated School District of the City of Newark ("NPS" or "District"), stands accused of conduct unbecoming."* [Teacher's Brief]

Moreover, argues the Teacher; *"Because the record below establishes that the District failed at arbitration to prove by a preponderance of the evidence that Ms. Mansfield has engaged in conduct unbecoming a teacher, the charges should be dismissed in their entirety. In the alternative, Ms. Mansfield urges the Arbitrator to consider the doctrine of progressive discipline and, given the many mitigating circumstances, find in favor of a lesser penalty than dismissal."* [Teacher's Brief]

The Board's views of the educational principles involved appear sound and undisputed; *"A teacher is entrusted with the care and custody of children with the hope that this trust will result in their maximum educational growth and development. Teachers not only impart knowledge regarding reading, writing and math, but they mold habits and attitudes and influence the opinions of their young pupils. Teachers are therefore considered role models and mentors."* [Board's Brief]

Each side submitted well-drafted and heavily documented post-hearing Briefs containing their significant 'Points' of view. Carrying the burden of proof the District submitted:

*I. THE DISTRICT HAS PROVEN THE TENURE CHARGES BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE.*
*II. MANSFIELD HAS FAILED TO PROVE THAT RETALIATION WAS THE REASON FOR THE TENURE CHARGE HEREIN.*
*III. THERE IS NO BASIS FOR CONSIDERING THE TESTIMONY OF THE CHILDREN AS BEING LESS CREDIBLE THAN ANY OTHER WITNESS OR TO NOT CONSIDER THE STATEMENTS MADE BY THE CHILDREN TO IAIU AND DURING THE DISTRICT'S INVESTIGATION*
*IV. THE PROPER PENALTY IS THE REMOVAL OF MANSFIELD FROM HER TENURED POSITION*

[Board's Brief]

In significantly greater detail, the District explored each of these 'Points' consistent with the evidence presented and its arguments in support thereof. Primary emphasis was placed upon the reliability of testimony at hearing involving the allegations of Teacher's actions in, "*Screaming... Withholding of Bathroom Privileges... Inappropriate Physical Contact*"; i.e., against the Students in her care. In further support were arguments in favor of the integrity of the investigatory process used to confirm the basis for the District's charges.

Specifically in regard to the investigation was the additional charge that the Tenured Teacher was also guilty of Insubordination, essentially by failing to cooperate with the investigating official [District's Manager of Compliance and Tenure, Ms. Takyi] attempting to meet with her during the interview process. The District's Brief recounted the testimony of both, the Teacher and Ms. Takyi. The District reflects on the testimony of both, charging that she:

"*... did not appear for her interview, not once, but twice, after being directed to do so by her employer, it is undeniable that Mansfield's actions were purposeful and an act of insubordination* [Board's Brief]

In rejoinder to the District's Brief the Teacher's defense(s) rest primarily upon the premise that there was a failure of evidence or proof required at hearing. Thus, the Teacher's 'Points' claim that the District failed to meet its burden of proof:

*I. THE DISTRICT'S FAILURE TO PROVE THE CHARGES AGAINST MS. MANSFIELD BY A PREPONDERANCE OF THE EVIDENCE WARRANTS DISMISSAL OF ALL THE CHARGES*

*II. THE STUDENTS' TESTIMONY IS NOT CREDIBLE, IS UNSUPPORTED, AND INSUFFICIENT TO SUSTAIN THE CHARGES*

*III. DISMISSAL IS UNWARRANTED AND TOO SEVERE A PENALTY UNDER THE CIRCUMSTANCES*

*IV. THE DISTRICT'S CHARGES WERE FILED IN RETALIATION FOR THE AWARD ISSUED IN FEBRUARY 2013 ORDERING MS. MANSFIELD'S REINSTATEMENT AND FOR HER OUTSPOKENESS REGARDING HER REINSTATEMENT IN THE SOUTH WARD AND REPORTING OF THE UNLAWFUL ASSIGNMENT TEACHING OUTSIDE OF HER CERTIFICATION*

[Teacher's Brief]

Continuing in a well-documented Brief, the Teacher argues certain required standards were not followed, i.e., standard of review, seriousness of a teacher's status, etc.:

"*..., a tenured employee's status must be taken seriously, with special attention to the procedures followed by the District. In Re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (Jan. 12, 2209), adopted by the Commissioner of Education (May 28, 2009).*"

[Teacher's Brief]

All of the above arguments, positions and evidence adduced at four (4) hearings were taken into careful consideration. Moreover, each Party concluded its views as follows.

**In summary** of the **Board's Position**, at the 'Conclusion' of its Brief,

"*As outlined above, the statutes and case law are clear. Mansfield, as a teacher, was to serve as a model of appropriate behavior during his daily interactions with students. Instead, Mansfield engaged in a pattern of inappropriate conduct with students, and then was insubordinate when she failed to cooperate in the District's investigation as to whether her actions constituted harassment, intimidation, or bullying. The testimony of the students and two of their parents, along with her pattern of screaming and improper physical contact with students at Miller Street Elementary School, leaves no doubt and no alternative that Mansfield is not fit to serve as a teacher and must be removed from her tenured teaching position*"

[Board's Brief]

**In summary** of the **Teacher's Position**, at the 'Conclusion' of its Brief,

"*For the foregoing reasons, the tenure charges against Ms. Mansfield should be dismissed and she should be reinstated to a teaching position, together with any back pay, benefits, and emoluments, retroactive to the date the tenure charges were filed against her. Alternatively, in the event that any of the charges are upheld, the mitigating factors warrant a conclusion that progressive discipline be invoked, and a less severe penalty is warranted under the circumstances.*" [Teacher's Brief]

## FINDINGS AND OPINION

A careful review of all evidence presented, including all documents submitted into the record, hand written and transcribed notes of testimony, occurred. This take into account the positions taken and arguments advanced by both parties.

Relevant portions of the statutory sections which the Parties mutually acknowledged being bound to were cited by each side and deemed relevant without further recitation. Those Statues impose a, "just cause" standard for dismissal also granting a School District the right to issue reasonable rules, orders and regulations which are not conflicting. There has been no challenge to those statutory standards for discipline by either side.

The District seeks justification for the 'Dismissal' here. The Teacher responds seeking re-instatement.

**Analysis; overview**

At the core of the issue stated above was whether a 'just cause' dismissal occurred, whether the penalty was too harsh or, fair under the various guidelines promulgated by authorities cited by both parties. The overriding principle in any such disciplinary proceeding is

whether a good faith showing of just cause was properly enforced. Both sides' briefs referenced these principles.

Beyond the above, further analysis below leads to the decision at the end hereof.

**Burden of Proof**

As in any matter involving employee disciplinary action, the burden is upon the Employer [here, Petitioner, Newark School District] to establish it had proper cause to take the action and, that an appropriate penalty was meted out under all attendant circumstances. The Tenured Teacher challenged that the standard was not met; contending that the preponderance of evidence by the District was not conclusive or, found wanting.

The Petitioner's case in the Matter of this Tenured Teacher [L. Mansfield] contained four major 'points' (outlined above), three of which were directly related to the evidence presented at hearing(s). The fourth point dealt with the propriety of penalty assigned, which could only attach if all elements of just cause were met by the standards of review.

Moreover the Teacher's own statement of the standard for evidence presented against her gave rise to the appropriate standard of review to be followed here. Citing the law as interpreted by numerous arbitrators, the Teacher's Brief correctly argued that:

*"...preponderance can be characterized as the greater weight of evidence in a case, not necessarily dependent on the number of witnesses,* ***but having the greater convincing power****. State v. Lewis, 67 N.J. 47 (1975); Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).* [Teacher's Brief]

This Arbitrator supports that 'characterization' and used the following contributing factors to review the evidence presented.

Credibility

Petitioner District presented the testimony of several eyewitness accounts in what can only be described, even in the broadest of general terms, as abusive. Respondent Teacher

attempted to minimize her culpability by denial that the actions even occurred; testimony (from both the affected children and parents) had the 'ring of truth' to it. Moreover, it was vastly supported by internal and external consistencies and, found to be more than sufficient to satisfy the District's burden. Notable also is that the Teacher did not supply evidence in rebuttal.

An important test of eyewitness sufficiency is whether consistency can be determined by/through the use of witness *sequestration.* This was enforced and occurred here, for all testifying witnesses. Moreover, it is notable here that when an 'objection' was repetitiously raised regarding whether these children could comprehend the meaning of 'truth telling' or, the taking of an 'oath' in that regard; each child was asked to explain the terms. Each child demonstrably and clearly understood both terms and testified accordingly.

Thus it was deemed to be credible and highly usable testimony given by each child and accompanying parent/ accompanying adult. Contemplating the record of this testimony it was persuasive that for a child of that tender age group to testify under oath is itself a very brave deed. Furthermore, having them testify against their Teacher, a supposed role model and mentor was likely an inspiring moment and by itself, a measure of truth telling.

Furthermore, the entire process seemed an unsavory task to each child and, not the least bit hinting of joyfulness or childish delight. Indeed it was likely tantamount to subjecting them to ridicule, embarrassment and/or perhaps feelings of disloyalty and guilt for their own actions. It was after all the suggested premise that an authority figure over them [the Teacher] was simply making an effort to impart 'appropriate' discipline, i.e., part of the course methodology for 'Character Education'.

Thus if we believe that a Teacher of 2nd Graders should be permitted to impose discipline by, *"Screaming...Withholding of Bathroom Privileges...Inappropriate Physical Contact"*

perhaps the standard is faulty and/or should be changed. Regardless, the testimony of these children and parents [*et al*] involved was believable and compelling. Thus despite any of the theories posited post-Hearing, suggesting that the testimony described herein was legally defensible, or wanting in any manner, shape or form; such defenses are without merit in this case. Each child [and parent] testified credibly and without guile. They were manifestly clear and without taint of any sort.

Sufficiency of the Evidence

Thus, despite the Teacher's testimonial defense [no culpability] for the classroom events described by the District's witnesses as having occurred in /around February of 2015, the evidence was overwhelmingly clear to the contrary. Even the 'reasonable person' could hardly dispute the veracity and thus the credibility of the Students who testified.

Unsupported - Corroborated

There was no basis in fact for the defense that this evidence was unsupported. Moreover, the confirming testimony of their parents and an uncle of one [*in loco parentis*] student provided substantial and thus persuasive ratification of nearly faultless and untainted testimony, ['not wanting to attend' this Teacher's class.] Thus taking all manner of evidence, cited authority and argument into consideration provided a basis for finding that the 'unbecoming conduct' described in the charges against this Teacher were proven beyond doubt, plainly by a preponderance of the evidence presented.

Clearly established by the evidence shown, this Teacher violated basic rules of what any enlightened culture should consider as civilized behavior toward children. It should be axiomatic that regardless of any 'written' rules that could or might have been promulgated, certain behaviors should be prohibited in the classroom.

Raised Voice

Any adult in a position of authority over and ostensibly placed in charge of the care for young children [i.e., these 2nd Graders] may on a rare occasion and, acting out of a moment of frustration, raise their voice occasionally. To her defense, the testimony inferred that this Teacher could have expressed herself in what some might say was a loud voice.

However, this Teacher also stands accused of 'screaming' at her 2nd Grade charges on an ongoing and continuous basis. We heard testimony which demonstrated the likelihood that it was more than an occasion. To have done so in this manner violated behavioral common sense and the basic rights of children under her authority and care, regardless of any rationale offered in her own defense. Even if the allegations of 'screaming' were overstated and thus perhaps to be discounted, there was much more.

Bathroom Breaks

In reply to testimony that she refused requests for bathroom breaks when these young children needed to relieve themselves, this Teacher offered neither rational basis nor specific rationale for her actions. The District elicited clear and convincing evidence of these incidents:

"*The testimony of R.R. and M.B. made clear that Mansfield would withhold bathroom privileges, even in emergencies. In fact, R.R. witnessed another student N.H. urinate on himself in front of the entire class. See Transcript, Volume II, 39:15-21; and 42:5-25. M.B.'s testimony made it clear while Mansfield would permit students to occasionally use the bathroom, she would withhold bathroom privileges for those students who were disrespectful to her. SEe Transcript, Volume II, 114:1-19. Withholding bathroom privileges is not an appropriate method for disciplining young children, but is cruel and unusual punishment that no teacher should be employing against 7 and 8 year* old students. [Board Brief]

Moreover and although responsible for their basic well-being and ironically, being assigned to educate and stimulate them through "character" development, it is beyond comprehension to imagine how this teacher's educational methodology would be met by refusing a young child's request for a bathroom break. In its place, this Teacher had no appropriate

response after listening to testimony that one or more of these children had simply relieved themselves where they stood or sat, when denied a bathroom break by her.

'Grabbing' of Clothing

The charges against this Teacher of having, "grabbed" students by their shirts or other articles of clothing are, similar to the above mentioned behaviors, deemed credible and trustworthy accounts brought to bear by the testimony of children and parental figures who testified in a highly persuasive manner. Such actions by a teacher therefore, are also found to be "Conduct Unbecoming" and again, add to the cumulative nature of the charges brought against this Teacher. The Teacher's reply in this regard was again, either mute or in denial.

Thus in summary fashion regarding the preponderance of the evidence found in the charges, it is more likely than not that this Teacher was culpable of "Conduct Unbecoming". Under traditional arbitral theory and the procedures of the State of New Jersey, it was submitted for the Arbitrator to determine the weight and credibility of the evidence presented.

Most Arbitrators selected to serve on this Panel have heard hundreds of witnesses testify under oath. Determining credibility can sometimes be a daunting task. The testimony elicited in this matter was clear and convincing, providing credibility to the District's case and contrary to the defense.

Consequently for the cumulative reasons raised herein, it is conclusive and thus persuasive that the referenced conduct of this Teacher discussed at length above was inappropriate and unbecoming of any Teacher, Tenured or otherwise. Accordingly, the Newark School District has met its burden of proof for this Tenured Teacher's Dismissal.

**Mitigating vs Aggravating Circumstance**

The Tenured Teacher's Brief contained a number of references to factors in mitigation of the charges/ penalty. At the conclusion stating: "*...in the event that any of the charges are upheld, the mitigating factors warrant a conclusion that progressive discipline be invoked, and a less severe penalty is warranted under the circumstances.*" That argument was linked to a variety of cited cases which, when reviewed however were not persuasively linked to the record of this Teacher.

While no set rule exists for applying mitigation to a particular set of circumstances, any neutral must be mindful of the gravity of charges which could have such a deleterious effect on an employee as found here. Balancing this is the potential for returning an employee to a workplace environment where, if the charges are deemed credible, there is a potential of ongoing and continued conduct deleterious to young [2nd Grade] children. Such factors are found here.

This neutral has in past applied the following mitigation standard generously where an employer was found to have meted out an overly harsh penalty. When a long term employee otherwise having served with distinction and/or a fairly unblemished record, is precipitously accused of a relatively minor infraction or one involving a singular incident of wrongdoing appearing to be out-of-character, then it is persuasive to and becomes incumbent upon the neutral to correct an injustice. Doing so might include converting a discharge to a lesser penalty by invoking progressive discipline, and imposing same upon the employer.

Consequently here it was determined that the charges filed by the Newark School District were appropriate. We cannot adopt the existence of mitigating factors suggested by the Teacher as warranting invocation of progressive discipline for her. Thus, correcting a penalty of termination with a less severe penalty is not warranted under all the attendant circumstances found here.

**Retaliation, res judicata and collateral estoppel:**

As well, 'retaliation' was another primary defense. The Teacher's Brief argued that a blatant and veiled motive for the current charges against the Teacher by the Newark School District existed. Ostensibly it argued that the current charges were only a 'refiling' of prior charges unsuccessfully brought against her for allegedly the same or similar charges previously raised during the 2013 school year. Also that her "outspokenness" after being re-instated previously, now provides the basis of her claim for 'retaliation' in this current set of charges. [Teacher's Brief]

Moreover arguing the theories of *Res judicata* and collateral estoppel as aggravating factors and thus as a part of her defense against the termination penalty. However, for several reasons clearly evidenced in the record before us it is persuasive that there is no outwardly plausible reason to doubt the veracity of the current charges under either of those theories.

Regardless of the 2013 charges or arbitration outcome [Arb. Gandel, Feb. 2013] resulting in this Teacher's re-instatement to her tenured position, no one can be immune to or immunized against 'fresh' charges, especially ones involving the nature and seriousness of those found herein. Also, these charges are deemed unconnected as having occurred in/around February 2015. A primary requisite of *Res judicata* is the requirement for an absolute showing that the person is being jeopardized, twice, for the same offense, i.e., the exact, same circumstances.

Here, there has been no showing of such duplication, except for the theoretical position taken in the post-hearing Brief. Moreover and further to the contrary of either *res judicata* or collateral estoppel, it was clearly demonstrated by the Newark School District that it had an absolute and statutorily mandated legal duty (and thus no choice) but to act upon the February 2015 parent/student complaints due to the nature and timetable of events shown here. That action

consisted of requiring a full and fair investigation be held, not only to protect the welfare of the students involved [February 2015], but to insure that any accused teacher be cleared or, held accountable for his/her actions.

In light of the alleged barriers to discipline suggested by the Teacher due to the prior arbitration decision of Arbitrator Gandel, there was no evidence of issue preclusion, either mentioned therein or made reference to by Teacher's Counsel in the current matter. Therefore, each of the preclusion defenses raised are deemed unfounded for multiple reasons.

1. The Newark School District had no choice but to act upon parent/student complaints of inappropriate conduct and/or behavior when brought to its attention in February 2015

2. The fact pattern here, despite any ironic similarities to the incidents that this same teacher was accused of in prior litigated matters, involves a fresh set of incidents. Thus, current charges do not fall under the protections afforded by the preclusion theories of *Res judicata* and collateral estoppel.

3. Moreover and despite the theoretical implications of the defense mentioned above, there was no evidence or proof of retaliation. To the contrary and as established through credible evidence by her new and therefore current Principal Ceparo, he demonstrated having welcomed this Tenured Teacher, first as her Mentor, then as her new Principal.

Thus, other than veiled and vague but unsubstantiated testimony by the Teacher and the theoretical suggestions implied in her brief but also unsubstantiated that [allegedly] by virtue of the Teacher's re-instatement and subsequent complaints about her assigned tasks, there is no finding by the preponderance of evidence that she was the victim of retaliation. This Teacher, like any other, had the right to file a 'grievance' or complaint over her concerns with her assignments at any time after her re-instatement, but did not take full advantage of litigating that right.

Although her concerns over assignments were not the subject of the inquiry placed before this tribunal, there was still no evidence of any wrongdoing by virtue of the interactions between the Teacher and co-workers or supervisory personnel. Again, if she had complaints she also had the experience, ability and resource channels for her to exercise her right to complain. The mere fact of her prior reinstatement did not automatically grant her any extra jurisdictional rights to bypass procedural processes in place for those purposes. Clearly by the District's evidence the Teacher's new Principal [Mr. Ceparo; also a prior Mentor] gave her all appropriate latitude to successfully re-enter her teaching career.

The current circumstances involve factually unconnected incidents occurring in / around February 2015. Accordingly, neither *res judicata* nor collateral estoppel can apply here.

In **summation** of the above, and after careful consideration of all evidence and the arguments in support thereof, it is only conclusive that the Tenured Teacher was properly charged with "Conduct Unbecoming". Moreover, it is persuasive that every conduct-related rule published by a School District was observed and had as its primary purpose the well-being of its students, faculty and any/ all visitors, minimally.

Clear evidence demonstrates that specific rules were in place to safeguard students [especially these young 2nd Graders], and equitably enforced against a teacher engaging in behavior of the kind this Teacher was charged with. The preponderance of the clear evidence testified to by the students, parents and her Principal, was more than sufficient to warrant a finding that the charges against this Teacher were proper and thus that the penalty of termination was just.

The presence of two (2) investigations [first by the IAIU and then, the District] initially gave some pause for consideration of the Teacher's claim that the replication of effort had sinister overtones. Yet, the Teacher's claims in this regard were allegations only and lacked proof.

Numerous illustrations of the above were found in the Teacher's Brief, "*During the investigation, counsel for Ms. Mansfield at the time forwarded a copy of the earlier Arbitration Award that was entered and made it known to the IAIU investigator that it was clear to Ms. Mansfield that the District administration was "out for Ms. Mansfield" Id, J1:50-52. Specifically, counsel wrote to the Commissioner of the Department of Children and Welfare, which oversees IAIU, on February 26, 2015, just days after the investigation commenced, and made it abundantly clear that Ms. Mansfield was being targeted by the District following the issuance of the arbitration award.*" [ Teacher's Brief] Nonetheless, the Teacher's case at Hearing did not follow through to establish proof of retaliation.

Despite the fact the documents containing these allegations by Teacher were a part of the record, opportunity to hear testimony from others could have occurred but did not. The Teacher's Brief mentioned the existence of prior Counsel who might have shed light on and potentially, erased doubts left open as to the veracity of her defense allegations regarding the process against her. Instead, prior counsel was not called to support her allegations nor was the prior IAIU Investigator [Ms. Pica] called to refute her findings by rebuttal testimony. No such testimony was heard and thus, only sheer allegations stand alone.

Consequently, instead of depending on the Teacher's allegations [her Brief] that the two tiered investigation was flawed i.e., as an, ["...*endless effort to terminate her again. J1:50*] we rely instead on the District's version of events thereafter testified to by its Investigator Michelle Takyi.

"*Ms. Takyi commenced her investigation into the allegations for mishandling of her students against Ms. Mansfield after she received the IAIU investigative report concluding their investigation of Ms. Mansfield. See Transcript, Volume III, 102:6-24; and See Exhibit Board-2, IAIU findings Report to Michelle Takyi dated March 17, 2015.*" [District Brief]

The explanations offered by Ms. Takyi were found to be credible and professional. They described how the IAIU Investigative Report left it entirely to the District to follow up as it saw fit to deal with the issues remaining from the IAIU findings. Also, Ms. Takyi's views demonstrated in great detail how the thoroughness of her full and fair investigation included

numerous interviews [5 students/parents, a supervising Principal] were conducted and which substantiated the testimony of all involved.

Insubordination

Ms. Takyi also shed light upon the rationale for the District's charge of insubordination when the Tenured Teacher failed to either show up for or attempt to reschedule, two Interviews. In great detail, Ms. Takyi demonstrated the lengths she explored in attempting (twice) to finalize a full and fair investigation by including an interview with the Teacher.

"*Nor did Mansfield ever give any reason for failing to appear for the meeting scheduled by Ms. Takyi for a second time, nor did Mansfield ever contact Ms. Takyi to reschedule this meeting again. See Transcript, Volume III, 113:17-20* [District's Brief] This version was substantially more believable than the Teacher's.

Therefore, whether she exercised some right to not take part or be excluded from the investigation, the Teacher she took no responsibility for her actions and/ or merely ignored a request to participate in the interview process. Thus Insubordination was charged and, self-evident.

Incompetence

There was no express showing of incompetence, *per se*. While it is arguably incompetent to demonstrate the type of behavior exhibited here, it is not specifically found in the decision below.

Just Cause

Despite the fact that Teacher's counsel acted diligently and thus assured that Teacher was well represented, the overwhelming facts here were not in her favor. Additionally, the preponderance of evidence against her was substantially more damaging. The Teacher's testimony was found wanting, both in its failure to complete gaps between basic allegations made and proofs necessary to justify them and also to explain inconsistencies between her views and that of District witnesses against her. Accordingly, the Teacher's credibility suffered.

Just cause required that the elements of a fair and progressive discipline had to be applied before the final step of dismissal could be imposed by the District on the Tenured Teacher in this

matter. Discussed at length herein, this included a full and fair investigation of the charges, and careful consideration of any mitigating and/or aggravating circumstances. The evidence is clear as detailed hereunder that all appropriate elements required for a just cause dismissal were present in this case. Thus the burden of proof was met by Petitioner, Newark School District

Despite Teacher seeking progressive discipline as an alternative remedy here, the elements of mitigating factors necessary were not found. Every employee under the protection of 'just cause' has some form of due process available to them. Here, every available protection against an injustice was present.

Taking all manner of evidence, argument and positions of the Parties into full consideration here, there is clear evidence that just cause was served.

Accordingly, the decision in this matter follows.

## DECISION:

Clear evidence as detailed hereunder demonstrated that all appropriate elements for a just cause dismissal of Tenured Teacher Lynderia Mansfield were present in this case. Moreover Petitioner, Newark School District, met its burden of proof by a preponderance of evidence.
Overwhelming and credible testimony from three (3) Students of this Teacher was shown by the District. In addition, corroborating testimony from parents of students lent further credence to the otherwise credible evidence that the District's charges were truthful.

Moreover, when given opportunity to refute, no adequate defenses were raised by the Tenured Teacher to either circumvent or contradict the District's rationale for discipline, the charges, or the penalty of dismissal. Additionally, there was no showing of remorse.

Taking all manner of evidence and argument by both parties into consideration and deliberation, it is the considered opinion of the undersigned neutral that Petitioner Newark School District had the absolute right to have charged Tenured Teacher Lynderia Mansfield with the offenses stated hereunder and to have sought and caused her dismissal thereafter. In view of the above, the penalty of dismissal for this Tenured Teacher is upheld.

No other remedies apply.

*Jay D. Goldstein,*

Jay D. Goldstein, Arbitrator

Dated: 25 September 2016

Jenkintown, PA

S 44-16

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|---|---|---|
| BERYL ZIMMERMAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |
| AND | : | |
| JUDY COMMENT, | : | |
| PETITIONER, | : | |
| V. | : | |
| SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY, | : | |
| RESPONDENT. | : | |

## SYNOPSIS

The petitioners in this consolidated case – tenured teachers employed by respondent on an hourly basis to provide services to students in non-public schools – alleged that their tenure rights as part-time teachers were violated when the Commission reduced their assigned work hours for the 2014-2015 school year from their 2013-2014 school year levels, while non-tenured and/or less senior part-time teachers were employed in positions within the scope of their certifications and endorsements. The Commission contends that the terms of the petitioners' employment agreements expressly contemplate flexibility regarding the precise number of hours to be assigned and do not vest them with the entitlement of a minimum number of weekly work hours. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, and the matter is ripe for summary decision; in order for a reduction of a part-time employee's hours to trigger tenure/seniority rights, there must be a guarantee – through contract or otherwise – to a minimum number of hours of employment; no such guarantee exists in the within matter; therefore, no violation of the petitioners' tenure or seniority rights occurred; and the two cases that are dispositive of this issue are *Theresa Alfieri and Therese Mezak v. Board of Educ. of the Township of Saddle Brook,* Commissioner Decision No. 320-01 (September 17, 2001), and *Lucy Kourtesis, et al. v. Board of Educ. of the Bergen County Special Services School District, Bergen County*, Commissioner Decision No. 535-11 (December 5, 2011). Accordingly, the ALJ granted respondent's motion for summary decision; and denied petitioners' appeal.

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

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

Issued 10/04/16

OAL DKT. NO. EDU 430-15, EDU 431-15 (CONSOLIDATED)
AGENCY DKT. NO. 327-11/14, 336-11/14

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|---|---|---|
| BERYL ZIMMERMAN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY, | : | DECISION |
| RESPONDENT. | : | |
| AND | : | |
| JUDY COMMENT, | : | |
| PETITIONER, | : | |
| V. | : | |
| SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY, | : | |
| RESPONDENT. | : | |

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners, Beryl Zimmerman and Judy Comment, and the Sussex County Educational Services Commission's (Commission) reply thereto. In this case, the petitioners, two part-time tenured teachers, allege that the Commission violated their tenure rights when it reduced their 2014-2015 weekly hours of work from their 2013-2014 school year schedule, while non-tenured part-time staff members were employed in positions within the scope of their certificates and endorsements. The Administrative Law Judge (ALJ) found that the Commission

did not violate the petitioners' tenure and seniority rights because the petitioners were not guaranteed a minimum number of hours through their employment contract or otherwise. Therefore, the ALJ granted summary decision in favor of the Commission and dismissed the petitions of appeal.

The petitioners' exceptions largely reiterate the substance of their submissions at the OAL, repeating the arguments therein to support the contention that the ALJ erroneously found that the Board did not violate the petitioners' tenure rights. The petitioners are claiming rights based on tenure over three non-tenured part-time employees who received work hours from the Commission which the petitioners assert they were entitled to receive during the 2014-2015 school year. The petitioners' maintain that *N.J.S.A.* 18A:28-5 protects them, as tenured teachers, from a reduction in compensation, i.e. reduced hours. There is no aspect of the tenure law that creates an exception as to the preservation of compensation by excluding part-time tenured employees. The petitioners further argue that allowing the employment contract and the lack of designated minimum hours to control the scope of the statutory protections of tenure is contrary to the law. Therefore, the theory denying the petitioners' claims that was espoused in the Initial Decision is contrary to the law and should be rejected. (Petitioners' Exceptions at 7-8)

In reply, the Commission also restated the positions advanced in its submissions at the OAL, arguing that the ALJ properly determined that the Commission was entitled to summary decision. The Commission stresses that – under the relevant case law – in order for a reduction of a part-time employee's hours to trigger tenure/seniority rights, there must be a guarantee of a minimum number of hours of employment. See, *Theresa Alfieri and Therese Mezak v. Board of Educ. of the Township of Saddle Brook, Bergen County*, Commissioner Decision No. 320-01 (September 17, 2001), *affirmed*, State Board (January 8, 2003), *affirmed,* No. A-3105-02 (App.

Div. June 14, 2004, *certif. denied*, 181 *N.J.* 547 (2004); *Lucy Kourtesis, et al. v. Board of Educ. of the Bergen County Special Services School District, Bergen County*, Commissioner Decision No. 535-11 (December 5, 2011), *affirmed*, No. A-2139-11 (App. Div. November 19, 2012), *certif. denied*, 213 *N.J.* 535 (2013). Although the petitioners' hours were fewer in the 2014-2015 school year than in the previous year, tenure and seniority protections were not triggered because their employment from its inception was intended to be flexible in terms of the precise number of hours to be worked, and they were not otherwise guaranteed a prescribed set of hours. Since the petitioners did not have a tenure right to the number of hours assigned during the 2014-2015 school year, the Commission did not violate their tenure and seniority rights. (Respondent's Exceptions at 5-6)

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Commission did not violate the petitioners' tenure and seniority rights. It is undisputed that *N.J.S.A.* 18A:28-5 protects the tenured petitioners from a reduction in compensation. However, it is also well established that, in the absence of a guarantee of a minimum number of hours for part-time teachers, a reduction in hours does not equate to a reduction in compensation under *N.J.S.A.* 18A:28-5, thereby triggering tenure rights. See, *Alfieri*, *supra*, State Board Decision No. 40-01 at 6-7; *Kourtesis*, *supra*, Commissioner Decision No. 535-11 at 7. Here, the petitioners' contracts only guaranteed an hourly compensation rate, which was not reduced by the Commission during the 2014-2015 school year; therefore, in the absence a guarantee for a minimum number of hours, the Commission's decision to reduce the petitioners weekly hours did not violate the petitioners' tenure rights. Finally, the Commissioner is not persuaded that the exceptions filed by the petitioners dictate a different result, because the objections outlined in the exceptions were

previously raised before the ALJ and were clearly taken into account by him in determining that the Commission was entitled to summary decision. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petitions of appeal are hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16
Date of Mailing: 10/04/16

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
**(CONSOLIDATED)**

**BERYL ZIMMERMAN,**
Petitioner,
v.
**SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY,**
Respondent.

OAL DKT. NO. EDU 00430-15
AGENCY DKT. NO. 327-11/14

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**JUDY COMMENT,**
Petitioner,
v.
**SUSSEX COUNTY EDUCATIONAL SERVICES COMMISSION, SUSSEX COUNTY,**
Respondent.

OAL DKT. NO. EDU 00431-15
AGENCY DKT. NO. 336-11/14

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

**Boris Shapiro**, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 7, 2016 Decided: July 11, 2016

BEFORE **JESSE H. STRAUSS**, ALJ t/a:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 12, 2014, petitioner Beryl Zimmerman filed a Verified Petition as did petitioner Judy Comment on November 19, 2014 against the Sussex County Educational Services Commission (Commission). They both contend that their tenure rights as part-time teachers for the Commission were violated when the Commission reduced their 2014-2015 school year weekly assigned hours of work from their 2013-2014 school year levels, while non-tenured and/or less senior part-time teachers were employed in positions within the scope of their certifications and endorsements. The Commission contends that the terms of petitioners' employment agreements expressly contemplate flexibility as to the precise numbers of hours to be assigned and do not vest them with the entitlement of a minimum number of weekly work hours.

After having received Answers from the Commission, on January 7, 2015, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted both Petitions to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, for determination as contested cases. After consolidation of the two matters on May 9, 2015, the parties filed Cross-Motions for Summary Decision, Briefs in Opposition and Reply Briefs in October and November 2015, along with a Joint Stipulation of Facts. Following February 8, 2016, Oral Arguments of the respective Motions for Summary Decision, the parties filed additional Memoranda on April 5, 2016.

## JOINT STIPULATON OF FACTS

1. The Commission, through its staff, provides Chapter 192, Chapter 193 and IDEIA (Individuals with Disabilities Education Improvement Act) services to students residing in Sussex County who are enrolled in full-time, non-public elementary and secondary schools. The Commission also operates a public school called

the Northern Hills Academy, which provides programs and services for special needs students from local school districts in the County.

2. Chapter 192 services consist of compensatory education in Basic Skills, i.e. Language Arts Literacy (Reading and Writing) and/or Math, as well as English as a Second Language and Home Instruction. Chapter 193 and IDEIA services consist of remedial special education services such as evaluation and determination of eligibility, supplementary instruction and speech-language therapy.

3. Chapter 192 and 193 services are State funded, while IDEIA services are funded by the federal government.

4. The Commission is compensated for the services it provides to Sussex County residents attending non-public schools through contracts with the local school districts.

5. Currently, the Commission employs seventy (70) staff members. Of those, ten (10) are part-time, non-public teachers.

6. Part-time teachers are employed for a 10-month term on an as needed basis.

7. The provision of Chapter 192, 193 and IDEIA services by part-time staff is dictated by the needs of students attending non-public schools.

8. The number of students receiving these services fluctuates from year to year and at times within the school year itself, as students move in and out of the local school districts, graduate, or otherwise become eligible or lose eligibility for such services.

9. Generally, the number of hours available for distribution among part-time staff is a product of the number of students receiving services and the needs of those

students, both of which fluctuate from school year to school year and through the course of each school year.

10. Given the fluctuating needs of the non-public schools, as well as the availability of funding, part-time teachers are not guaranteed a minimum number of hours by contract or collective negotiations agreement. (See, Exhibit J-1, the Collective Negotiations Agreement between the Commission and the Educational Services Employees' Association, effective July 1, 2012 through June 30, 2015.).

11. Petitioner Comment is a tenured, part-time instructor who holds an instructional certificate with endorsements as an elementary N-8 teacher, as well as a K-12, Highly Qualified English teacher. (See, Exhibit J-2, Ms. Comment's Instructional endorsements).

12. Petitioner Comment has been continuously employed by the Commission on a part-time basis since the 1997-1998 school year. (See, Exhibit J-3, Ms. Comment's contracts for the 2013-2014 and 2014-2015 school years.

13. Petitioner Comment's assigned hours fluctuated between the 1997-1998 and 2013-2014 school years.

14. During the aforesaid years, Petitioner Comment provided Chapter 192, Chapter 193 and IDEIA based instruction at various non-public schools serviced by the Commission.

15. On May 5, 2014, the Commission's Board of Directors renewed Petitioner Comment's contract for the 2014-2015 school year. (See Exhibit J-4, the Board's May 5, 2014, meeting minutes).

16. At the outset of the 2014-2015 school year, Petitioner Comment was assigned fewer hours per week than the year prior. Her assigned hours were limited to Chapter 192 instruction, which she was expected to provide in groups of no

fewer than three students, unless expressly authorized by the SCESC Superintendent. (See, Exhibit J-5, the 2014-2015 SCESC Staff Handbook).

17. Petitioner Comment's annual income for the 2013-14 school year was $36,838.74, whereas her annual income for the 2014-2015 school year was $10,331.13.

18. Petitioner Ostrowsky Zimmerman is a tenured, part-time instructor who holds an educational certificate with an endorsement as an elementary school teacher. (See, Exhibit J- 6, Ms. Zimmerman's instructional Certificate).

19. Petitioner Zimmerman has been continuously employed by the Commission on a part-time basis since the 2002-2003 school year. (See, Exhibit J-7, Ms. Zimmerman's contracts from the 2013-2014 and 2014-2015 school years).

20. Petitioner Zimmerman's hours fluctuated between the 2002-2003 and 2013-2014 school years.

21. During the aforesaid years, Petitioner Zimmerman provided Chapter 192, Chapter 193 and IDEIA based instruction at various non-public schools serviced by the Commission.

22. At the outset of the 2014-2015 school year, Petitioner Zimmerman was assigned fewer hours per week than the year prior. Her assigned hours were limited to Chapter 192 instruction, which she was expected to provide in groups of no fewer than three students, unless expressly authorized by the SCESC Superintendent. (See, Exhibit J-5).

23. Petitioner Zimmerman's annual income for the 2013-14 school year was $27,668.81, whereas her annual income for the 2014-2015 school year was $19,603.42.

24. On May 5, 2014, the Commission's Board of Directors renewed Petitioner 's contract for the 2014-2015 school year. (See, Exhibit J-4).

25. Wesley Baughman was employed by the Commission as a part-time, hourly non-public school teacher throughout the 2013-14 and 2014-15 school years. He was not tenured.

26. During the 2014-2015 school year, Wesley Baughman provided Chapter 192, Chapter 193 and IDEIA instruction in the area of Language Arts Literacy to students attending grades 8 through 12 at several non-public schools serviced by the Commission. (See, Exhibit J-8, Mr. Baughman's 2014-2015 time sheets).

27. Kathy Bammert Diaz was employed by the Commission as a part-time, hourly non-public school teacher throughout the 2013-14 and 2014-15 school years. She was not tenured.

28. During the 2014-2015 school year, Kathy Diaz provided Chapter 192, Chapter 193 and IDEIA instruction to students attending grades 1 through 7 at one of the non-public schools serviced by the Commission. (See, Exhibit J-9, Ms. Diaz's 2014-2015 timesheets).

29. Michael Ness was employed by the Commission as a part-time, hourly non-public school teacher during the 2014-2015 school year from November 12, 2014, through June 30, 2015. He was not tenured.

30. During the 2014-2015 school year, Michael Ness provided Chapter 192 and Chapter 193 instruction to students attending grades 1 through 8 at several non-public schools serviced by the Commission. (See, Exhibit J-10, Mr. Ness's 2014-15 time sheets).

31. Sarah G. Crabb has been employed by the Commission as a part-time hourly non-public school teacher from September 1, 2002, to the present. She has attained tenure and seniority rights.

32. During the 2014-15 school year, Ms. Crabb provided Chapter 192 instruction to students attending grades 1 through 7 at one of the non-public schools serviced by the Commission. (See, Exhibit J-11), Ms. Crabb's 2014-15 timesheets.

## LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c), which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citations omitted).

I **CONCLUDE** that this matter is ripe for summary disposition. There are no material disputed facts which require a plenary hearing.

The tenure laws, N.J.S.A. 18A:28-1 to -18 (Act), define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right" imposed upon a teaching staff member's contractual employment status. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra, 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

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

Pursuant to the Act, teachers who are under tenure "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, conduct unbecoming ... or other just cause." N.J.S.A. 18A:28-5(a) and (b). Tenure, however, does not "limit the right of any board of education to reduce the number of teaching staff members,

employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause." N.J.S.A. 18A:28-9. Dismissals resulting from any such reduction, commonly referred to as a reduction in force (RIF) "shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10.

Petitioners contend that their tenure rights were violated when the Commission reduced their 2014-2015 school year weekly assigned hours of work (and, consequently, their compensation as well) from their 2013-2014 school year levels, while non-tenured and/or less senior part-time teachers were employed in positions within the scope of their certifications and endorsements. The Commission argues that, although a reduction of a full-time teaching staff member's hours of employment, with a corresponding reduction in salary, is an RIF, which triggers tenure seniority rights, such principles do not apply here because petitioners are and have always been part-time, non-salaried employees. The Commission emphasizes that the terms of the petitioners' employment agreements expressly contemplate flexibility as to the precise number of hours to be assigned and do not vest them with the entitlement of a minimum number of weekly work hours.

Two cases are dispositive of this issue in the Commission's favor. See, Alfieri v. Saddle Brook Board of Education, EDU 11677-98, Initial Decision (July 23, 2001), adopted, Commissioner (September 17, 2001), affirmed State Board (January 8, 2003) <http://njlaw.rutgers.edu/collections/oal/>, affirmed, No. A-3105-02 (App.Div. June 14, 2004), certification denied, 181 N.J. 547 (2004) and in Kourtesis v. Bergen County Special Services District, EDU 14168-10, Initial Decision (September 6, 2011), 2011 N.J. AGEN LEXIS 471, adopted, Commissioner (December 5, 2011),

<http://njlaw.rutgers.edu/collections/oal/>, affirmed, No. A-2139-11 (App. Div. November 19, 2012), certification denied, 213 N.J. 535 (2013).[1]

In Alfieri, petitioners were tenured teachers employed by the Saddle Brook Board of Education on a part-time basis as remedial teachers for students in need. They were only allowed to work up to a maximum of 19 ½ hours per week but were not guaranteed a number of minimum hours. They set their own schedules and most of their instruction was on a one-to-one basis. The Superintendent issued a directive for the 1998-1999 school year requiring a minimum of three students be taught in every remedial skills class. This resulted in a reduction in the number of hours petitioners worked each week. Alfieri, supra, No. A-3105-02 (slip op. at 2).

Petitioners filed a petition with the Commissioner of Education alleging that their tenure rights as part-time supplemental teachers were violated by the directive, which reduced their number of hours and weekly compensation while the employment and compensation of non-tenured full-time employees with comparable skills had remained unchanged. Id. at 2-3.

The Administrative Law Judge (ALJ) assigned the matter concluded that no tenure and/or seniority rights of the part-time hourly teachers were violated. On review, the Commissioner ruled, in part, as follows:

> It is undisputed that [the] petitioners knowingly entered into employment with the Board in positions having fluid hours, not to exceed 19 or 19.5 hours per week, based on the needs of its students for remedial instruction. Further, petitioners' employment hours fluctuated from year to year, even pay period to pay period, based on those needs. Consequently, the Commissioner agrees with the Board that given the structure of the programs in which petitioners were employed and the terms of their employment agreements, they never had any tenure entitlement to a minimum number of hours worked per year. Therefore, while petitioners' hours of employment were fewer in the 1998-1999 school year than in the previous year, tenure and

[1] The Kourtesis Initial decision is not publicly available on the Rutgers website and although the Commissioner's decision is available, it is under the wrong docket number - EDU 14168-11 instead of EDU14168-10.

> seniority protections were not triggered because their employment from its inception was intended to be flexible in terms of the precise number of hours to be worked.
>
> [Id. at 3.]

The State Board of Education (State Board) affirmed the decision of the Commissioner and found, in part, as follows:

> In this case, the Board had not required that petitioners work a definite number of hours each week when it appointed them, but rather had merely established the maximum number of hours that they were permitted to work on a weekly basis. If the Board had reduced that maximum to less than 19 ½ hours per week and if the petitioners had actually suffered a reduction in the number of hours that they worked weekly as a result of the Board's action, there would be no question but that a reduction in staff had occurred within the meaning of N.J.S.A. 18A:28-9 such that petitioners' tenure and seniority rights would be triggered. However, the Board in this case did not act to reduce the maximum number of hours that petitioners could work. Hence, we concur with the Commissioner that, in the absence of any guarantee of a minimum number of hours, a reduction in staff within the meaning of the statute did not occur in this case.
>
> [Id. at 3-4.]

The Superior Court Appellate Division affirmed, finding the decision of the State Board was reasonable. Id. at 4.

Similarly, in Kourtesis, petitioners were tenured teachers employed on an hourly basis by the Bergen County Special Services District to provide Chapter 192/193 services to non-public school students. Their work hours varied throughout the school year and from year to year depending on the needs of the non-public schools. Their collective negotiations agreement (CNA) restricted their work day to no more than 6.75 consecutive hours, while their yearly employment contract specified their hourly rate and longevity stipend. Neither the CNA nor the employment contract guaranteed petitioners a minimum number of work hours, or required their work assignments to be based on seniority. Kourtesis, supra, No. A-2139-11 (slip op.).

Due to the closing of three non-public schools in which petitioners worked and a 13 percent reduction in state funding for the Chapter 192/193 program, the Supervisor of Instruction decided to reduce the work hours she assigned petitioners "across the board" for the 2010-2011 school year rather than terminating a staff member. When petitioners were notified of their reduced hours, they filed petitions with the Commissioner of Education alleging that the board's reduction of their work hours constituted a RIF pursuant to N.J.S.A. 18A:28-9 and a violation of their tenure and seniority rights. Ibid.

After the matter was transmitted to the OAL, the parties filed motions for summary decision. The ALJ assigned to the matter recognized that Klinger v. Cranbury Bd. of Educ, 190 N.J. Super. 354, 357 (App. Div. 1982) certif. denied, 93 N.J. 277 (1983), held that a reduction in hours constitutes a RIF. She found, however, that according to Alfieri, supra, there must be a minimum guarantee, through contract or otherwise, to a minimum number of hours of employment in order for an actual reduction in hours to constitute a RIF.

The ALJ concluded:

> the Board did not violate appellants' tenure and seniority rights because there was no reduction in compensation within the meaning of N.J.S.A. 18A:28-5, and no RIF within the meaning of N.J.S.A. 18A:28-9. She found that the Board did not guarantee appellants, by contract or otherwise, a minimum number of work hours; appellants' employment contracts only guaranteed them a rate of compensation and longevity stipend; appellants were remedial instructors who had acquired tenure by working on an hourly basis; appellants had flexible work schedules with fluctuating hours that varied from year to year based on the number of eligible students; the CBA limited appellants' hours to no more than 6.75 hours per day, and the Board did not reduce this number; appellants' positions were not abolished; there was no reduction in the number of staff; and no appellant was transferred, reassigned, or subjected to any other form of adverse action.
>
> [Ibid.]

On review, the Commissioner adopted the ALJ's Initial Decision and dismissed the petitions. The Commissioner concluded the board did not violate petitioners' tenure and seniority rights. He distinguished Klinger and relied on Alfieri to find there was no RIF under N.J.S.A. 18A:28-9 because petitioners' had no guarantee of a minimum number of work hours, petitioners were not terminated, and they did not suffer a reduction in compensation given the nature of their employment, the fluctuating work hours from year to year, and the lack of a guarantee of a minimum number of hours. The Superior Court Appellate Division affirmed "for the reasons expressed by the Commissioner," finding no abuse of discretion. Ibid.

Petitioners contend that the present matter, however, is distinguishable from Alfieri and Kourtesis. They argue that, unlike the petitioners in those cases, they do not contend that their tenure rights require their employment in full time positions. Since they were not dismissed from all work, they assert that their tenure rights are based upon the annual compensation they received in 2013-2014 and their right for 2014-2015 to rise to that same level. They aver established case law directly on point establishes that a reduction in compensation for a part-time teacher is a sufficient basis to invoke the protections of tenure. In support of their proposition, they cite Ackerman v. Oakland Board of Education, 1986 S.L.D. 2191 and Von Schalscha v. Tenafly Board of Education, OAL Dkt. No. EDU 7945-82, Initial Decision (July 15, 1983), adopted, Commissioner (Sept. 2, 1983).

Petitioners' argument that the present matter is distinguishable from Alfieri and Kourtesis; and that Ackerman and Von Schalscha are applicable fails to recognize the gravamen of the Alfieri and Kourtesis decisions. As the Commission persuasively argues, these more recent cases make it abundantly clear that, for a reduction of a part-time employee's hours to trigger tenure/seniority rights, there must be a guarantee, through contract or otherwise, to a minimum number of hours of employment. No such guarantee exists here. Where hours vary by nature and no reasonable expectation of a proscribed set of hours exists, an employee's tenure/seniority rights will lay dormant. In Ackerman and Von Schalscha, there was a reasonable expectation of prescribed

weekly hours, unlike the petitioners in Alfieri and Kourtesis, whose hours of employment varied from week to week and year to year. It is of no moment that Alfieri and Kourtesis involved a protest by part-timers regarding less senior full-time employees whereas petitioners protest the retention of less senior or non-tenured part-timers. It is a difference without a significance in light of the principal foundation of those cases.

Petitioners additionally argue that the Commission improperly eliminated the Chapter 193/IDEIA hours they had enjoyed in the past on the erroneous belief that they could not provide Chapter 193/IDEIA services with a "students with disabilities" or "teacher of the handicapped" certification. Notwithstanding whether or not such certifications were, indeed, necessary, the holdings of Alfieri and Kourtesis nevertheless prevail. While a reduction in hours of employment for a good reason or an erroneously-based reason can be a RIF, for an actual reduction in hours to equate to a RIF and implicate tenure seniority protections, there must be an entitlement to a minimum number of hours of employment. Such is not the case here.

Accordingly, I **CONCLUDE** that the Commission is entitled to summary decision as a matter of law.

## ORDER

It is hereby **ORDERED** that the petitions of Comment and Zimmerman be **DISMISSED.**

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

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

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

July 11, 2016
DATE

**JESSE H. STRAUSS,** ALJ t/a

Date Received at Agency: July 11, 2016

Date Mailed to Parties: July 11, 2016

id

335-16LM

335-16


State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*


September 21, 2016

Hector Ferrer, *Pro Se*
[redacted]
Teaneck, New Jersey 07666

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Machado Law Group
136 Central Ave.
Clark, New Jersey 07066

Vittorio S. LaPira, Esq
Fogarty & Hara
21-00 Route 208 South
Fairlawn, New Jersey 07410

Re: *Board of Education of the Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside, Bergen County and Hector Ferrer, OAL Dkt. No. EDU 9966-15, Agency Dkt. No. 124-6/15.*

Dear Parties,

I have reviewed the materials filed in connection with Mr. Ferrer's Motion for Reconsideration of the Acting Commissioner's decision dated August 10, 2016. In the August 10, 2016 decision, the Acting Commissioner declined to grant interlocutory review of the July 12, 2016 Order of Administrative Law Judge Evelyn J. Marose. If reconsideration is denied, Mr. Ferrer alternatively seeks a stay of the ALJ's July 12, 2016 Order.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.




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Upon review and consideration of the submissions, I find that Mr. Ferrer has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. In his Motion for Reconsideration, Mr. Ferrer generally argues that his motion should be granted because there has been "a pattern of judicial misconduct, conduct grossly prejudicial to the administration of justice"; additionally, he points to the existence of various alleged conspiracies in support of his motion. The Commissioner has discretion under *N.J.A.C.* 1:1-14.10 to decline to entertain a request for interlocutory review, and the Acting Commissioner appropriately exercised that discretion when he issued the August 10, 2016 decision. Mr. Ferrer has not presented any new evidence that would warrant granting Mr. Ferrer's request for interlocutory review of the July 12, 2016 Order at this juncture.

I also find that the petitioner has failed to satisfy the requirements for a stay of the July 12, 2016 Order.[1] Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134. Mr. Ferrer has not established, nor did he argue, any of the *Crowe* factors in his motion papers.

Accordingly, Mr. Ferrer's Motion for Reconsideration of the Acting Commissioner's decision, dated August 10, 2016, and the request for a stay of the July 12, 2016 Order, are hereby DENIED.[2]

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH
**Via Regular Mail**

---

[1] In the July 12, 2016 Order, Mr. Ferrer was directed to comply with certain discovery requests by July 29, 2016, and if he failed to do so, his petition of appeal would be dismissed.

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

336-16LM

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

September 21, 2016

Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.
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Janelle Edwards-Stewart, Esq.
Porzio Bromberg & Newman P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997

Re: *In the Matter of the Tenure Hearing of Margaret Bradley, School District of the Township of Springfield, Union County, Agency Dkt. No. 235-9/16.*

Dear Counsel,

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Margaret Bradley, School District of the Township of Springfield, Union County, Agency Dkt. No. 235-9/16.* The record includes the respondent's motion to dismiss the tenure charges, as well as the respondent's formal resignation filed with the District on May 31, 2016. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

337-16L

# State of New Jersey

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
*Commissioner*

September 23, 2016

Joseph G. Antinori, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

Marianne Seibel
[redacted]
Delran, New Jersey 08075

Re: *In the Matter of the Tenure Hearing of Marianne Seibel, State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 237-9/16.*

Dear Parties,

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Marianne Seibel, School District of the City of Camden, Camden County, Agency Dkt. No 237-9/16.* The record includes the District's request to withdraw the tenure charges filed in this matter, as well as the respondent's formal resignation filed with the District on August 24, 2016. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

David C. Hespe
Commissioner

c: Amy L. Gillette, Esq.
County Superintendent
State Law Library

DCH/MKD/JKH

338-16LM

338-16

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

CHRIS CHRISTIE
*Governor*
KIM GUADAGNO
*Lt. Governor*

DAVID C. HESPE
*Commissioner*

September 21, 2016

Marc H. Zitomer, Esq.
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Florham Park, NJ 07932

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Law Offices of Alan L. Zegas
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Chatham, NJ 07928

Re: *In the Matter of the Tenure Hearing of Brigitte Geiger, School District of the Township of Mount Olive, Morris County, Agency Dkt. No. 106-4/12, OAL Dkt. No. EDU 5974-12 AND In the Matter of the Tenure Hearing of Sharon Jones, School District of the Township of Mount Olive, Morris County, Agency Dkt. No. 107-4/12, OAL Dkt. No. 6047-12 (Consolidated), Commissioner's Decision No. 205-16A*

Dear Counsel:

I have reviewed the materials filed in connection with Board's Motion for Clarification of the Commissioner's June 6, 2016 final decision in the above-captioned matter. Pursuant to that decision, the respondents "shall forfeit the 120 days' salary that has already been withheld pursuant to *N.J.S.A.* 18A:6-14; shall be suspended for an additional six months without pay; and shall have their increments withheld for two years." The Board is now seeking clarification as to the length of the suspension intended by the Commissioner, since the petitioners never had their salary withheld pursuant *N.J.S.A.* 18A:6-14.

In its papers, the Board argues that the Commissioner intended to impose a ten-month suspension without pay, which would consist of the 120 days that respondents' salaries could have been withheld pursuant to *N.J.S.A.* 18A:6-14, plus the additional suspension for six months. The Board notes that instead of suspending respondents for 120 days from when the tenure charges were certified, the Board transferred respondents to clerical positions while the charges were pending before the Commissioner and Office of Administrative Law. The Board seeks to clarify that respondents should be suspended for the 120 days referenced in the opinion, plus the additional six months suspension imposed by the Commissioner, along with the withholding of two years of salary increments.

In their response, respondents agree that under the rationale of the Commissioner's June 6, 2016 decision, respondents should suffer a salary loss for a total period of 10 months, because they were originally paid for the 120-day period.

In issuing his June 6, 2016 decision, the Commissioner intended for respondents to suffer a suspension without pay for a total of ten months and have their increments withheld for two years. Certainly, if respondents were paid for the 120-day period that their salaries could have been withheld pursuant to *N.J.S.A.* 18A:6-14, then the Board is entitled to impose that portion of the penalty now. Accordingly, the respondents shall be suspended for ten months without pay and have their increments withheld for two years.

IT IS SO ORDERED.*

Sincerely,

David C. Hespe
Commissioner

c: County Superintendent
State Law Library

DCH/MKD/BON

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

345-16

OAL DKT. NO. EDU 03727-16
AGENCY DKT. NO. 36-2/16

| | | |
|---|---|---|
| M.G., on behalf of minor child, C.G., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16

Date of Mailing: 10/04/16

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 03727-16

AGENCY DKT. NO. 36-2/16

**M.G., ON BEHALF OF MINOR CHILD, C.G.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,**

Respondent.

---

**M.G.,** petitioner, pro se

**Deryls Guiterrez,** Esq., for respondent (Adams, Guiterrez & Lattiboudere, LLC, attorneys)

Record Closed: August 16, 2016 Decided: August 29, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on March 8, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

August 29, 2016
DATE

**SARAH G. CROWLEY**, ALJ

Date Received at Agency: August 29, 2016 (emailed)

Date Mailed to Parties: 8/30/16

/mel

**SETTLEMENT AGREEMENT AND RELEASE**

**M.G. o/b/o C.G. v. Somerset Hills Board of Education, Somerset County,**
**Agency Docket No. 36-2/16**
**OAL Docket No.: EDU 03727-2016S**

This Settlement Agreement ("Agreement") is made this ____ day of July, 2016, by and between Petitioner M.G. ("M.G.") o/b/o C.G. ("C.G."), and Respondent/Cross-Petitioner Somerset Hills Board of Education ("Somerset Hills District") (hereinafter collectively referred to as the "Parties").

**WHEREAS**, on or about February 16, 2016, M.G. filed a Pro Se Residency Appeal with the Commissioner of Education, which was docketed as 36-2/16 ("Petition"), challenging the Board's January 21, 2016 determination that C.G. did not reside in Bernardsville, New Jersey; and

**WHEREAS**, on or about March 4, 2016, the Board filed an Answer to M.G.'s Petition and also filed a Cross-Petition for tuition costs for C.G. for the 2014-15 and 2015-16 school years; and

**WHEREAS**, the matter was transmitted to the Office of Administrative Law for a hearing before the Honorable Sarah G. Crowley, A.L.J. on July 20, 2016, which was docketed as EDU 03727-2016S; and

**WHEREAS**, M.G. acknowledges that C.G. did not reside with M.G. in Bernardsville, New Jersey on a full time basis during the 2014-15 and 2015-16 school years; and

**WHEREAS,** the Parties intend to adopt, by way of compromise, all claims which were either raised or could have been raised in the Petition and Cross-Petition; and

**NOW THEREFORE**, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. M.G. will complete the necessary Somerset Hills District forms to effectuate the immediate withdrawal of C.G. from the Somerset Hills District.
3. M.G. agrees that C.G. will continue to reside with his biological father, V.G., in Warren, New Jersey, on a full time basis during the 2016-17 school year.
4. As C.G. will continue residing with V.G. on a full time basis, M.G. will assist V.G. and C.G. with enrolling C.G. in the Warren Public Schools for the 2016-17 school year.

5. M.G. will take all necessary actions to rescind and/or revoke the September 21, 2015 Certificate of Guardianship issued by the Somerset County Surrogate's Court.
6. M.G. shall voluntarily withdraw the instant Petition.
7. Subject to Paragraph 8, the District shall withdraw its Cross-Petition for tuition costs.
8. In the event that C.G. does not withdraw from the Somerset Hills District in accordance with Paragraph 2, or in the event that C.G. subsequently becomes enrolled in the Somerset Hills District again, the Somerset Hills District expressly reserves the right to reinstate its claim seeking the full amount of tuition costs for C.G. for the 20114-15 and 2015-16 school years.
9. Additionally, M.G. agrees to and hereby releases and gives up any and all claims and rights which he may have against the Somerset Hills District (including any of its officers, employees, agents and representatives). This releases all claims of M.G. and C.G., including those of which M.G. is not aware and those not expressly mentioned in this Release.
10. The Parties agree that this Agreement, and all of its terms, are and will remain confidential to the maximum extent possible by law.
11. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
12. This Agreement shall not serve as a precedent for any other matter.
13. The Parties acknowledge that they have entered into this Agreement voluntarily and hereby sign it without duress or coercion.
14. This Agreement shall be governed by the laws of the State of New Jersey.

**PETITIONER**
MARIO GIMENEZ

By: _____

Dated: 08-07-16

**RESPONDENT/CROSS-PETITIONER**
SOMERSET HILLS BOARD OF EDUCATION

By: _____

Dated: July 24 2016

346-16

OAL DKT. NO. EDU 07929-16
AGENCY DKT. NO. 129-5/16

| | | |
|---|---|---|
| P.K., ON BEHALF OF MINOR CHILD, M.K., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, GLOUCESTER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16

Date of Mailing: 10/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 07929-16

AGENCY DKT. NO. 129-5/16

**P.K., ON BEHALF OF MINOR CHILD, M.K.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, GLOUCESTER COUNTY,**

Respondent.

---

**Lilia Londar,** Esq., for petitioner (Weir & Partners LLP, attorneys)

**John J. Armano, Jr.,** Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: August 19, 2016 Decided: August 29, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on May 26, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

August 29, 2016
DATE

**SARAH G. CROWLEY**, ALJ

Date Received at Agency: August 29, 2016 (emailed)

Date Mailed to Parties: August 29, 2016 (emailed)

/mel

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2016 AUG 19 A 11:36
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

**SETTLEMENT AGREEMENT**

**AND**

**MUTUAL RELEASE**

This Settlement Agreement and Mutual Release (hereinafter the "Agreement") is made and entered into by and between **PAULA KONNICK** ("**KONNICK**") and **GREENWICH TOWNSHIP BOARD OF EDUCATION** ("**THE BOARD**") for good and valuable consideration, the receipt and sufficiency of which is mutually acknowledged and agreed to by the parties.

**RECITALS**

**WHEREAS**, Konnick filed a Petition of Appeal on May 3, 2016, entitled P.K. o/b/o minor child, M.K. v. Twp. Of Greenwich BOE; OAL Docket No.: 129-5/16; and

**WHEREAS**, the Board filed an Answer to the Petition or about May 25, 2016; and

**WHEREAS**, the matter was transferred to the Office of Administrative Law and a hearing was scheduled for July 13, 2016; and

**WHEREAS**, the parties having amicably agreed to resolve the Appeal; and

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, and in consideration of the foregoing recitals and of the mutual covenants and agreements contained herein, and intending to be legally bound, the Parties do hereby covenant and agree as follows:

## AGREEMENT

1. **Release of Claims**. The Parties willingly, knowingly and voluntarily do hereby, with prejudice, RELEASE, ACQUIT AND FOREVER DISCHARGE the other, willingly, knowingly, and voluntarily do RELEASE, ACQUIT AND FOREVER DISCHARGE each other from any and all known and unknown claims, suits, demands, damages, losses, costs, actions, expenses, causes of action and other obligations of whatever nature or source from the beginning of time to the effective present date with respect to the Appeal.

2. **Consideration**. Konnick agrees to withdraw her appeal, OAL Docket No.: 129-5/16, and in exchange the Board agrees to forego any claims it may have had for tuition for the period of ineligible attendance, including the initial 21-day filing period and the period during which the appeal was pending. Nothing in this Agreement would preclude M.K. from attending Greenwich Township Schools upon establishing residency in Greenwich Township.

3. **No Admission**. The purpose of this Agreement is to resolve fully, completely and finally, all claims relating to the Appeal. This Agreement shall not be construed as an admission or of a violation of any Federal, State or Local Statute, regulation, judicial doctrine or other law or a violation of any right of any person or entity.

4. **No Assignment**. The Parties represent and warrant that they have not assigned any pertinent rights to any other person or entity and no person or entity is entitled

to assert on their behalf any claim based on or arising out of its relationship with each other.

5. **Complete Agreement**. The Parties affirm that the only consideration for executing this Agreement are the promises, including mutual releases, expressly contained and described herein. The Parties further represent and acknowledge that in executing this Agreement they do not rely, and have not relied, upon any promise, inducement, representation, or statement by any other Party or its agents, representatives, or attorneys about the subject matter, meaning, or effect of this Agreement that is not stated in this document.

6. **Binding Effect**. This Agreement shall be binding upon all Parties and upon their next of kin, heirs, attorneys, representatives, administrators, executors, officers, shareholders, employees, agents, successors, and assigns and any affiliated entities, enterprises or corporations and shall inure to the benefit upon all Parties and upon their next of kin, heirs, attorneys, representatives, administrators, executors, officers, shareholders, employees, agents, successors, and assigns and any affiliated entities, enterprises or corporations.

7. **Counterparts**. This Agreement may be executed in counterparts, including counterparts transmitted by fax or email, and each counterpart, once executed, shall have efficacy of a signed original. True and correct copies of signed counterparts may be used in place of the originals for any purpose.

The undersigned acknowledge and agree that that they have carefully read this "Settlement Agreement and Mutual Release"; know and understand its contents; have had ample opportunity to consult with legal counsel; freely and voluntarily agree to abide by its terms, are

fully authorized to so agree and be bound; and they have not been coerced into signing this Agreement.

Paula Konnick

Paula Konnick

Dated 7-14-16

Greenwich Township Board of Education

Dated 8/8/16

347-16

OAL DKT. NO. EDU 17357-15
AGENCY DKT. NO. 1312-10/15

| | | |
|---|---|---|
| M.B. and S.B. on behalf of minor child, E.B., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16

Date of Mailing: 10/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 17357-15
AGENCY DKT. NO. 312-10/15

**M.B. AND S.B. on behalf of minor child, E.B.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,**
Respondent.

---

**Seth N. Broder**, Esq., for petitioners (Broder Law Group, attorneys)

**Arthur F. Risden**, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: August 25, 2016 Decided: August 29, 2016

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 27, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

August 29, 2016
DATE

**EDWARD J. DELANOY, JR.**, ALJ

Date Received at Agency: 8/30/16

Date Mailed to Parties: 8/30/16

mph

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
Phone: (856) 234-4114
Fax: (856) 234-4262
Attorneys for Respondent
Moorestown Township Board of Education

BY: ARTHUR F. RISDEN, ESQUIRE (ID #2901973)

| | |
|---|---|
| E.B., a minor child by her parents, M.B. and S.B.,<br><br>Petitioners<br><br>vs.<br><br>MOORESTOWN TOWNSHIP BOARD OF EDUCATION,<br><br>Respondent. | BEFORE THE COMMISSIONER OF EDUCATION<br><br>DOCKET NO.: 312-10/15<br><br>**SETTLEMENT AGREEMENT AND GENERAL RELEASE** |

## SETTLEMENT AGREEMENT & GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is entered into by and between the Moorestown Township Board of Education (the "Board"), and M.B. and S.B. ("Parents"), who reside at 716 Lippincott Avenue, Moorestown, NJ 08057, and are the parents of E.B., a student enrolled in the Moorestown Township Public School District ("District") (the Board, Parents, and E.B. collectively referred to as the "Parties").

WHEREAS, E.B. is a fourteen (14) year old student in Grade Nine; and

WHEREAS, the Board is the local educational authority with the responsibility of providing a free, appropriate public education to E.B.; and

WHEREAS, the Board provided/offered what it considered to be an appropriate class schedule for E.B., but Parents disputed the appropriateness of the proposed class schedule (the "Litigation"); and

WHEREAS, the Parties, following good faith negotiations, without alleging or admitting deficiencies in the educational program offered or provided to E.B. by the Board, have amicably resolved the dispute concerning the educational program for E.B.; and

WHEREAS, the Parties enter into this document to outline the Parties' agreement, release claims, and express the full and complete terms of the agreement;

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. E.B. will receive additional academic support during 12th period, should she choose to take advantage of same.

2. The Board will provide E.B. with the option of "test chunking."

3. E.B. will have access to peer tutoring, subject to availability. With respect to peer tutoring, the Board will attempt in good-faith to facilitate a peer tutor, but cannot guarantee that same will be available at all times during the school year.

4. The Board shall grant permission for one of its employees to provide tutoring to E.B. for as long as E.B. and the Parents deem tutoring to be necessary. Parents acknowledge that should the employee tutor become E.B.'s classroom teacher at any time, that employee will be prohibited, pursuant to District policy, from continuing to tutor E.B. In that case, Parents are free to hire another District employee, subject to availability, as a tutor for E.B. at Parents' expense.

5. With respect to a District employee – or any other tutor – tutoring E.B., it is expressly understood and agreed by the Parties that the Board has no financial responsibility for same.

6. If at any time E.B. ceases to attend, be enrolled in, or is no longer a resident of the Moorestown Township School District, the Board's obligations hereunder shall immediately cease.

7. In consideration of the above, the Parents, individually and on behalf of E.B., and E.B. hereby forever and fully waive and release the Board, its members, officers, administrators, agents, servants, employees, and/or assigns from any and all claims in connection with the Litigation that have accrued as of the date of this Agreement, under any law, regulation, or legal theory, including, without limitation:

a. compensatory education;

b. attorneys and other professional fees;

c. private evaluations;

d. reimbursement related to any unilateral and/or out-of-district placement, whether known or unknown;

d. N.J.A.C. 6A:14-1.1, et seq.;

e. Individuals with Disabilities in Education Improvement Act, 20 U.S.C. §1415 et seq.;

f. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701, et seq.;

g. Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101;

h. Family Education Rights and Privacy Act, 20 U.S.C. §1232g, et seq.;

i. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000, et seq.

j. The Rehabilitation Act of 1973, as amended, 20 U.S.C. §7801, et seq.;

k. 29 U.S.C. §794(a);

l. 42 U.S.C. §1983;

m. 42 U.S.C. §1988; and

n. New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq.

Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

8. Neither Party will be considered to be a "prevailing party" for any purpose.

9. The Parties agree and acknowledge that this Agreement is subject to approval by the Board during its next regularly scheduled meeting following the execution of this Agreement.

10. The Parties agree that the terms of this Agreement shall remain strictly confidential to the fullest extent permitted by law, and shall not be disseminated, discussed with, or disclosed to any person(s), entity, or organization who is not a party herein, except in the event of any required legal disclosure, including but not limited to any action for the enforcement of this Agreement by either Party in an agency or court of law. In the event that this term is violated, all responsibility of the Board shall be void.

11. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, if they so choose and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

12. Parents represents they have the authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of E.B. not a party hereto.

13. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties. This

Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior oral and all contemporaneous oral agreements, understandings, and negotiations. This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

IN WITNESS WHEREOF, the Parties hereto set their hands and seals the day and year written above.

FOR THE MOORESTOWN TOWNSHIP BOARD OF EDUCATION:

BY: _____ DATED: 8-9-16
Paul Whitman, Business Administrator

BY: _____ DATED: 8-9-16
Kathy Goldenberg, Board President

FOR THE PARENTS:

BY: _____ DATED: 7-12-16
M.B., individually and o/b/o E.B.

BY: _____ DATED: 7-12-16
S.B., individually and o/b/o E.B.

*MOORESTOWN TOWNSHIP PUBLIC SCHOOLS*
*Administration Building, 803 North Stanwick Road*
*Moorestown, New Jersey 08057*
*(856) 778-6600 Ext. 18150*
*Fax: (856) 235-0961*
*E-mail lshugars@mtps.com*

Lynn E. Shugars
*Business Administrator/Board Secretary*

August 18, 2016

On August 9, 2016, the Moorestown Township Board of Education approved the following resolution:

**7. Settlement Agreement**

MOTION:

I recommend the Board approve the following resolution:

Resolved by the Moorestown Township Board of Education to adopt and approve the Settlement Agreement between Student #8010522 and the Moorestown Township Board of Education attached as Exhibit #17-20.

Moved by: Mr. Weinstein Second: Mr. Pugh Vote: All Ayes

This is a certified copy of the minutes of the Moorestown Township Board of Education meeting held on August 9, 2016.

Paul A. [illegible]
Paul Whitman
Board Secretary

348-16

OAL DKT. NO. EDU 08020-16
AGENCY DKT. NO. 133-5/16

| | | |
|---|---|---|
| C.J., ON BEHALF OF MINOR CHILDREN, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL – denying petitioner's application for emergent relief – is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16

Date of Mailing: 10/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER DENYING EMERGENT RELIEF**
OAL DKT. NO. EDU 08020-2016
AGENCY DKT. NO. 133-5/16

**C.J., ON BEHALF OF MINOR CHILDREN,**
Petitioner,
v.
**TOWNSHIP OF WILLINGBORO BOARD OF EDUCATION, BURLINGTON COUNTY,**
Respondent.

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**C.J.,** petitioner, pro se

**Patrick J. Madden**, Esq., for respondent Willingboro Township Board of Education (Madden and Madden, P.A., attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 25, 2016, petitioner filed a Verified Petition for emergent relief with the Commissioner of the Department of Education seeking to have her four children transferred from the Willingboro School District (Willingboro). The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for

hearing as an emergent matter on August 25, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Willingboro filed a brief in opposition to the Petition on behalf of Willingboro on September 8, 2016. Willingboro also submitted the certification of the Principal Willingboro High School which essentially denies all of the allegations of mistreatment of C.J.'s children. Petitioner filed a response to the respondent's opposition on September 13, 2016. In addition, the petitioner submitted several emails including testing scores of her children as well as the juvenile disposition record for A.D. which indicate that she was found guilty of the charge of aggravated assault on June 2, 2016. A telephone conference was held with the parties on September 8, 2016, and oral argument on the emergent application was scheduled for September 14, 2016. The parties appeared and presented argument on September 14, 2016, and the record closed on the emergent relief at that time.

## FACTUAL BACKGROUND

Petitioner has four children in the Willingboro High School and filed this emergent application on behalf of all of the children seeking to have them placed out of the district. Petitioner submits a one page letter in support of her application alleging that her children are being abused and are afraid to go back to school. She further alleges that one of her children is suffering from depression due to the treatment she has received at school and that one is on blood pressure medication as a result of pressures at school. Petitioner claims that all of her children are being bullied and receive therapy as a result of the anxiety they suffer from attending school in Willingboro.

One of the petitioner's children, A.D. was suspended last April, and has not returned to school since. The District claims that the child and the parent have refused to attend the reentry hearing, and C.J. does not deny this. The hearing has been scheduled for next week, and C.J. has agreed to attend. After A.D. was suspended in April, she and the other three children received home schooling for the remainder of the year. A.D. received a ten day suspension and was scheduled for a hearing regarding

her return to school. It is unclear why the other children were taken out of school or under what conditions they all received homeschooling. However, the petitioner has refused to return the children to school and filed this emergent application seeking to have all four of her children placed out-of-district. She does not state where she wants them placed or any legal basis for such out-of-district placement.

## LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the test by clear and convincing evidence.

In this matter, the first prong of the test requires the petitioner to demonstrate that the children will suffer irreparable harm if the requested relief is not granted. Other than a conclusory statement from the petitioner that they will suffer irreparable harm, petitioner does not allege or demonstrate any irreparable harm to the children. Although I empathize with C.J.'s concerns and do not doubt that her children are unhappy in the school, there is no demonstration of irreparable harm. The second prong of the requirement for obtaining emergent relief is that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, such relief may "not be granted when the principal of law on which it depends is disputed, and has not been settled in this state." Stevens v. Paterson & N. R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869). In this matter, the petitioner seeks to have her four children placed out-of-district

but fails to set forth any legal basis for such relief. Accordingly, the second prong of the test for emergent relief has not been met.

The third prong of the test for emergent relief requires a petitioner to demonstrate a likelihood that they will prevail on the merits of the underlying claim. In the present matter, petitioner seeks an out-of-district placement for all of her children because she claims that they are being bullied and are afraid to go to school. The petitioner presents no legal basis for such out-of-district placement, and has thus, failed to demonstrate a likelihood of success on the merits in this case. Although I found the petitioner sincere and credible in her arguments regarding her concerns for her children, there is no legal basis to simply place them out-of-district.

Finally, in order to obtain emergent relief, the relative equities of each party must be balanced to determine who will suffer greater harm if they do not prevail on the question of emergent relief. There is nothing to prevent the petitioner from sending her children back to school in Willingboro and no evidence to demonstrate that any of the children are entitled to an out-of-district placement or that they will suffer any harm if returned to school in Willingboro. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondent.

## CONCLUSION

Based on the foregoing, I **CONCLUDE** that petitioner has not demonstrated that emergent relief is appropriate in this matter. Petitioner's request is **DENIED**.

## ORDER

Having **CONCLUDED** that petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**, it is **ORDERED** that the underlying petition in this matter will proceed on a non-emergent track.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Sarah G. Crowley

September 15, 2016
DATE

**SARAH G. CROWLEY**, ALJ

SGC/mel

349-16

OAL DKT. NO. EDU 13150-16
AGENCY DKT. NO. 230-8/16

| | | |
|---|---|---|
| PATRICIA MCRAE, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16
Date of Mailing: 10/04/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

**EMERGENT RELIEF**

OAL DKT. NO. EDU 13150-16

AGENCY DKT.NO. 230-8/16

**PATRICIA MCRAE**

Petitioner,

v.

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

Respondent.

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**Patricia McRae**, pro se

**Benard Mercado, Esq.** Senior Associate Counsel (Charlotte Hitchcock, Esq., General Counsel, Attorneys)

Record Closed: September 21, 2016 Decided: September 22, 2016

BEFORE **LELAND S. McGEE,** ALJ:

Petitioner brings this Emergency Relief action seeking an order compelling respondent to immediately reinstate her employment. On August 31, 2016, the Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) as a contested case.

## STATEMENT OF FACTS

Petitioner was hired as a non-tenured second grade teacher through the Provisional Teacher Program Alternate Route, for the 2015 – 2016 school year. Respondent gave petitioner an "Ineffective" mid-year rating, a "Partially Effective" annual rating, and a "Partially Effective" observation rating throughout the school year. Petitioner was also the subject of an incident relating to a charge of conduct unbecoming. On May 10, 2016, respondent gave petitioner a formal notice that her teaching contract was not being renewed for the 2016 – 2017 school year based on her performance and conduct.

On August 24, 2016, petitioner filed the within application for emergent relief.

## DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the instant matter, the presumed potential for irreparable harm lies in the fact that petitioner asserts that she has had difficulty securing alternate employment. There has not been a showing of "immediate irreparable injury."

Petitioner also asserts that, under New Jersey Law, respondent was required to provide training by way of a mentor, and failed to do so. Petitioner stated that she verbally requested mentorship assistance; however she did not make a written request because she did not want to "make waves." Petitioner provided a copy of the Overview of 2014 New Jersey Teacher Mentoring Regulations (N.J.A.C. 6A:9B-8. This document purportedly reflects the contractual obligation of respondent to provide a mentor to petitioner. Petitioner acknowledges that she did not seek assistance from the teachers' union until May 2016, the end of the school year.

Petitioner's assertions appear to be more closely related to a contract dispute, however, no evidence was offered which confirms the details of the contractual relationship between petitioner and respondent. Petitioner provided a copy of her one-page Employment Contract executed on August 31, 2015. It does not refer to respondent's obligation to provide a mentor to petitioner nor does it incorporate by reference, any other guiding documents. Petitioner provided a copy of the Mentor Handbook 2009 – 2010.

## CONCLUSION

After hearing the arguments of petitioner and respondent, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by or the likelihood of prevailing on the merits.

For the foregoing reasons, I **CONCLUDED** that petitioner's request for relief should be **DENIED**.

## ORDER

It his hereby **ORDERED** that the request for emergent relief is **DENIED.**

It is further **ORDERED** that the parties complete the exchanged of Discovery by October 28, 2016.

It is further **ORDERED** that, respondent shall file any dispositive motions on or before November 18, 2016. Petitioner shall file an Answer to the motion on or before December 16, 2016. Respondent may file a Reply to the Answer on or before January 6, 2016. The parties shall contact the undersigned through his assistant, to schedule an Evidentiary Hearing or Oral Argument on the motion.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 22, 2016

DATE

**LELAND S. McGEE,** ALJ

sej

| | | |
|---|---|---|
| M.F., ON BEHALF OF MINOR CHILD, J.F. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter in August 2015, seeking a determination that J.F. resided within the regional area served by the Red Bank Regional High School. The respondent Board counterclaimed for tuition. The matter was transmitted to the Office of Administrative Law (OAL) to ascertain petitioner's residency and the amount of any tuition due. Petitioner failed to appear at a hearing scheduled for February 29, 2016, and the OAL returned the file to the Commissioner. In a decision dated March 22, 2016, the Commissioner remanded the matter to the OAL for resolution of the Board's counterclaim for tuition for the period of J.F.'s ineligible attendance in Red Bank schools. A hearing on the counterclaim was scheduled for July 6, 2016, but the petitioner again failed to appear.

On remand, the ALF found, *inter alia*, that: J.F. attended Red Bank Regional High School for the 2012-2013, 2013-2014, 2014-2015, and 2015-2016 school years; the Board's counterclaim sought tuition for only two of the school years in question, 2013-2014 and 2014-2015; the Board has established that the per-pupil cost for a high school student for these two school years was $13,250 and $13,600 per year, respectively. The ALJ concluded that J.F. was not entitled to attend school free of charge during the two school years in question, and ordered petitioner to reimburse Red Bank for tuition in the amount of $26,850 for J.F.'s period of ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's finding that J.F. was not entitled to a free public education in Red Bank during the 2013-2014 and 2014-2015 school years. However, the Commissioner modified the ALJ's calculation of tuition due to reflect that, pursuant to *N.J.A.C.* 6A:22-6.2, respondent is not allowed to recoup tuition for the 2013-2014 school year, but is entitled to tuition for the 2015-2016 school year. Accordingly, the Initial Decision was adopted with modification, and the petitioner was ordered to reimburse the Board $27,500 for tuition costs for the 2014-2015 and 2015-2016 school years.

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

October 4, 2016

OAL DKT. NO. EDU 04516-16
(EDU 14435-15 ON REMAND)
AGENCY DKT. NO. 232-8/15

| | | |
|---|---|---|
| M.F., ON BEHALF OF MINOR CHILD, J.F., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.[2]

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that J.F. was not domiciled in Red Bank for the 2013-2014 and 2014-2015 school years, and was not entitled to a free education in the District during that period of time. However, the ALJ's calculation of the total amount of tuition owed to the Board is modified as set forth below.

Pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.3, the Commissioner shall assess tuition against petitioner for the time period during which J.F. was ineligible to attend school in the District. Furthermore, *N.J.A.C.* 6A:22-6.2 limits the assessment of tuition to "the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal." In this matter, following a residency hearing on July 22, 2015, the Board issued a

[1] The Commissioner was not provided with a transcript of the July 6, 2016 hearing at the OAL.

[2] Petitioner failed to appear at the initial hearing scheduled for February 29, 2016, as well as the July 6, 2016 hearing for disposition of respondent's counterclaim. Petitioner also has not provided an explanation regarding her failure to appear.

Final Determination of Eligibility on August 6, 2015, finding – in relevant part – that petitioner did not reside in the Red Bank Regional School District during the 2013-2014 and 2014-2015 school years, and that tuition should be assessed for the period of J.F.'s ineligible attendance in the District's school. Subsequently, on August 24, 2015, petitioners filed this instant appeal. Therefore, pursuant to *N.J.A.C.* 6A:22-6.2, petitioner may be assessed tuition for the 2014-2015 school year, but not the 2013-2014 school year – as it would exceed the one year limit. The petitioner may also be assessed tuition for the 2015-2016 school year, during which time the hearing and decision on appeal were pending and J.F. attended school in the District.

The Commissioner hereby modifies the ALJ's assessment of the total tuition owed to the Board, as respondent is not allowed to recoup tuition for the 2013-2014 school year, but is entitled to tuition for the 2015-2016 school year. Therefore, the Board is entitled to tuition reimbursement in the total amount of $27,500.00 – which is the sum of $13,600.00 (the annual per pupil cost for the 2014-2015 school year), and $13,900.00 (the annual per pupil cost for the 2015-2016 school year).

Accordingly, the Initial Decision of the OAL – as modified herein – is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $27,500.00 for tuition costs incurred for the 2014-2015 and 2015-2016 school years, during which time J.F. was ineligible to attend school in Red Bank.

IT IS SO ORDERED.[3]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/04/16

Date of Mailing: 10/04/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 04516-16
(ON REMAND) EDU 14435-15
AGENCY DKT. NO. 232-8/15

**M.F., ON BEHALF OF MINOR CHILD, J.F.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,**
Respondent.

---

**No appearance by or on behalf of petitioner**

**Marcie Mackolin,** Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever and Osborne, LLC, attorneys)

Record Closed: July 7, 2016 Decided: August 22, 2016

BEFORE **DEAN J. BUONO**, ALJ:

## STATEMENT OF THE CASE

Petitioner M.F., the mother of J.F., challenges the determination made by the Board of Education of the Red Bank Regional High School District (District) that she did

not reside in the Red Bank School District. The District filed a counterclaim seeking payment of tuition for the number of days J.F. attended school in the district.

## PROCEDURAL HISTORY

On August 5, 2015, the District notified the petitioner that her daughter, J.F., was ineligible to attend the schools of the district due to non-residency. Petitioner appealed the decision. On September 17, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Several conference calls were held and attempts to settle were explored by the parties. A hearing was scheduled for February 29, 2016, and the petitioner did not appear. Petitioner was marked as "Failed to Appear" and the matter was returned to the agency for disposition.

On March 23, 2016, the case was remanded for disposition of the counterclaim. Notices were sent to all parties and the matter was heard on July 6, 2016. The petitioner again "Failed to Appear." The District presented its proofs for the counterclaim but the record remained open for the petitioner to explain her nonappearance. When no explanation was received from petitioner regarding her failure to appear, the record was closed on July 7, 2016.

## FACTUAL DISCUSSION

The facts of this case are not in dispute and as such, I **FIND** the following facts:

1. Petitioner's daughter, J.F., attended Red Bank Regional High School for the 2012-2013, 2013-2014, 2014-2015 and 2015-2016 school years.

2. For the 2012-2013 school year, petitioner agreed to pay for tuition and entered into a payment agreement for the cost of the tuition for that school year in the amount of $12,900 with the District. (Exhibit A.)

3. Petitioner presented a check to the District for the first payment installment that was returned by the bank for insufficient funds. Petitioner made a $1,000 payment on July 8, 2013, and a $1,000 payment on August 20, 2013. Petitioner failed to make another payment to the District on the agreement, leaving $10,900 due and owing.

4. For the 2013-2014 school year, petitioner, as proof of residency, presented a lease agreement with a listed address within the regional area that the District serves free of a tuition obligation. That address is 12 Horace Place, Red Bank, New Jersey. (Exhibit B.)

5. On August 9, 2014, a Student Activities/Request for Payment form was completed for J.F. to receive payment for "CIT Honorarium." The address provided was 8 Copperfield Court, Eatontown, New Jersey ("Eatontown address"). (Exhibit C.)

6. For the 2014-2015 school year, petitioner, as proof of residency, presented a lease agreement with a listed address within the regional area that the District serves free of a tuition obligation. That address is 16 Leighton Place, Red Bank, New Jersey ("Red Bank address"). (Exhibit D.)

7. Thereafter, the District received information that J.F. was not actually residing and domiciled at the Red Bank address, but was actually residing at the Eatontown address.

8. The District engaged the services of Wil-Bur Investigations, Inc. to conduct an investigation into J.F.'s actual residence.

9. Surveillance was conducted of the Eatontown address and the Red Bank address on October 2014. Surveillance included following petitioner and J.F. from the Eatontown address to Red Bank Regional High School. In addition, an investigation regarding the ownership of each of the addresses and the vehicles located at those addresses were conducted. It was determined at the conclusion

of the investigation that petitioner and J.F. did not reside at the Red Bank address. (Exhibit E.)

10. On July 1, 2015, a Notice of Initial Determination of Ineligibility, along with the supporting documents, was delivered to plaintiff, at both the Eatontown and Red Bank addresses, via regular mail, Certified Return Receipt mail and hand delivery. The Certified Mail for the Eatontown address was returned "unclaimed." (Exhibit F.)

11. On July 22, 2015, a residency hearing was conducted before the Board of Education. Petitioner appeared on behalf of J.F.

12. The Board determined that J.F. was not domiciled or a resident of Red Bank, which would have entitled her to attend the High School without a tuition obligation.

13. On August 6, 2015, the Final Determination of Ineligibility, along with the supporting documents, were delivered to petitioner at both the Eatontown and Red Bank addresses, via regular mail, certified return receipt mail and hand delivery. The certified mail for the Red Bank address was returned "unclaimed." (Exhibit G.)

14. On August 6, 2015, petitioner completed a Request for Taxpayer Identification Number and Certification ("W-9"). The home address listed by petitioner was the Eatontown address. (Exhibits H and R-7.)

15. On August 24, 2015, petitioner filed an appeal from the District's determination of ineligibility.

16. Tuition for the 2013-2014 school year was $13,250. (Exhibit I.)

17. Tuition for the 2014-2015 school year was $13,600. (Exhibit J.)

## TESTIMONY

Christina Galvao, Business Administrator for the District, testified that during the 2012–2016 school years J.F. attended four years of high school in the District. She also testified that she too was present during the residency hearing on July 22, 2015. She corroborated the cost of a student in the District. She presented invoices prepared by the High School which established the per-pupil cost for tuition-adjustment. The balance owed for J.F. attending the High School was $10,900 (Exhibit A and R-8) for the 2012–2013 school year. Tuition for the 2013-2014 school year was $13,250 (Exhibit I) and tuition for the 2014-2015 school year was $13,600 (Exhibit J). She testified that it was her understanding that these figures were accurate.

## FINDINGS OF FACT

Petitioner did not attend the hearing once again, and I so **FIND**:

Respondent has filed a counterclaim seeking only the tuition for the days J.F. was attending the District ineligibly for the 2013-2014 and 2014-2015 school years. As such, the District must establish the cost of tuition and the number of days J.F. attended the District's schools when she was ineligible to do so. The invoices from the High School establishes the per-pupil costs for the 2013-2014 and 2014-2015 school years (Exhibits I and J) are self-authenticating, and, accordingly, I **FIND** that the per-pupil cost for a high school student to attend school in the district is $13,250 and $13,600 per year respectively.

The District alleges that although the District became aware that M.F. no longer resided in-district in 2012, J.F. attended its schools ineligibly for the entire 2013-2014 school year. In support of this contention, the District has offered for the 2013-2014 school year, a lease agreement with a listed address of 12 Horace Place, Red Bank, New Jersey, that is within the regional area that the District serves free of a tuition obligation (Exhibit B). On August 9, 2014, the Student Activities/Request for Payment

form was completed for J.F. to receive payment for "CIT Honorarium." The address provided in the form was the Eatontown address (Exhibit C.) Also, for the 2014-2015 school year, petitioner, as proof of residency, presented a lease agreement with the Red Bank address that is within the regional area that the District serves free of a tuition obligation (Exhibit D).

Surveillance was conducted of the Eatontown address and the Red Bank address in October 2014. Surveillance included following petitioner and J.F. from the Eatontown address to the High School. Additionally, an investigation regarding the ownership of each of the addresses and the vehicles located at the homes was conducted. It was determined at the conclusion of the investigation that petitioner and J.F. did not reside at the Red Bank address (Exhibit E). I put great weight on the independent investigation.

Accordingly, I **FIND** that J.F. became ineligible to attend school in the District for the 2013-2014 school district and that continued through graduation in 2016. I **FIND**, by a preponderance of the credible evidence, that J.F. attended school in the District for the 2013-2014 and 2014-2015 school years while domiciled in Eatontown, which is outside of the District.

Although there was testimony that there is an existing balance of $10,900 for the 2012-2013 school year and a total outstanding balance of $51,650, the counterclaim in this case is only for the 2013-2014 and 2014-2015 school years. The amount of $51,650 is unsupported by any documentation or claim and I cannot **FIND** that as a fact in this matter.

## CONCLUSIONS OF LAW

At issue is whether J.F. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533,

rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that J.F. attended school within the district for the 2013-2014 and 2014-2015 school years while domiciled outside of the District. Accordingly, I **CONCLUDE** that J.F. was not entitled to a free public education in the district. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of J.F.'s attendance in-district was $13,250 for the 2013-2014 school year and $13,600 for the 2013-2014 school year respectively. Accordingly, I **CONCLUDE**

that the District is entitled to be reimbursed for tuition by the petitioner in the amount of $26,850. I further **CONCLUDE** that petitioner's appeal should be dismissed.

## ORDER

It is, therefore, **ORDERED** that petitioner M.F., pay respondent, Board of Education of the Red Bank Regional High School District tuition in the total amount of $26,850 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that J.F. was ineligible to attend school while domiciled outside the district is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

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

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

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

August 22, 2016
DATE

**DEAN J. BUONO**, ALJ

Date Received at Agency: 8/22/16

Date Mailed to Parties: 8/30/16

/dm

## APPENDIX

## WITNESSES

**For Petitioner:**

None

**For Respondent:**

Christina Galvao, School Business Administrator, Red Bank Board of Education

## EXHIBITS

**For Petitioner:**

None

**For Respondent:**

R-1 New Jersey Residential Lease Agreement for property located at 16 Leighton Place, Red Bank, NJ 07701

R-2 Surveillance Report by Wil-Bur Investigations, Inc., dated November 18, 2014

R-3 Investigation Report by Wil-Bur Investigations, Inc., dated July 18, 2015

R-4 Red Bank Regional High School Board of Education Tuition Agreement

R-5 Red Bank Regional High School Board of Education Automated Clearing House (ACH) Authorization Agreement

R-6 Red Bank Regional High School Student Activities / Request for Payment Form

R-7 Request for Taxpayer Identification Number and Certification (W-9 Form)

R-8 Red Bank Regional High School Statement, dated August 20, 2013

R-9 Correspondence from Red Bank Regional High School to M.F., dated June 27, 2013

R-10 Residential Lease Agreement for property located at 12 Horace Place, Red Bank, NJ 07701

R-11 Correspondence from Red Bank Regional High School to M.F., dated August 20, 2014

R-A Red Bank Regional High School Board of Education Tuition Agreement and Automated Clearing House (ACH) Authorization Agreement

R-B Residential Lease Agreement for property located at 12 Horace Place, Red Bank, NJ 07701

R-C Red Bank Regional High School Student Activities / Request for Payment Form

R-D New Jersey Residential Lease Agreement for property located at 16 Leighton Place, Red Bank, NJ 07701

R-E Investigation Reports by Wil-Bur Investigations, Inc., dated November 18, 2014 and July 18, 2015

R-F Anthony P. Sciarrillo letter to M.F. regarding residency and Notice of Initial Determination of Ineligibility

R-G Notice of Final Ineligibility, dated August 5, 2015

R-H Request for Taxpayer Identification Number and Certification (W-9 Form)

R-I Red Bank Regional High School Board of Education Tuition Agreement, dated August 13, 2013

R-J Red Bank Regional High School Board of Education Tuition Agreement, dated July 11, 2014

351-16

**STATE OF NEW JERSEY**
**DEPARTMENT OF EDUCATION**
**BUREAU OF CONTROVERSIES AND DISPUTES**

In the Matter of the Tenure Hearing
of Shirley Cato

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**State-Operated School District**
**of the City of Newark,**

"Petitioner,"

- and -

**Shirley Cato,**

"Respondent."

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**DECISION APPROVING**
**SETTLEMENT AGREEMENT**

Agency Docket No. 94-3/16

**Before**
**Robert C. Gifford, Esq.**
**Arbitrator**

**Appearances:**

**For the Petitioner:**
Robert M. Tosti, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless

**For the Respondent:**
Robert T. Pickett, Esq.
Pickett & Craig

On April 28, 2016, I was assigned as the arbitrator for the above referenced matter. Settlement discussions took place May 10, 17, 27, and 31, 2016. The hearing officially commenced on June 10 2016, but the parties agreed to continue their settlement discussions in lieu of proceeding on the evidentiary record. The parties continued their active settlement discussions throughout the months of June, July, and August, but they were unable to resolve the matter. Throughout this process, requests for extensions of time to conduct the hearing and issue a decision were timely requested and granted.

Pursuant to my discussions with the parties' attorneys, a total of three (3) additional hearing days were scheduled for this matter: September 26, 27, and 30, 2016. On September 26, 2016, the parties continued their settlement discussions in lieu of proceeding on the record whereupon they successfully reached the general terms for settlement that needed to be reduced to writing. The hearing scheduled for September 27th was cancelled.

On September 30, 2016, the parties formally executed and adopted a settlement agreement resolving the tenure charges the State-Operated School District filed with the State of New Jersey, Department of Education on March 24, 2016. The terms of settlement are attached hereto. On September 30, 2016, I conducted a final conference with the parties' attorneys and the Respondent to discuss these terms.

N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. A copy of N.J.A.C. 6A:3-5.6 was provided to the parties. The parties' settlement agreement expressly details the basis for resolution. I have thoroughly reviewed and considered the parties' reasons for settlement set forth therein. Having considered the stated reasons in conjunction with the issues raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: October 1, 2016
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 1st day of October, 2016, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-2021

18 This agreement is entered subject to approval by the Administrative Board of Trade, Inc. on September 30, 2016 at Chicago, Illinois.

Robert T. Pickett

9/30/16

10/1/16

See Decision Approving Settlement Agreement attached hereto

8. This agreement is further subject to approval by the Arbitrator, Robert Gifford, Esq. for submission to the Commissioner of Education.

Dated: 4/25/2011

SHIRLEY CATO

Dated:

Robert T. Pickett

ROBERT PICKETT, ESQ
Attorney for Shirley Cato

Dated: 4/28/11

CHRISTOPHER CERF
State District Superintendent

CERTIFICATION OF CONSENT TO SETTLEMENT
TERMS PURSUANT TO N.J.A.C. 6A:3-6.4(b)

Dated:

ROBERT FOSTI, ESQ
Attorney for Newark Public Schools

APPROVED:

Date:

ROBERT C. GIFFORD, Arbitrator

## CERTIFICATION

I, SHIRLEY CAVIO, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I hereby state that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

SHIRLEY CAVIO

Exhibit A

Christopher Cerf
State District Superintendent
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

**Re: Shirley Cato**
**Notice Of Retirement / Resignation**

Dear Superintendent Cerf,

I hereby submit my resignation from my employment with the Newark Public Schools effective as of November 1, 2016 as I will be retiring.

Dated: 10/20/2016

Shirley Cato

352-16

OAL DKT. NO. EDU 11392-16
AGENCY DKT. NO. 204-7/16

| | | |
|---|---|---|
| M.F. AND J.F., ON BEHALF OF MINOR CHILD, J.F., | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the Initial Decision of the OAL have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner notes that this emergent matter also involves an Office of Special Education Programs (OSEP) matter which was transmitted to the OAL concurrently with this matter, and docketed as EDS 11383-16. The Administrative Law Judge (ALJ) issued a Final Decision on Emergent Relief in that matter on September 1, 2016, denying the petitioners' request for emergent relief, pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Specifically, the ALJ found that petitioners did not demonstrate that J.F. will suffer irreparable harm if the requested relief is not granted, and since all elements of the *Crowe* test must be met in order to warrant emergent relief, petitioners' request for emergent relief must be denied.

As the issues resolved in the Final Decision on Emergent Relief were within OSEP's jurisdiction and resolved all emergent issues, there is nothing left for the Commissioner

to determine with respect to petitioners' motion for emergent relief. The Commissioner notes that although this matter was captioned as an Initial Decision, decisions on emergent motions instead require the issuance of an Order. *N.J.A.C.* 1:1-12.6. An Initial Decision on the underlying matter may be issued following a plenary hearing on the merits or a dispositive motion. *N.J.A.C.* 1:1-18.1.

Accordingly – for the reasons expressed herein – this matter is hereby remanded to the OAL for a plenary hearing, or such other proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/05/16

Date of Mailing: 10/05/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 11392-16
AGENCY DKT. NO. 204-7/16

**M.F. AND J.F. O/B/O MINOR CHILD J.F.,**
Petitioner,
v.
**MORRIS BOARD OF EDUCATION,**
Respondent.

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**Thomas A. Cataldo**, Esq. for Petitioners (Thomas A. Cataldo, attorneys)

**Janelle Edwards-Stewart**, Esq., for Respondent (Porzio Bromberg & Newman, P.C., attorneys)

Record Closed: August 24, 2016 Decided: September 1, 2016

BEFORE **LELAND S. McGEE,** ALJ:

Petitioners bring this emergency relief action before the Commissioner of Education (Commissioner) seeking an order compelling Respondent to pay for tuition and provide transportation to the Somerset County Vocational Technical School. On July 29, 2016, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL). The Office of Special Education Programs transmitted a companion case that was filed under OAL DKT. NO. EDS-11383-16, to the OAL on the same date.

On August 19, 2016, Respondent filed an Answer to the Petition, a Brief in Opposition to the Motion for Emergent Relief and supplemental Certifications. On August 22, 2016, Petitioner filed a Response to Petitioner's Opposition to the Motion for Emergent Relief together with supporting Certification. On August 24, 2016, Respondent filed a response to the Certification together with supporting Certification and exhibits. Oral Argument was heard on August 24, 2016, at which time the record closed.

## STATEMENT OF FACTS

J.F. is a 14-year old student within the Morris School District (""MSD"), eligible for services and protection against discrimination under Section 504 of the Rehabilitation Act of 1973 ("the Plan"). He was diagnosed with Attention Deficit Disorder and Auditory Processing deficits, which impact his organizational abilities, ability to complete assignments, and short term memory. The Plan describes J.F. as a "well behaved" young man and does not address any necessary behavioral support or placement needs due to his condition. It focuses on classroom and homework support. Petitioners had fifteen (15) days to express any disagreements with the contents of the Plan however they gave written consent to implementation of the Plan.

J.F. attended Frelinghuysen Middle School through the 5th grade. Petitioners unilaterally placed J.F. in the Unity Charter School for grades 6 through 8 before reenrolling him in the MSD for the 2016-17 school year. Following reenrollment, Petitioner advised MDS that they secured admission for J.F. at an automotive program at Somerset County Vocational and Technical Schools ("SCVTS") for the 9th grade. Petitioners requested that MSD pay the tuition and transportation to SCVTS, beginning in September 2016, and continuing through grade twelve.

## DISCUSSION AND CONCLUSIONS

The underlying claims in this matter were discussed and resolved in the companion case filed under OAL DKT. NO. EDS-11383-16.

I **CONCLUDE** that Petitioners are not entitled to an Order requiring the Board to pay for J.F. to attend an out-of-county vocational school.

## ORDER

I hereby **ORDER** that Petitioners' request for relief is **DENIED.**

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

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

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

September 1, 2016
DATE

**LELAND S. MCGEE**, ALJ

Date Received at Agency: September 1, 2016

Date Mailed to Parties:
LSM/lr

353-16

OAL DKT. NO. EDU 02377-16
AGENCY DKT. NO. 21-2/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ELIZABETH CALDERON, SCHOOL DISTRICT OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY

COMMISSIONER OF EDUCATION

DECISION

This matter was opened before the Commissioner of Education by petitioner (Freehold Board of Education), seeking suspension of respondent's (Elizabeth Calderon) teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without providing the requisite notice to petitioner. Following transmittal of the matter to the Office of Administrative Law (OAL), the parties proposed a Stipulation of Settlement (Agreement), which the Administrative Law Judge sent to the Commissioner with a recommendation for approval.

Upon review of the terms of the proposed Agreement, the Commissioner rejects same because the parties wish to apply a one year suspension retroactively – from November 16, 2015 to November 15, 2016 – and the record below is devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period above. Under *N.J.S.A.* 18A:26-10, the Commissioner may suspend a teacher's certificate for up to one year for wrongful cessation of performance of her duties. The central purpose of the statute is to ensure proper notice to the school in order to deter disruption of services and adverse impact on students when teachers abruptly resign. *See Penns Grove-Carney's Point Board of Education v. Leinen, 94 N.J.A.R.* (EDU) 405, 407. As the parties in this matter have agreed to retroactive suspension of respondent's certificate, the Commissioner may – at his discretion – consider the proposed suspension, provided that respondent remained

unemployed as a teacher for the duration of the suspension, and has attested to same by way of an affidavit. In the absence of any affirmation in this regard, the Commissioner cannot approve the within settlement.

Accordingly, this matter is remanded to the OAL for revision of the Agreement or for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/06/16
Date of Mailing: 10/06/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 02377-16

AGENCY DKT. NO. 21-2/16

**IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ELIZABETH CALDERON, SCHOOL DISTRICT OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY.**

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**Micci J. Weiss,** Esq., for petitioner (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

**Elizabeth Calderon,** respondent, pro se

Record Closed: August 12, 2016 Decided: August 29, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on February 9, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

August 29, 2016
DATE

**SARAH G. CROWLEY**, ~~ALJ~~

Date Received at Agency: August 29, 2016 (emailed)

Date Mailed to Parties: 8/30/16

/mel

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Micci Weiss, Esq. (Attorney ID 046522005)
Attorneys-at-Law
5 Ravine Drive
Matawan, NJ 07747
Tel.: 732-583-7474
Attorneys for Petitioner

| | |
|---|---|
| FREEHOLD BOROUGH BOARD OF EDUCATION,<br>Petitioner,<br><br>vs.<br><br>ELIZABETH CALDERON,<br>Respondent. | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br><br>OAL DOCKET NO. EDU 02377-2016S<br>Agency Ref. No. 22-1/16<br><br>**STIPULATION OF SETTLEMENT** |

WHEREAS, the Parties appeared in the Office of Administrative Law on July 7, 2016 before the Honorable Sara G. Crowley, A.L.J. for the hearing in this matter; and

WHEREAS, at that time, the Parties reached an amicable settlement of this matter, which was placed on the record, and which shall be memorialized by this Stipulation of Settlement.

NOW, THEREFORE, the Parties hereby stipulate to the following facts and agree to resolve this matter upon the following terms:

1. Freehold Borough Board of Education (the "Board") hired Elizabeth Calderon ("Ms. Calderon") as a Spanish teacher, commencing on Monday, November 16, 2015.

2. Ms. Calderon executed an employment contract with the Board, which, in accordance with N.J.S.A. 18A:26-10, required that she provide the Board with sixty (60) days' notice of any resignation.

3. On Monday, November 16, 2015, at 8:03 a.m., Ms. Calderon emailed a letter of resignation to the Board.

4. Ms. Calderon failed to appear for work, despite the sixty (60) day notice provision in her employment contract and as required by law.

5. The Board initiated this action seeking suspension of Ms. Calderon's teaching certificate for failing to provide sixty (60) days' notice as required by the employment contract and N.J.S.A. 18A:26-10.

6. The Parties have agreed that Ms. Calderon's teaching certificate shall be suspended from November 16, 2015 through November 15, 2016.

7. This is the entire agreement of the Parties and may not be altered or amended, except in writing, with the same formality as this agreement.

8. This Stipulation of Settlement is subject to approval by the Commissioner of Education.

Respondent

By: Elizabeth Calderon
Elizabeth Calderon

Cleary Giacobbe Alfieri Jacobs LLC
Attorneys for Petitioner

By: _____
Micci J. Weiss

SO APPROVED AND RECOMMENDED:

_____
Hon. Sarah G. Crowley, A.L.J.

Dated: _____

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

---X

In the Matter of the **TENURE** Hearing of:

**THOMAS STRASSLE,**

Respondent,

and

**SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY**

Petitioner.

---X

Agency Dkt. No.
131-5/16

**OPINION AND AWARD**

Before **MELISSA H. BIREN, Esq.,** Impartial Arbitrator

**APPEARANCES:**

**For the Petitioner**
Kenney, Gross, Kovats & Parton
Daniel Roberts, Esq.

**For the Respondent**
Mellk O'Neill
Edward A. Cridge, Esq.

Pursuant to *N.J.S.A. 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the School District of the Township of Old Bridge, Middlesex County (the "District") against Thomas Strassle ("Strassle") were referred to me for a hearing and decision. I conducted a hearing at the offices of the Old Bridge Board of Education on July 7, 2016, July 20, 2016 and August 24, 2016.[1]

At the start of the hearing, the parties agreed that the issue to be decided in this tenure hearing is as follows:

> Has the School District of the Township of Old Bridge, Middlesex County, established that the Respondent, Thomas Strassle, engaged in misconduct as alleged in the charges brought against him. If so, what shall be the penalty?

Both parties were represented by counsel and had a full opportunity to adduce evidence, to cross-examine each other's witnesses and to make argument in support of

[1] A request for additional time to conclude the hearing and to issue the Opinion and Award was timely made to the Commissioner, which request was granted.

their respective positions. A stenographic record was taken of the hearing. The parties submitted written closing memoranda, each citing legal authorities to support its position. Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, all of the evidence adduced, authorities cited and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

**Background:**

Strassle is a tenured teacher in the District, beginning his employment in September 2003. At all times relevant to these charges, Strassle was assigned to the Old Bridge High School where he was an industrial arts teacher.

By letter dated September 29, 2015, the District Superintendent, David Cittadino ("Cittadino"), notified Strassle that he was being placed on paid administrative leave "pending the outcome of a criminal and administrative investigation into conduct unbecoming a teacher, in reference to student contact." (District Exhibit 14.) On April 5, 2016, Strassle and his attorney, Edward Cridge, Esq., were given notice that tenure charges would be filed against Strassle seeking termination of his employment. The Old Bridge Board of Education (the "Board") certified the charges on April 28, 2016 and forwarded them to the Commissioner of Education. The Statement of Tenure Charges include four charges alleging conduct unbecoming a teaching staff member as well as incapacity. (District Exhibit 1.) On May 18, 2016, Respondent filed an Answer to the Tenure Charges denying each of the allegations set forth. After review, the Commissioner of Education deemed the charges sufficient, if true, to warrant dismissal or reduction in salary. The matter was then referred to arbitration by me pursuant to TEACHNJ.

Tenure laws are meant to protect teachers from dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Board of Education*, 90 N.J. 63, 73 (1982). *See also, Santiago v. Elizabeth Board of Education*, 2000 WL 1235359, OAL Docket No. EDU-7135-98, Initial Decision (August 30, 2000). By statute in New Jersey, tenured teaching staff "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause..." *N.J.S.A.* 18A:28-5. "Conduct unbecoming" is not specifically defined in the statute. It has been called an

"elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the [public entity] ... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *In re Emmons,* 63 N.J. Super. 136, 140 (App. Div. 1960). See also *Karins v. City of Atl. City,* 152 N.J. 532, 554 (1998). The touchstone of the decision as to whether particular behavior is properly considered conduct unbecoming "lies in the certificate holder's 'fitness to discharge the duties and functions of one's office or position.' (citation omitted)" *In re Young,* 202 N.J. 50, 66 (2010). "Conduct unbecoming is a type of disciplinary charge that is determined on a case-by-case basis and can embrace a wide range of conduct." *Santiago, supra,* 2000 WL 1235359 at *2. Under appropriate circumstances, "unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." *In re: Fulcomer,* 93 N.J. Super. 404, 421 (App. Div. 1967.)

The District has the burden of proving that Strassle engaged in conduct unbecoming a tenured teacher as alleged in these charges and that such conduct warrants his removal from the District. It must do so by "a preponderance of the competent, relevant and credible evidence. (citations omitted)" *Ashe-Gilkes, Sch. Dist. Of City of East Orange, Essex County,* 2009 N.J. Agen LEXIS 12, 52, OAL Kdt. No. 07135-08 (2009). For the reasons set forth below, while the District has proven one of the factual allegations against Strassle, it has not proven the most serious of the factual allegations underlying the charges against him requiring dismissal of most of the tenure charges. The misconduct that has been proven warrants disciplinary action for conduct unbecoming but is insufficient to demonstrate that Strassle is unfit to meet his responsibilities as a teacher. The District has not proven conduct unbecoming or incapacity warranting Strassle's removal from his teaching position.

**The Motion to Dismiss:**

The gravamen of the four charges against Strassle involve allegations that Strassle gave money to a female student, N.C., over a period of time, that he then requested sexual favors in exchange for the money and that he engaged in inappropriate sexual contact with that student. The District presented four witnesses, including: (a) L.Q., a student in Strassle's photography class; (b) Michael Machen, a detective with the Old Bridge Police

Department; (c) Sally Fazio, Vice Principal of Old Bridge High School; and (d) David Cittadino, Superintendent of Schools. The District also admitted various exhibits into evidence.

These serious allegations against Strassle arise from a complaint made in September 2015 by a female student, N.C., who was in Strassle's photography class during the 2014-2015 school year. The underlying factual allegations in the tenure charges are based entirely on N.C.'s statements. Significantly, however, N.C. did not testify at the hearing. Further, none of the District's witnesses had any first hand knowledge of N.C.'s allegations against Strassle. Given this lack of competent, reliable evidence, Respondent moved to dismiss these charges at the close of the District's case-in-chief. After careful review of the record, this motion was granted on the record at the hearing held on August 24, 2016. As indicated, the District had the burden of proving the factual allegations in the tenure charges by a preponderance of the competent, relevant and credible evidence. It has not met this burden.

Although hearsay may be admissible in arbitration, hearsay evidence alone is insufficient to prove an allegation. This is especially true where, as here, a tenured teacher is subject to termination. "Respondent has a fundamental due process right to face his accusers at trial." *IMO Tenure Hearing of Richard Vencenti, State Operated School District of the City of Paterson,* DOE Dkt . No. 255-14, Opinion and Award at p. 17 (Arbitrator Howard C. Edelman, June 11, 2014). Although N.C.'s sworn statement to the police on September 30, 2015 was admitted as evidence of the investigation that was performed leading to these tenure charges, N.C.'s statement to the police was a hearsay statement that could not, and was not, admitted for the truth of the matter asserted therein. N.C. was not subject to any cross-examination when providing her statement, much less cross-examination by Respondent's counsel. Because N.C. did not testify at the hearing, N.C. could not be cross-examined to test the veracity of her claims. Respondent was unable to question N.C. about significant inconsistencies between her first sworn statement to the police made on September 28, 2015, in which she denied any sexual contact with Strassle, and her second sworn statement on September 30, 2015, in which she alleged that she engaged in a sexual act with Strassle. Further, Respondent was unable to question N.C. about possible bias, improper motivation or any other facts that might indicate that the allegations were

fabricated and should not be believed. Further, because N.C. did not testify at the hearing, I did not have any opportunity to assess her credibility.

In addition, there was no other competent, reliable evidence presented at the hearing that corroborated N.C.'s claims that are at the core of these tenure charges. No other witness had direct knowledge of any facts that would support N.C.'s allegations that Strassle gave her money, that he requested sexual favors in return or that there was sexual contact between the two.[2] Moreover, while the Old Bridge Police Department and the Institutional Abuse Section of the Department of Children and Families separately investigated N.C.'s allegations, no criminal or other charges (apart from these tenure charges) were filed against Strassle as a result of N.C.'s statements and the resulting investigations. Significantly, at the conclusion of the police investigation which included N.C.'s sworn statements, Detective Machen wrote that he "was advised by the Middlesex County Prosecutor's Office that no criminal charges were going to be pursued in the matter" and that "there was not sufficient probable cause to proceed." (District Exhibit 23.)[3]

These allegations, if proven, would have established conduct unbecoming and just cause for dismissal. Due process, however, requires that the District prove these serious charges by a preponderance of the evidence before a 12-year tenured teacher, with no evidence of prior discipline, is dismissed for the reasons set forth. To uphold these charges in the total absence of competent and reliable evidence to support them would result in the type of miscarriage of justice that these tenure proceedings are intended to prevent. Accordingly, all of the charges relating to allegations that Strassle gave N.C. money, that he requested sexual favors in return or had any inappropriate physical contact, including sexual contact, with N.C. were properly dismissed at the conclusion of the District's case-in-chief.

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[2] In fact, there are inconsistencies not only between N.C.'s statements to the police, but also between her description of a conversation with Strassle in the dark room (discussed below) and the testimony of two other students who were present for that conversation.

[3] There was no evidence presented at the hearing with respect to the conclusions reached by the Institutional Abuse Section of the Department of Children and Families, including whether the investigation resulted in any factual findings as to N.C.'s allegations. Nor is there any evidence in this record that any action was taken against Strassle as a result of this investigation.

**The Remaining Charges:**

While a substantial portion of the tenure charges were dismissed for the reasons set forth above, allegations regarding a conversation with several female students in Strassle's photography class were not dismissed at the conclusion of the District's case-in-chief. Specifically, Tenure Charge No. 1 alleged, in part, as follows:

> b. During January 2015, Strassle had a discussion with several female students in his charge in his period 5/6 photography class, including [L.G., K.H., A.A., M.S.A., and N.C.] in a darkroom/office adjacent connected to (sic) his classroom at Old Bridge High School. (citations to the Statement of Evidence omitted.)
>
> c. During the course of that conversation, Strassle discussed prostitution with the female students, and asked them if any of them would have sex for money. (citations to the Statement of Evidence omitted.)

The charges allege that by such conversation (along with the conduct that was dismissed), Strassle violated the provisions of "Board Policies and Regulations, Employee Handbook, and any standard of conduct that a diligent professional would undertake or condone" and that he engaged in conduct unbecoming warranting his dismissal. (Joint Exhibit 1.)

Two students who were present when this conversation occurred testified at the hearing. L.Q. testified for the District. She was in Strassle's photography class in the 2014-2015 school year. She explained that the class was taught in the classroom, with a separate dark room used to develop film. L.Q. recalled a conversation in the dark room during that school year. There were approximately 16 or 17 students in the dark room when the conversation took place, although the conversation involved only five female students, including L.Q., K.H., M.S., A.A. and N.C. It occurred in the middle of the class period. L.Q. could not recall who started the conversation, but testified that one of the students commented that the fastest way to make money is to become a stripper; in her statement to the police, however, L.Q. indicated that the topic was prostitution, not being a stripper. (Respondent Exhibit 4.) According to L.Q. most of the students in the conversation said that they would not "do that," i.e., engage in prostitution or work as a stripper. Although she could not recollect Strassle's exact words, L.Q. testified that Strassle, who was present at the time the conversation took place, asked if they would do anything for money, "like

[with] someone around his age". (Tr. I at 62.)[4] According to L.Q., the girls responded "like umm, not really." (Tr. I at 35.) L.Q. testified that she did not have a reaction, other than to say she would not do anything. According to L.Q., when the class ended, her friends left the dark room together, including N.C. who went to her English class.[5] L.Q. and her friends did not discuss the conversation again. The conversation ended, "and that was it." (Tr. I at 53.) When asked whether, beyond the conversation described above, Strassle had ever discussed anything of a sexual nature with students in a class that she witnessed, L.Q. testified "no." (Tr. I at 37.) L.Q. testified that even after this conversation, she continued to visit Strassle's classroom with N.C. and sometimes others on several occasions "to hang out", stating that "at that point Mr. Strassle, he was all right to hang out with. He was a cool teacher." (Tr. I at 49 -51.)

A second student, K.H., testified on Respondent's behalf. She was in the same photography class as L.Q. and N.C. during the 2014-2015 school year. K.H. did not have a specific recollection of the conversation that L.Q. testified about as summarized above. She recalled telling the police that:

> We have had times when all the girls in the photography room have been like that's it, I give up, I'm going to be a hooker, I'm going to be a stripper, that's it. And jokingly Mr. Strassle will be like ha-ha, give me a call then, and we would be just like chill and that was it. Because it was always jokes. (Tr. II at 19.)

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[4] On direct examination, L.Q. elaborated on her initial statement, indicating that Strassle had asked if they would "sleep with" anyone for money. (Tr. I at 36.) On cross-examination, however, L.Q. testified that she did not recall Strassle's exact words and had no specific recollection that he actually used the words "sleep with." (Tr. I at 62.) In her statement to the police, L.Q. stated that the topic of prostitution came up and Strassle asked the group "if we ever did prostitution and how much we would offer to do it." (Tr. I at 64.)

[5] In her statement to the police, N.C. indicated that in this conversation, in front of her friends, she said she would become a prostitute and that Strassle asked if she would do it with somebody like me. She "laughed and shrugged it off." She also claimed that after class, she stayed behind and Strassle asked if she was serious and how much she would charge him to have sex and that she responded $100. This statement is inconsistent with L.Q.'s testimony both as to what was said in front of all the students and whether N.C. stayed behind for a separate conversation with Strassle. Once again, N.C. was not called to testify and could not be cross-examined to address these additional inconsistencies.

K.H. told the police, and testified at the hearing, that the conversation with Strassle in the dark room was not serious. It was a joking conversation.[6] She felt comfortable going to speak to Strassle about her problems, and stated "Strassle would never hurt a fly. He is one of the kindest people I've ever met..." (Tr. II at 20.)

Strassle did not testify at the hearing. He did not deny that this conversation took place or otherwise dispute the substance of the conversation in the dark room with these students in the 2014-2015 school year. Based on the testimony of both L.Q. and K.H., therefore, it is clear that some conversation took place in the dark room where this group of female students made comments regarding prostitution and/or becoming a stripper as a way to earn money and that Strassle then joined in the conversation. He did not seek to end the conversation as inappropriate for the classroom, but rather participated in the conversation asking in some manner whether any of the girls would do "it" for money. Both witnesses testified that the conversation did not have a significant impact on them, with K.H. saying that Strassle was joking around and L.Q. stating at the hearing that she did not have any reaction to his comments and in her statement to the police that it was not serious. These two students did not speak about the conversation again with their friends or with Strassle. Significantly, their testimony overall indicated that they did not feel uncomfortable with Strassle, even after this conversation in the dark room. Moreover, the evidence does not support that this conversation was part of a pattern of inappropriate comments of a sexual nature with his students. To the contrary, L.Q. expressly testified that she had not witnessed Strassle making any other comments of a sexual nature. (Tr. I at 37.)

Nonetheless, inserting himself in a conversation with female high school students about becoming prostitutes or strippers, and asking whether they would do anything for money, even if intended as a joke, was improper for a teacher. It was entirely unrelated to the curriculum for the class. As Cittadino testified, "stripping has very little to do with photography and the curriculum that is supposed to be imposed." (Tr. 1 at 181.) Further, Strassle could not know how any student would react to his comments – whether they would think he was joking or was serious about the question or whether such comment could have other detrimental consequences. As a tenured teacher Strassle should have

[6] In L.Q.'s statement to the police, she also stated that "it wasn't serious" when describing what was said in the conversation. (Respondent Exhibit 4.)

known that joining a conversation with female students about the students' willingness to engage in prostitution or stripping was inappropriate without a specific rule expressly addressing such conduct. As the District argued, "a finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based primarily on a violation of an implicit standard of good behavior. *Emmons, supra,* 63 N.J. Super., at 140; *Newark v. Massey*, 93 N.J. Super. 317, 323 (App. Div. 1967)." (Closing Memorandum at p. 2.)

Strassle's comments, however, did violate certain District policies.[7] While most of the policies and regulations identified in the tenure charges and in Cittadino's testimony were relevant to the more egregious allegations that have been dismissed (see above) and not to the limited factual allegation that was proven, Strassle's decision to engage in this conversation in the dark room with female students violated the following:

- Board Policy 3281, Inappropriate Staff Conduct, stating, in pertinent part, that:

  School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils... A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils." (District Exhibit 12.)

- Employee Handbook:

  Section 11.1: Personal Conduct
  The Board expects that all of its employees will conduct themselves with the pride and respect associated with their positions, their fellow employees, students, parents and everyone else associated with the Board in one form or another. Employees should always use good judgment and discretion in carrying out the Board's business.

  Employees of the Board should always use the highest standards of ethical conduct. (District Exhibit 3.)

  Section 12.1 Class 1 Violations:
  Conduct unbecoming a professional.

In conclusion, based on the testimony of the two student witnesses, and absent any testimony from Strassle disputing his participation in the conversation with these female

[7] Respondent did not dispute that he was provided with copies of the applicable District policies.

students in the dark room, I find that the District has proven the allegations that Strassle engaged in an inappropriate conversation with the students during the 2014-2015 school year and that by such action, Strassle violated Board policies and engaged in conduct unbecoming a tenured teacher.

**Penalty:**

The District seeks Strassle's termination from employment. Whether termination is appropriate must be decided on the facts and circumstances of each case. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record, the effect of such conduct on the maintenance of discipline among students and staff, and the likelihood of such behavior recurring. *In re Fulcomer,* 93 N.J. Super. 404 (App. Div. 1967). Having considered all of the evidence in this case, and all of the arguments presented and cases cited, dismissal is not warranted in this case.

It is significant that the more serious allegations of misconduct were not proven and were dismissed. All that remained in the case was the allegation that Strassle engaged in an inappropriate conversation with female students on one occasion. While it is true, as the District argued, that termination of a tenured teacher has been found to be appropriate based on a single incident if sufficiently egregious,[8] the conduct proven in this case does not rise to the level of such egregious misconduct to warrant discharge. The penalty must be proportionate to the misconduct proven; removal from his tenured teaching position is an unduly harsh penalty for the misconduct proven in this case. Indeed, as Respondent argued, termination would be inconsistent with the penalties imposed in other tenure cases where more serious misconduct was proven. In each of the cases that Respondent relied upon, the Commissioner or Arbitrator, considering the proven misconduct as well as mitigating factors, as applicable, reduced the penalty from termination to suspensions of varying lengths.[9]

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[8] See, *In re Fulcomer,* 93 N.J. Super. 404 (App. Div. 1967).

[9] *See e.g., IMO Tenure Hearing of Richard Vincenti, State Operated School District of the City of Paterson,* DOE Dkt. No. 255-14 (2014) (Teacher engaged in "abusive, angry, demeaning behavior on a number of occasions; penalty was forfeiture of 120 days of pay withheld plus suspension of additional one-half school year without pay); *IMO Tenure Hearing of Edith Craft, School District of*

I am not persuaded that the actions proven in this case render Strassle unfit to continue to teach. The evidence does not demonstrate that returning Strassle to his position would cause any harm or otherwise have an "injurious effect" on the "maintenance of discipline and the proper administration of the school system." *In re Fulcomer,* 93 N.J. Super. 404, 422 (App. Div. 1967). The proven charge involves an isolated instance of an inappropriate conversation with female students; there is no evidence of any pattern of inappropriate conduct. Based on the testimony of the two students who testified, his comments during the conversation did not make them uncomfortable being in his class or in his presence or otherwise adversely impact his ability to teach and to maintain discipline in his classroom. Nor is there evidence that Strassle, a 12-year employee in the District, had any prior disciplinary action taken against him. Taking into consideration all of these factors, Strassle shall be returned forthwith to his position as a tenured teacher in the District.

Nonetheless, the misconduct proven in this case demonstrated a serious lapse in judgment for which substantial discipline is warranted to assure that Respondent

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*the Twp. Of Franklin, Somerset County,* Comm. Of Ed. Dec. No. 366-11 (2011) (Teacher slapped handicapped student across his face with an open hand; penalty was forfeiture of 120 days of pay withheld plus four additional months suspension without pay and loss of adjustment increase for one year); *IMO Tenure Hearing of Adam Mierzwa, School District of the Twp. Of Franklin, Somerset County,* Comm. Of Ed. Dec. No. 283-08 (2008) (Teacher failed to control his temper and displayed poor judgment, allowing feelings of frustration and anger to overwhelm professional judgment on two occasions; penalty was forfeiture of 120 days of pay withheld plus additional four months suspension without pay); *IMO Tenure Hearing of Adelphia Poston, School District of the City of Orange Twp. Essex County,* Comm. Of Ed. Dec. No. 362-06 (2006) (Board proved use of expletive words in classroom on one occasion; penalty was forfeiture of 120 days of salary withheld); *IMO Tenure Hearing of Barbara Emri, School District of the Twp. Of Evesham, Burlington County,* Comm. Of Ed. Dec. No. 371-02 (2002) (District proved a pattern of inappropriate conduct towards students, as well as racially inappropriate remarks; penalty was forfeiture of 120 days of pay withheld plus six additional months suspension without pay and a permanent reduction of one step on salary guide); *IMO Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute, Passaic County,* Comm. Of Ed. Dec. No. 259-01 (2001) (Teacher failed to supervise students resulting in students viewing sexually explicit videotape; penalty was 30 days loss of pay); *IMO Tenure Hearing of George Mamunes, Pascack Valley Regional High School District, Bergen County,* Comm. Of Ed. Dec. No. 208-00 (2000) (Teacher uttered racist, sexist and/or derogatory comments to students on several occasions; penalty was forfeiture of 120 days of pay withheld plus additional two months salary and one year withholding of merit increment); *IMO Tenure Hearing of Henry Allegretti, School District of the City of Trenton, Mercer County,* Comm. of Ed. Dec. No. 96-00 (2000) (Teacher engaged in inappropriate discussions/comments/conduct of a sexual nature with students on several occasions; teacher reinstated subject to finding of fitness with loss of salary for six months plus withholding of salary increments for two school years).

understands the seriousness of his error in judgment and to impress upon him that such conduct must not be repeated. Considering the entire record before me, I find that a forfeiture of the 120 days of pay already withheld pursuant to TEACHNJ following certification of the tenure charges is the appropriate penalty for the misconduct proven in this case.

By reason of the foregoing, I issue the following:

**AWARD**

a) The allegations in Charge One, paragraphs (b) and (c) have been proven, with such conduct constituting conduct unbecoming and providing just cause for discipline.

b) All other charges in the tenure charges are dismissed with prejudice for the reasons set forth on the record on August 24, 2016 and in this Opinion and Award.

c) Thomas Strassle shall be reinstated to his position as a tenured teacher in the District. The penalty for the proven allegations as set forth in paragraph (a) above shall be reduced from termination to a forfeiture of the 120 days of pay already withheld following the certification of the tenure charges. Therefore, there shall be no back pay awarded in connection with this 120 days loss of pay.

Dated: October 5, 2016

Melissa H. Biren, Arbitrator

State of New Jersey)

County of Essex )

On this 5th day of October 2016 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree, Notary Public

ROBERT D AGREE
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018

OAL DKT. NO. EDU 18226-15
AGENCY DKT. NO. 320-10/15

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| ANITRA MARTIN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

Upon review, it is noted that the settlement makes reference to petitioner's resignation to occur on June 30, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/16

Date of Mailing: 10/14/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 18226-15
AGENCY DKT. NO. 320-10/15

**ANITRA MARTIN,**
Petitioner,
v.
**CITY OF JERSEY CITY BOARD OF EDUCATION,**
**HUDSON COUNTY,**
Respondent.

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**Philip Feintuch,** Esq. for petitioners (Feintuch, Porwich and Feintuch, attorneys)

**Cherie L. Adams**, Esq. for respondent (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: August 26, 2016 Decided: September 1, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 12, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

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

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

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

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

September 1, 2016
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: 9-6-16

Mailed to Parties: SEP 6 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

2016 AUG 31 A 11:47

**ADAMS GUTIERREZ & LATTIBOUDERE, LLC**
The Legal Center
1037 Raymond Blvd, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
Jersey City Public Schools

| | |
|---|---|
| ANITRA MARTIN<br><br>Petitioner,<br><br>vs.<br><br>JERSEY CITY PUBLIC SCHOOLS<br><br>Respondent. | BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION<br><br>AGENCY REF. NO.: 320-10/15<br>OAL DOCKET NO.: EDU 18226-2015 N<br><br>**STIPULATION OF SETTLEMENT** |

The Jersey City Public Schools (the "District"), who principal office is located at 346 Claremont Street, Jersey City, New Jersey 07305, and its successors, assignees, officers, employees, agents and representatives (collectively, "District"), and Anitra Martin ("Petitioner"), residing at 217 B Bradford Avenue, Cedar Grove, New Jersey 07009, have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Petitioner is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the Parties intend to adopt, by way of compromise and accord, an amicable resolution of the Petition of Appeal; and

**NOW THEREFORE**, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties mutually agree as follows:

1. Concurrent with the execution of this Stipulation, Petitioner shall submit an irrevocable letter of resignation to the District, which shall provide for her resignation from the District, effective June 30, 2016 ("Effective Date"). (See Exhibit A to the Stipulation, a copy of Petitioner's signed letter of resignation).
2. Petitioner shall continue to earn her regular salary of in regular payroll installments through June 30, 2016.
3. As of the Effective Date, all of Petitioner's rights of employment with the District, including but not limited to accrued salary, benefits, tenure, and seniority, will cease.
4. Petitioner will not apply for reemployment with the District at any time. Specifically, Petitioner will be considered to have permanently resigned from her tenured position as a result of this Stipulation of Settlement. If Petitioner does apply for reemployment with the District and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Petitioner's employment.
5. Petitioner's health benefits shall cease effective July 1, 2016. Should Petitioner wish to continue health benefits, she may do so through COBRA at her own expense.
6. This Stipulation is based upon the understanding that Petitioner's separation from employment with the District, effective June 30, 2016, will be deemed a voluntary resignation. Upon inquiry from any third party to authorized employees or representatives of the District, those employees or representatives will provide no information other than to confirm Petitioner's position, salary and dates of employment.

7. Upon final approval of the signed Stipulation of Settlement by the Judge, the Petitioner shall and hereby does withdraw the instant Petition of Appeal. The District agrees that it will not pursue Tenure Charges against Petitioner as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to file and consider for certification, tenure charges against Petitioner, and Petitioner reserves the right to defend same.

8. In exchange for the consideration set forth in paragraph 2 above, the sufficiency of which is hereby acknowledged, Petitioner hereby waives, releases and discharges any and all claims or rights that she has or may have against the District and its members, the Jersey City Public Schools, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Petitioner's employment with the District or separation from employment with the District. It specifically includes, without limitation, all claims which Petitioner may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with

Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Petitioner also agrees to withdraw any and all pending complaints or actions that have been filed against the District or any of its employees or representatives.

9. Notwithstanding the above, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Petitioner agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Petitioner of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Petitioner acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Petitioner understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven (7) day period.

11. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Petitioner is expressly forbidden from discussing this Stipulation with any person,

other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Petitioner agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Petitioner specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Petitioner understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the District receives an OPRA request, for which this Stipulation would be responsive, the Petitioner understands that the District is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

12. This agreement shall not constitute a precedent in any matters involving other District employees.

13. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

14. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

15. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

16. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

17. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

18. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

19. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

20. The parties agree that the terms of the settlement agreement are subject to approval by the Board of Education of the Jersey City Public Schools.

21. Additionally, this Stipulation is subject to final approval by the Judge pursuant to N.J.A.C. 1:1-19.1, and will become effective only upon approval by the Judge. Counsel for the Parties shall jointly request the Judge's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Petition of Appeal.

Dated: 8/17/16

ANITRA MARTIN

Dated: 8/26/16

JERSEY CITY PUBLIC SCHOOLS

By:

## CERTIFICATION

I, Anitra Martin, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 8/12/16

ANITRA MARTIN

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF CORISSA DEVENEY, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE CITY OF | : | DECISION |
| BAYONNE, HUDSON COUNTY. | : | |

## SYNOPSIS

Petitioning Board filed tenure charges of conduct unbecoming and excessive absenteeism against respondent, a tenured secretary, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner and dismissed the respondent from her tenured position in petitioner's school district.

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

October 14, 2016

AGENCY DKT NO. 228-8/16

| | | |
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| IN THE MATTER OF THE TENURE | : | |
| HEARING OF CORISSA DEVENEY, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE CITY OF | : | DECISION |
| BAYONNE, HUDSON COUNTY. | : | |

For the Petitioner, Robert J. Merryman, Esq.
No appearance by or on behalf of Respondent, Corissa Deveney

This matter was opened before the Commissioner of Education on August 29, 2016, through tenure charges of conduct unbecoming and excessive absenteeism certified by Patricia McGeehan, Superintendent of the School District of the City of Bayonne, together with supporting evidence against Corissa Deveney, a tenured secretary in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via regular and certified mail, sent on or about August 25, 2016.

On August 30, 2016, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner*," and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail copy that was sent to the respondent was returned as unclaimed. The copy sent to the respondent via regular mail was not returned. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent is a 10-month tenured secretary employed by the District, and that her attendance has been an issue since the 2012-2013 school year. During the 2015-2016 school year, the respondent worked only 10 days between September 1, 2015 and September 28, 2015. The respondent went out on leave under the Family and Medical Leave Act (FMLA) on October 1, 2015; this leave was originally intended to conclude on November 23, 2015, but was extended several times until April 1, 2016. Throughout her FMLA leave, the respondent failed to report back to work as scheduled and failed to call in to report her absences despite numerous written and verbal requests for updated medical information. Finally, since the respondent's most recent medical authorization expired on April 1, 2016, the respondent has not returned to work and all of the District's requests for further information have gone unanswered.

Deeming the allegations to be admitted – and noting that respondent has failed to respond to the charges certified against her – the Commissioner finds that petitioner's charges of excessive absenteeism and conduct unbecoming a staff member have been proven, and that they warrant respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/16
Date of Mailing: 10/14/16

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

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| CLARA BRITO HERRERA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST NEW YORK, HUDSON COUNTY AND MONICA M. TONE, INTERIM EXECUTIVE COUNTY SUPERINTENDENT FOR HUDSON COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

Petitioner – formerly employed by the respondent school district under tenure as an Assistant Superintendent – asserted that her tenure rights were violated when her employment contract as Superintendent of the district was not approved by the Interim Executive County Superintendent (ECS) because the salary therein was in excess of the established "maximum salary amount" of $177,500 for the position of superintendent in the West New York school district. Petitioner's salary in her former tenured position as Assistant Superintendent had been $190,587, and the employment contract as superintendent included the same salary. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue herein, and the matter is ripe for summary decision; the regulations governing employment contracts for superintendents, *N.J.A.C.* 6A:23A-3.1(a)(1), state that the ECS shall review and approve a superintendent's new employment contract, including contracts that replace expired contracts for existing tenured and non-tenured employees; pursuant to *N.J.A.C.* 6A:23A-3.1(e)(2), no contract for a superintendent shall include an annual salary in excess of the maximum salary amount plus additional district salary increments and/or a high school salary increment, if applicable; petitioner's argument that the reduction of her salary to the maximum allowed superintendent salary in the West New York School District violated the tenure rights that she had accrued as an Assistant Superintendent is without merit, as the Board did not reduce her compensation as an Assistant Superintendent; rather, petitioner's compensation was reduced because she took the job as Superintendent, the salary for which is governed by standards that include the maximum salary cap; petitioner's tenure rights accrued as Assistant Superintendent remain intact, but do not extend to her position as Superintendent; if petitioner were to return to the position of Assistant Superintendent, she would be entitled to all tenure rights attendant to that position. The ALJ concluded that there was no violation of petitioner's tenure rights and, accordingly, granted the respondents' motion for summary decision.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter for the reasons set forth therein. The petition was dismissed.

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

Issued 10/14/16

OAL DKT. NO. EDU 18014-15
AGENCY DKT. NO. 296-9/15

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|---|---|---|
| CLARA BRITO HERRERA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST NEW YORK, HUDSON COUNTY AND MONICA M. TONE, INTERIM EXECUTIVE COUNTY SUPERINTENDENT FOR HUDSON COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

This dispute concerns whether petitioner's tenure rights as an Assistant Superintendent were violated when she accepted a position as the Superintendent of Schools, with a salary subject to a cap under the Fiscal Accountability regulations, *N.J.A.C.* 6A:23A, which was lower than petitioner's salary in her tenured position. The Administrative Law Judge (ALJ) determined that petitioner's tenure rights were not violated as the regulatory salary cap for superintendents did not affect petitioner's tenure as Assistant Superintendent.

The record of this matter, along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Additionally, petitioner's exceptions and respondents' replies thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. While reflecting her obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner's exceptions are unpersuasive, and substantially recast and reiterate the arguments made below. Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's determinations.

Petitioner takes exception to the ALJ's decision that petitioner's tenure rights were not violated when her compensation as Superintendent was "reduced" to $177,500 in accordance with the regulatory salary cap. Petitioner argues that she is entitled to her Assistant Superintendent salary of $190,587 in her new position, and that respondents violated her tenure rights under *N.J.S.A.* 18A:6-10 and 28-5 by approving an employment contract with a lower salary. The ALJ concluded that *N.J.A.C.* 6A:23A-3.1(e)(2) does not affect petitioner's tenure as Assistant Superintendent, and the regulation is consistent with the Legislature's intent to curb excessive superintendent salaries. Petitioner contends that the ALJ erred in his conclusion because: his reliance on *N.J.S.A.* 18A:28-5(c) was misplaced; he erroneously interpreted *N.J.S.A.* 18A:17-20.4; and he failed to consider the last sentence of *N.J.A.C.* 6A:23A-3.1(e)(2). The Commissioner disagrees.

As a preliminary matter, the ALJ is correct in determining that tenure rights accrued in one supervisory or administrative position are not transferable to another, and therefore, petitioner cannot assert her tenure rights as Assistant Superintendent in her current position as Superintendent. *See N.J.S.A.* 18A:28-5(c). Petitioner argues that *N.J.S.A.* 18A:28-5(c) typically arises in the context of a reduction in force, and is intended to prevent tenured employees from asserting claim to another position in which they have not served. The context in which transferability of tenure has been addressed in other cases does not negate the plain language of *N.J.S.A.* 18A:28-5(c) ("tenure in any of the administrative or supervisory positions enumerated herein . . . shall not extend to any other administrative or supervisory position") or its applicability to this matter. By attempting to transfer her tenure rights to her non-tenurable Superintendent position, petitioner seeks to extend her accrued tenure from one position to another in direct contravention of *N.J.S.A.* 18A:28-5(c).

The Superintendent position is separate and apart from petitioner's previous position of Assistant Superintendent, and she does not have tenure as Superintendent.[1] When lifetime tenure for superintendents was abolished, those who had accrued tenure in the position prior to the effective date of the amendments were protected through inclusion of *N.J.S.A.* 18A:17-20.4, which provides in pertinent part: "[n]othing in this section or in this act shall affect any tenure rights which shall have already accrued to any superintendent prior to the effective date. . . ." Consequently, superintendents such as Raymond J. Brosel, Jr., and Dr. Thomas N. Turner[2] – who had accrued tenure rights prior to August 24, 1991[3] – were grandfathered; anyone hired after that time, such as petitioner in this matter, no longer accrued tenure in the superintendent position. Therefore, petitioner – who does not have tenure in the non-tenurable Superintendent position – cannot impose her tenure rights from her service as Assistant Superintendent.

*N.J.S.A.* 18A:17-20.4 also provides that "[a] superintendent of schools promoted from within a district shall retain all tenure rights in any position which was previously held by the superintendent in the district." Petitioner has misapplied this provision to argue that all her rights as a tenured Assistant Superintendent, including the salary commensurate with the position, will follow her to the Superintendent's position, and her compensation cannot be reduced to comply with the regulatory salary cap of *N.J.A.C.* 6A:23A-3.1(e)(2). The purpose of *N.J.S.A.* 18A:17-20.4 is to ensure that a tenured district employee *retains* or maintains her rights to the position in which she has accrued tenure once she is appointed as superintendent, since

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[1] Pursuant to *N.J.S.A.* 18A:17-20 *et seq.*, as amended on August 24, 1991, superintendents no longer acquire tenure in the position. Petitioner was appointed as Superintendent, effective July 1, 2015.

[2] Petitioner used Brosel and Turner as examples of superintendents with lifetime tenure whose salaries were not capped pursuant to *N.J.A.C.* 6A:23A-3.1(e)(2).

[3] Brosel was appointed as superintendent as 1986 and Turner became superintendent in his present district in 1987.

lifetime tenure can no longer be accrued as a superintendent. In other words, if petitioner returned to her position as Assistant Superintendent in the District, she would receive the benefits of accrued tenure in that position. Petitioner, however, has conflated retention of tenure rights in a particular position with transfer or extension of said tenure rights to the Superintendent position, and seeks to *transfer* her right to the Assistant Superintendent salary to her compensation as Superintendent, where such right clearly does not exist. *See N.J.S.A.* 18A:28-5(c) and *N.J.A.C.* 6A:23A-3.1(e)(2). If we were to adopt petitioner's interpretation of "retain" and apply her reasoning that employees "retain all tenure rights" in the superintendent position, then it would mean that *all* rights – including an employee's lifetime tenure in another position – would carry over to their position as superintendent, which is illogical and inconsistent with *N.J.S.A.* 18A:17-20 *et seq.* This notion that *N.J.S.A.* 18A:28-5(c) does not apply in this matter and that a tenured district employee's rights in a particular position can be transferred to the superintendent position is also inconsistent with *N.J.A.C.* 6A:23A-3.1(e)(2), which specifically places a cap on superintendents' salaries, and would defeat the purpose of the Fiscal Accountability regulations if employees tenured in other positions were ultimately allowed to disregard the regulatory salary cap and extend their tenure rights.

Petitioner proffers that the final sentence of *N.J.A.C.* 6A:23A-3.1(e)(2) – "[t]his paragraph shall be construed consistent with any tenure rights acquired pursuant to *N.J.S.A.* 18A:6-10 *et seq.*" – means that her tenured Assistant Superintendent salary must be maintained even when she is employed as Superintendent. However, the last sentence applies to the compensation of tenured superintendents pursuant to *N.J.S.A.* 18A:17-20.4, which petitioner is not, and she simply cannot extend her tenure as Assistant Superintendent to the Superintendent position. *See N.J.S.A.* 18A:28-5(c) and *N.J.S.A.* 18A:17-20 *et seq.* In compliance with

*N.J.S.A.* 18A:17-20.4, *N.J.A.C.* 6A:23A-3.1(e)(2) protects the tenure rights of superintendents who have lifetime tenure in their position, such as Raymond J. Brosel, Jr. and Dr. Thomas N. Turner. The subject provision of *N.J.A.C.* 6A:23A-3.1(e)(2) is not intended to extend tenure rights accrued in other positions, nor can it be applied to contractual tenure. *See New Jersey Association of School Administrators v. Cerf*, 428 *N.J. Super.* 588 (App. Div. 2012) (upholding the cap on superintendent salaries pursuant to the Fiscal Accountability regulations); *Bacher v. Bd. of Educ. of the Twp. Of Mansfield*, Commissioner Decision No. 84-12, decided March 5, 2012, *aff'd*, Dkt. No. A-3743-11T2 (App. Div. 2013) (finding reduction of petitioner's salary to comply with the regulatory cap was proper and it did not violate petitioner's contractual tenure rights); *Seitz v. Bd. of Educ. of the Twp. of Parsippany-Troy Hills and Serafino*, Commissioner Decision No. 258-13, decided July 15, 2013 (affirming the ALJ's conclusion that the board's reduction of petitioner's salary in accordance with the Fiscal Accountability regulations was proper and the board was entitled to reimbursement from petitioner for the amount overpaid). Since petitioner is not a lifetime tenured superintendent she is not entitled to compensation exceeding the salary cap.

Application of the regulatory salary cap in this case does not violate petitioner's tenure rights as her salary was not reduced during her time as Assistant Superintendent and was appropriately reduced once she accepted the position as Superintendent. *See New Jersey Association of School Administrators v. Schundler*, 211 *N.J.* 535 (2012) (holding that the Legislature had the authority to modify terms and conditions for future contracts without violating tenure laws when it directed the Commissioner to issue regulations consistent with the enabling statutes and the Legislature's goal, and finding that tenure rights were not violated when sick leave was capped pursuant to the Fiscal Accountability regulations).

Petitioner also argues that the ALJ erred when he did not consider evidence of the two lifetime tenured superintendents, Brosel and Turner, whose salaries are higher than the cap. Petitioner maintains that this evidence demonstrates that the Executive County Superintendent (ECS) failed to properly construe the final sentence of *N.J.A.C.* 6A:23A-3.1(e)(2) in this matter. In reply, the respondents note that the two superintendents acquired lifetime tenure in their superintendent positions before tenure for superintendents was abolished, and therefore, petitioner's status as a tenured Assistant Superintendent is not analogous to the two superintendents' lifetime tenure rights in their position and has no bearing on the issue at hand. The Commissioner agrees. However, to the extent such evidence is to be considered, it only supports the narrow application of the last sentence of *N.J.A.C.* 6A:23A-3.1(e)(2), as discussed above. Petitioner does not have tenure as a superintendent, and therefore, the regulatory salary cap was properly applied to her without violating her tenure rights as an Assistant Superintendent.

Accordingly, the recommended decision of the OAL is adopted as a final decision in this matter for the reasons set forth therein, and the petition is dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/16

Date of Mailing: 10/17/16

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 18014-15
AGENCY DKT. NO. 296-9/15

**CLARA BRITO HERRERA,**

Petitioner,

v.

**BOARD EDUCATION OF THE TOWN OF WEST NEW YORK, AND MONICA M. TONE, INTERIM EXECUTIVE COUNTY SUPERINTENDENT FOR HUDSON COUNTY.**

Respondent.

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**Andrew Babiak**, Esq., for petitioner (Andrew Babiak, Attorneys at Law, attorneys)

**Jenna A. Rottenberg**, Esq., for respondent, Board of Education (Florio, Perrucci, Steinhardt & Fader, attorneys)

**Caroline Jones**, Deputy Attorney General for respondent Interim Executive County Superintendent, Monica M. Tone (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: July 18, 2016 Decided: August 30, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises out of the respondent Interim Executive County Superintendent (ECS) Monica Tone's (Tone) decision not to approve an employment contract for petitioner Clara Herrera (Herrera) in excess of $177,500, the "maximum salary amount" for a superintendent in respondent Board of Education of the Town of West New York's (the Board) school district. Before being appointed to Superintendent of Schools for the Board, Herrera had tenure as an Assistant Superintendent and earned a salary of $190,587.

On September 24, 2015, Herrera filed a Petition for Declaratory Relief seeking a new employment contract, retroactive to July 1, 2015, with an annual salary of $190,587. The Commissioner of Education (the Commissioner) converted the Petition to a Petition of Appeal and on November 10, 2015, transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A pre-hearing conference was held on December 29, 2015, at which time a schedule for the completion of discovery was established as well as a schedule for filing of dispositive motions. On or about June 29, 2016, the parties filed simultaneous motions for summary decision. On or about July 5, 2016, the parties filed a Joint Stipulation of Facts and on or about July 15, 2016, the parties filed their respective replies to the cross-motions for summary decision. Oral argument was scheduled for September 8, 2016, however the parties agreed that the matter should be decided on the papers and the record closed on July 18, 2016.

## FINDINGS OF FACT

The parties executed a Joint Stipulation of Facts on May 24, 2016, and May 26, 2016, respectively and as such the **FACTS** of this case are not in dispute. I **FIND** the following to be the **FACTS** of this case:

1. Since February 1, 1981, Petitioner, Clara Brito Herrera (hereinafter Petitioner), has been continuously employed by the Respondent, Board of Education of the Town of West New York (hereinafter referred to as the Board) as a teaching staff member.

2. For the period from February 1, 1981, through June 30, 1997, Petitioner worked for the Board as a Bilingual/ESL Teacher.

3. For the period from July 1, 1997, through June 30, 1999, Petitioner worked for the Board as a Gifted & Talented Teacher.

4. Beginning July 1, 1999, Petitioner was promoted by the Board and began employment as a Supervisor, and served as a Supervisor until June 30, 2002.

5. Beginning July 1, 2002, Petitioner was promoted by the Board and began employment as a Principal. Petitioner served as the Principal of P.S. #3 from July 1, 2002, through June 30, 2004.

6. From July 1, 2004, through June 30, 2006, Petitioner served as the Principal of P.S. #5.

7. For the period from July 1, 2006, through June 30, 2007, Petitioner worked for the Board as the Director of Elementary Education.

8. From July 1, 2007, through August 31, 2007, Petitioner served as the Principal of the Harry L. Bain Elementary School.

9. From September 1, 2007, through November 15, 2011, Petitioner served as the Principal of P.S. #1.

10. Beginning November 16, 2011, Petitioner was appointed by the Board and undertook the duties of Acting Assistant Superintendent. Petitioner served as the Acting Assistant Superintendent from November 16, 2011, through December 15, 2011.

11. Beginning December 16, 2011, Petitioner was promoted by the Board and began employment as Assistant Superintendent. Petitioner served as the Assistant Superintendent from December 16, 2011, through June 30, 2015.

12. Beginning July 1, 2015, Petitioner was appointed by the Board to the position of Superintendent of Schools.

13. Petitioner holds a standard Instructional Certificate and holds a standard Administrative Certificate with Supervisor, Principal, and School Administrator endorsements.

14. Petitioner holds lifetime tenure with the Board in the positions of Teacher, Supervisor, Principal, and Assistant Superintendent.

15. For the period from November 16, 2011, through June 30, 2012, Petitioner was paid an annual pro-rated salary of $185,000.

16. For the period from July 1, 2012, through June 30, 2013, Petitioner was paid an annual pro-rated salary of $188,700.

17. For the period from July 1, 2013, through June 30, 2014, Petitioner was paid an annual pro-rated salary of $188,700.

18. For the period from July 1, 2014, through June 30, 2015, Petitioner was paid an annual pro-rated salary of $190,587.

19. Since January 11, 2011, through the present, Respondent, Monica M. Tone, has served as the Interim Executive County Superintendent for Hudson County (hereinafter referred to as the ECS).

20. In June 2015, after receiving the proposed employment contract from the Board for the position of Superintendent of Schools, Petitioner spoke with the ECS. Petitioner questioned whether she could receive the salary she was receiving in her position of Assistant Superintendent. The ECS referred Petitioner to the Question and Answer document. The ECS told Petitioner that she would research the issue of her salary amount. The ECS subsequently followed up with Petitioner and informed Petitioner that the salary of a superintendent could not be higher than the maximum salary amount for a district of that enrollment size.

21. The Board's reported student enrollment for the 2013-2014 school year was 8,269 students and for the 2014-2015 school year the reported student enrollment was 8,372 students.

22. According to N.J.A.C. 6A:23A-1.2 and -3.1(e)(2), the "maximum salary amount" for a Superintendent of Schools in the Board's school district was $177,500, which amount includes a "high school salary increment" of $2,500.

23. By letter dated June 29, 2015, the ECS approved the Employment Contract.

24. On or about July 15, 2015, the Board approved the Employment Contract.

25. The Employment Contract grants Petitioner an annual salary of $177,500 and Petitioner has been paid that salary since her appointment as Superintendent of Schools.

## LEGAL ANALYSIS AND CONCLUSIONS

### A. Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b) a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

"When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . . ." N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not himself [or herself] to weigh the evidence." Id. at 540.

**B. Whether Herrera's reduction in compensation as a superintendent violated her tenure rights.**

No person under tenure in the New Jersey public school system can be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing" is conducted. N.J.S.A. 18A:6-10. Tenure in the public school system Jersey can be achieved by any staff member "in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses." N.J.S.A. 18A:28-5.

The regulations governing employment contracts for superintendents state that the ECS shall review and approve a superintendent's new employment contract, including contracts that replace expired contracts for existing tenured and non-tenured employees. N.J.A.C. 6A:23A-3.1(a)(1). "No contract for a superintendent . . . or person otherwise serving as superintendent . . . shall include an annual salary in excess of the maximum salary amount plus, if applicable, additional district salary increment(s) and/or a high school salary increment." N.J.A.C. 6A:23A-3.1(e)(2).

> The "'maximum salary amount" for superintendents means $125,000 for any district or districts with a total enrollment of 250 or less based on the enrollment figures in the Application for State School Aid (ASSA) filed by the district(s) on the prior October 15; $135,000 for any district or districts with a total enrollment of 750 or less but greater than 250 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; $145,000 for any district or districts with a total enrollment of 1,500 or less but greater than 750 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; $155,000 for any district or districts with a total enrollment of 3,000 or less but greater than 1,500 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; $165,000 for any district or districts with a total enrollment of 6,500 or less but greater than 3,000 based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15; and $175,000 for any district or districts with a total enrollment greater than 6,500 based on the enrollment figures in the ASSA filed by the district(s) on

> the prior October 15. The Commissioner, upon written application by the board(s) of education and on a case-by-case basis, may approve a waiver of the maximum salary amount for any district or districts with a total enrollment of 10,000 or more based on the enrollment figures in the ASSA filed by the district(s) on the prior October 15.
>
> [N.J.A.C. 6A:23A-1.2.]

"Judicial review of agency regulations begins with a presumption that the regulations are both valid and reasonable." New Jersey Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012); see New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dep't of Agric., 196 N.J. 366, 385 (2008). "As a result, the party challenging a regulation has the burden of proving that the agency's action was arbitrary, capricious or unreasonable." Schundler, 211 N.J. at 548.

> That inquiry focuses on three things: (1) whether the agency's action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Ibid.]

"Courts afford an agency great deference in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible." Id. at 549 (citing In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)). "To decide whether a particular agency action is authorized, a court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives." Ibid. "[A] court's obligation is to determine and give effect to the Legislature's intent" and the court "must invalidate a regulation that is inconsistent with the statute it purports to interpret." Ibid.

In July of 2006, "the Legislature adopted a concurrent resolution that declared 'this State's high property taxes are a matter of great concern to the people of New

Jersey." Schundler, 211 N.J. at 540 (citing Assemb. Con. Res. 3, 212th Leg. (2006), <http://www.njleg.state.nj.us/2006/bills/acr/3_I1.pdf>). "The resolution created four legislative committees on school funding, government consolidation and shared services, public employee benefits, and constitutional reform." Schundler, 211 N.J. at 540.

In its final report, the Committee on Government Consolidation and Shared Services found that "inflated salaries and lucrative benefits for superintendents, assistant superintendents, and business administrators have cost New Jersey taxpayers millions of dollars." Id. at 540-41.

The Committee proposed the addition of the position of ECS to provide enhanced oversight of local administrative spending. Ibid. The ECS has the authority to "approve or disapprove the hiring, compensation, and benefit plans of local school superintendents, among other things." Ibid. The Legislature adopted this recommendation in 2007. Id. at 542.

The Legislature required the new ECS's to "review and approve, according to standards adopted by the commissioner, all employment contracts for superintendents of schools, assistant superintendents of schools, and school business administrators in school districts within the county, prior to the execution of those contracts." Ibid. (quoting N.J.S.A. 18A:7-8(j)). The Commissioner of Education issued regulations on July 1, 2008, titled "Fiscal Accountability, Efficiency and Budgeting Procedures," N.J.A.C. 6A:23A, which "set standards that executive county superintendents must use in their review of new employment contracts for superintendents, assistant superintendents, and school business administrators." Ibid.

The Legislature can "modify the terms and conditions of public service by enacting new laws that reflect new policies—unless the State Constitution says otherwise." Schundler, 211 N.J. at 560; see Spina v. Consolidated Police and Firemen's Pension Fund Commission, 41 N.J. 391 (1964) (the general approach in our State is that the terms and conditions of public service in office or employment rest in

legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution provides otherwise); see also New Jersey Ass'n of Sch. Bus. Officials v. Davy, 409 N.J. Super. 467, 490 (App. Div. 2009) (our courts have long recognized that absent constitutional restriction, the Legislature may modify terms and conditions of public service).

Thus, the Legislature may provide "specific direction to the Commissioner to adopt regulations that would curtail abuses and cut administrative costs" and the new regulations may apply prospectively to future contracts. Schundler, 211 N.J. at 560. The Commissioner, under direction of the Legislature, may set future terms and conditions of public employment so long as they do not present constitutional concerns. Ibid. Additionally, "[t]enured assistant superintendents cannot claim a constitutionally protected property right under state law to future contract terms." Ibid.

The Legislature expressly authorized the Commissioner of Education to adopt standards by which an ECS will review and approve a superintendent's contract. N.J.S.A. 18A:7-8(j) (each ECS shall "review and approve, according to the standards adopted by the commissioner, all employment contracts for superintendents[.]"). When setting the standards for reviewing a superintendent's contract, the Commissioner added "a cap on maximum salary determined by the size of the district's enrollment." New Jersey Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 599 (App. Div. 2012). "In responding to comments objecting to the proposed caps and their impact on superintendents and quality education, the Commissioner explained that the caps were needed because of the districts' continued failure to control administrative costs" and explained that "the caps were sufficiently high to attract high quality and "talented candidates" because the range of possible salaries "was more than twice the average earned by an individual living in New Jersey, and higher than the median salary for superintendents in Pennsylvania, Delaware and New York." Id. at 599-600; see 43 N.J.R. 284(a). This cap on salary based on enrollment is "wholly consistent with and furthers the Legislature's goal of controlling excessive spending on administration to facilitate thorough and efficient public education." Cerf, supra, 428 N.J. Super. at 601.

"[T]he Legislature, not th[e] salary cap amendment, limited a board's authority to pay [superintendents] as much as it wishes . . . by mandating review and approval of 'all employment contracts for superintendents' for compliance with standards set by the Commissioner." Id. at 602 (quoting N.J.S.A. 18A:7-8(j)). "Thus, the question in this case involves the interplay of two or more statutes, which we must seek to harmonize under the assumption that the Legislature was aware of its actions and intended for the related laws to work together." Cerf, supra, 428 N.J. Super. at 602; see Schundler, supra, 211 N.J. at 555. "In Schundler, [supra,] the Court considered tenure laws and . . . the same statutory amendments implicated here, authorizing regulations that altered specified benefits for some tenured officials[,] . . . and concluded that those statutes and the implementing regulations could and should be read together, harmonized and given 'their intended effect.'" Cerf, supra, 428 N.J. Super. at 602-03 (quoting Schundler, supra, 211 N.J. at 540-42).

Here, Herrera claims that reducing her salary to the maximum salary amount for superintendents in West New York School District violated her tenure rights that she accrued as an Assistant Superintendent. Herrera argues that N.J.A.C. 6A:23A-3.1(e)(2), the regulation implementing the maximum salary cap, is in conflict with the tenure statutes, N.J.S.A. 18A:6-10, and N.J.S.A. 18A:28-5, prohibiting a reduction in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing" is conducted.

However, the Board did not reduce Herrera's compensation as an Assistant Superintendent. Instead, Herrera's compensation was reduced when she took the job as Superintendent. The salary of a superintendent is governed by the standards set by the Commissioner, which include the maximum salary cap.

The New Jersey Legislature authorized the Commissioner to adopt these standards under N.J.S.A. 18A:7-8(j). The Legislature's purpose was to reign in administrative spending and allow the Commissioner to adopt standards to curb the "inflated salaries and lucrative benefits for superintendents" that have cost New Jersey taxpayers millions of dollars. The Legislature also created Tone's position of ECS to

review and approve the employment contracts of superintendent's within her County according to the standards adopted by the Commissioner.

As in Schundler, supra, the tenure statutes and the regulation imposing the maximum salary cap for superintendents can be harmonized and given their intended effect. Herrera's tenure rights that she accrued as an Assistant Superintendent are not affected by N.J.A.C. 6A:23A-3.1(e)(2), which governs the maximum salary for superintendents. The Legislature limited the salary of superintendents when it mandated "review and approval of all employment contracts for superintendents for compliance with standards set by the Commissioner." Cerf, supra, 428 N.J. Super. at 602. Thus, N.J.A.C. 6A:23A-3.1(e)(2) is not in conflict with the tenure statutes and Herrera's tenure rights were not violated when her salary was reduced to $177,500, the maximum allowed for a superintendent in West New York School District under N.J.A.C. 6A:23A-3.1(e)(2).

Petitioner also claims that the regulation implementing a maximum salary cap for superintendents, N.J.A.C. 6A:23A-3.1(e)(2), is in conflict with N.J.S.A. 18A:17-20.4, which states: "[a] superintendent of schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district."

However, N.J.S.A. 18A:17-20.4 is not implicated here because the Board did not violate any of the tenure rights that Herrera accrued as an Assistant Superintendent. N.J.S.A. 18A:17-20.4. Tenure in administrative or supervisory positions accrues only by employment in that administrative or supervisory position and "[t]enure so accrued shall not extend to any other administrative or supervisory position." N.J.S.A. 18A:28-5. Thus, Herrera's tenure rights as Assistant Superintendent do not extend to her position as Superintendent. If she were to return to that position, should be entitled to all tenure rights attendant to that position.

For the foregoing reasons I **CONCLUDE** that Herrera's rights under the tenure statutes, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5, were not violated because N.J.A.C.

6A:23A-3.1(e)(2) does not affect Herrera's tenure rights as an Assistant Superintendent. Further, the regulation is consistent with the Legislature's intent to curb excessive superintendent salaries in New Jersey. Thus, the Board's Motion for Summary Decision should be granted.

## ORDER

It is hereby **ORDERED** that the motion for summary decision by Respondent Board of Education, and by Respondent Monica M. Tone is hereby **GRANTED**. It is further **ORDERED** that the motion for summary decision by Petitioner Herrera is hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

August 30, 2016
DATE

**LELAND S. McGEE**, ALJ

Date Received at Agency: August 30, 2016

Date Mailed to Parties: SEP 1 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

359-16

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| J.K., ON BEHALF OF MINOR CHILD, T.K., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed an appeal on March 16, 2016, seeking a determination that the respondent Board's decision to deny T.K.'s application for readmission to the Warren County Technical School violated regulations governing admission to county vocational school districts; additionally, petitioner sought an order directing that T.K. be readmitted to the district. By letter dated September 18, 2015, the respondent Board advised J.K. that T.K.'s application for readmission was denied. T.K. had been enrolled in the Warren County Technical School during the 2013-2014 and 2014-2015 school years, but was withdrawn in August 2015 by his aunt, who shared joint custody with petitioner J.K., T.K.'s mother. Subsequently, J.K. informed the school that she wanted T.K. reenrolled and objected to the withdrawal by his aunt. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; T.K.'s aunt was the custodial guardian and shared joint custody of her nephew with his mother, J.K.; the Board, in accepting the withdrawal of T.K. from his aunt, did not violate any duty to J.K.; T.K.'s application for readmission to the program was denied by respondent because it was submitted outside of the application window; the letter dated September 18, 2015, advising petitioner that T.K.'s application was denied, was the final decision of the respondent Board regarding the application of T.K.; the within petition was not filed until March 16, 2016; and the petitioner failed to timely file the petition pursuant to *N.J.A.C.* 6A:3-1.3(i). The ALJ concluded that the petition was late filed; accordingly, the ALJ granted the Board's motion for summary decision, and denied petitioner's cross motion.

Upon review, the Commissioner concurred with the ALJ's findings, and his conclusion that the petition was untimely. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

Issued 10/17/16

OAL DKT. NO. EDU 05099-16
AGENCY DKT. NO. 86-3/16

| | | |
|---|---|---|
| J.K., ON BEHALF OF MINOR CHILD, T.K., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision – to the extent that it dismisses the petition as untimely – is adopted as the final decision in this matter, for the reasons stated therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/16
Date of Mailing: 10/19/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 05099-16
AGENCY REF. NO. 86-3/16

**J.K. ON BEHALF OF MINOR CHILD T.K.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL, WARREN COUNTY,**
Respondent.

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**Laura A. Siclari**, Esq., for petitioner (McCusker, Anselmi Rosen, Carvelli, attorneys)

**Michael I. Goldman**, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: July 12, 2016 Decided: September 2, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks a determination: that Respondent's denial of petitioner's application for readmission to Warren County Technical School violated N.J.A.C.

6A:19-2.3(b); an order directing petitioner T.K. be readmitted to the Warren County Technical School; and, reimbursement of attorney's fees, expert fees and costs.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on April 5, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing order, dated April 22, 2016, was entered by the undersigned.

Respondent filed a motion for summary decision on July 7, 2016. Petitioner filed a cross-motion for summary decision on July 12, 2016.

## ISSUES

Did Respondent violate N.J.A.C. 6A:19-2.3(a) by denying T.K.s application for admission; did Respondent, in accepting the withdrawal of T.K. submitted by his aunt, Suzanne Eick, the custodial guardian, violate J.K.'s custodial rights; did Respondent discriminate against [Petitioner based upon their socio-economic status; and, is Petitioner's claim time barred.

## FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

T.K. was enrolled at the Warren County Technical School during the 2012-2014 and 2014-2015 academic years. These were T.K.'s freshman and sophomore years.

During the period T.K. was enrolled at the Warrant County Technical School he resided in Warren County with his aunt, Suzanne Eick. Ms. Eick shared custody of T.K. with J.K., T.K.'s mother. J.K. resides in Florida. Suzanne Eick is J.K.'s sister.

On August 4, 2015, Suzanne Eick withdrew T.K. from the Warren County Technical School, noting on the withdrawal form "going back to his mom in Florida."

J.K. telephoned the Warren County Technical School on August 8, 2015, to advise the school that T.K. would be returning to school. J.K. telephoned the school again on August 11, 2015, and spoke with Vice Principal John Mclecraine. J.K. advised Mr. Mclecraine that she had joint custody with Ms. Eick and that she objected to T.K. being withdrawn from the school by Ms. Eick.

Respondent advised J.K. that T.K. would have to re-apply for admission to the Warren County Technical School.

T.K. applied for admission to the Warren County Technical School thereafter.

T.K. also was enrolled at Phillipsburg High School during this period.

Jill Sember was awarded joint custody and made the custodial guardian of T.K. by Order of the Superior Court of New Jersey, Chancery Division, Ocean County. Ms. Sember resides in Warren County.

By letter dated September 18, 2015, the Warren County Technical School advised J.K. that T.K.'s application for admission had been denied. Prior to the letter J.K. was advised orally that T.K.'s application was denied.

Petitioner filed a Verified Petition of Appeal with the New Jersey Department of Education, Bureau of Controversies and disputes on March 16, 2016.

The Warren County Technical School is a County Vocational School pursuant to N.J.S.A. 6A:54-1 et seq.

I **FIND** the following additional **FACTS**:

The official application deadline for the 2015-2016 school year was January 15, 2015, with applications being accepted until January 29, 2015. T.K.'s application was submitted after this deadline.[1]

T.K.'s application was denied by Respondent as Respondent was not accepting additional students at the time of T.K.'s application and that the application was submitted outside the application window. Residency was not a basis for the denial of the application.

Respondent's application process provides for a rubric of seven categories for application.

Respondent's admission policy states in pertinent part, "No pupil shall be denied admission or participation in any vocational-technical educational program due to race, creed, religion, national origin, ancestry, age, marital status, sexual orientation, gender, social or economic status, or disability."

The record is devoid of any evidence of discrimination by Respondent against Petitioner, notwithstanding Petitioner's allegations to the contrary.

Respondent never advised Petitioner that it was reconsidering its decision to deny the application of T.K. Nothing contained in the correspondence or emails between counsel for Petitioner and Respondent indicate anything to the contrary.

The letter dated September 18, 2015, the Warren County Technical School to J.K. advising her that the application of T.K. was denied was the final decision of Respondent regarding the application of T.K.

[1] It is noted that T.K. could not have filed a timely application as he was not withdrawn from school until August 2015 by his aunt, Suzanne Eick.

## LEGAL ANALYSIS AND CONCLUSION

### Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

I **CONCLUDE** there are no genuine issues of material fact and the matter is ripe for summary decision.

### Custodial Rights

Petitioner asserts that Respondent violated the custodial rights of J.K. when it learned that J.K. did not agree with the unilateral withdrawal of T.K. by Suzanne Eick. Petitioner argues that Respondent should have done something more than it did. In support of their position, petitioner cite Pascale v. Pascale, 140 N.J. 583 (1995) (citing

Beck v. Beck, 86 N.J. 480 (1981)) and C. Madison v. W. Davis, 438 N.J. Super. 20 (Ch.Div. 2014).

The cases cited all discuss joint custody and decision-making authority among individuals that share custody of minor children. None of these cases hold that a Board of Education is responsible for enforcing custodial rights of a non-custodial parent.

The Superior Court, Chancery Division, Family Part is the venue where J.K. should have sought redress for any violation of custodial rights.

I **CONCLUDE** that Respondent did not owe a duty to J.K. regarding her custodial rights. Suzanne Eick was the custodial guardian and shared joint custody of T.K. Respondent, in accepting the withdrawal of T.K. from Ms. Eick, did not violate any duty owed to J.K.

**Violation of N.J.A.C. 6A:19-2.3(a)**

N.J.A.C. 6A:19-2.3(b) states:

> A county vocational school district shall admit resident students based on board-approved policies and procedures that ensure equity and access for enrollment that shall be posted on the school district's website. A county vocational school district shall similarly admit non-resident students to the extent that space is available, pursuant to N.J.S.A. 18A:54-20.1(b).

Petitioner's point to alleged inconsistencies in Respondent's responses as to why it denied the application of T.K. as the basis for the assertion that Respondent violated N.J.A.C. 6A:19-2.3(b). However, the record is clear as to why Respondent denied the application: they were not admitting more students and the application window was past.

N.J.A.C. 6A:19-2.3(a) provides that,

> Each resident district board of education shall ensure that resident students may apply to and, if accepted, attend a county vocational school pursuant to N.J.S.A. 18A:54-20.1. The existence of the same career and technical education program at the resident district board of education shall not negate a student's right to apply to and, if accepted, attend a county vocational school, subject to the following limitations[.]

Clearly, Respondent denied the application on existing policies and procedures.

I **CONCLUDE** that Respondent did not violated N.J.A.C. 6A:19-2.3(b).

**N.J.A.C. 6A:3-1.3(i)**

N.J.A.C. 6A:3-1.3(i) states,

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Petitioner asserts that the time frame of ninety days provided for in N.J.A.C. 6A:3-1.3(i) was met as they were attempting to settle the matter with Respondent. This claim fails. Nothing in the record remotely indicates that Respondent was ever reconsidering its decision to deny admission to T.K. Nothing contained in the letters and emails between counsel support this assertion. Petitioner claims that the letter, dated November 2, 2015, from Allan P. Dzwilewski, Esq., Respondent's counsel at the time, to petitioner's counsel, stating he was reviewing counsel's previous letter of October 27, 2015, somehow means that Respondent was reconsidering its position. This simply is not a fair reading of the letter. It says nothing of the sort. It is merely a perfunctory response by one attorney to a letter to a client from another attorney.

Petitioner, at the time of this letter, still had more than a month to file a verified petition with the Department of Education. Inexplicably, Petitioner did not file its verified petition until March 16, 2016, 180 days after the denial letter of September 1, 2015.

I **CONCLUDE** that Petitioner failed to timely file a verified petition in accordance with N.J.A.C. 6A:3-1.3(i) and therefore the same is time barred.

I further **CONCLUDE** that Petitioner's motion for summary decision be denied, and, that Respondent's motion for summary decision be granted.

## ORDER

It is hereby **ORDERED** that Petitioner's motion for summary decision is **DENIED**, and Petitioner's Verified Petition be **DISMISSED** with prejudice.

It is further **ORDERED** that Respondent's motion for summary decision be **GRANTED**.

This Initial Decision disposes of all issues in controversy in this matter.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

9/2/16
DATE

Thomas R. Betancourt
**THOMAS R. BETANCOURT**, ALJ

Date Received at Agency: 9-2-16

Date Mailed to Parties: 9-2-16

db

# APPENDIX

## List of Moving Papers and Pleadings

For Petitioner:

Verified Petition on Appeal dated March 15, 2016

Motion for Summary Decision and brief in support, dated July 8, 2016, and filed July 12, 2016

Certification of Laura A. Siclari, Esq. dated July 8, 2016, and filed July 12, 2016, with Exhibits A through V

Reply brief in support of Petitioner' motion for summary decision, and in opposition to Respondent's motion for summary decision dated August 3, 2016, and filed August 15, 2016

For Respondent:

Notice of Motion to Dismiss in Lieu of Answer dated April 4, 2016

Answer to Verified Petition of Appeal

Motion for Summary Decision and brief in support, dated July 7, 2016, and filed July 7, 2016

Certification of Michael I. Goldman, Esq., dated July 7, 2016, and filed July 7, 2016, with Exhibit

Reply brief in support of Respondent's motion for summary decision, and in opposition to Petitioner' motion for summary decision, dated July 28, 2016, and filed August 1, 2016

359-16

359-16L

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

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

KIMBERLEY HARRINGTON
*Acting Commissioner*

October 19, 2016

Stephen R. Fogarty, Esq.
Fogarty & Hara
21-00 Route 208 South
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Bruce Helies, Esq.
Wolff, Helies, Spaeth & Lucas
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Manasquan, New Jersey 08736

Kerri A. Wright, Esq.
Porzio Bromberg & Newman, PC
100 Southgate Parkway, P.O. Box 1997
Morristown, New Jersey 07962

Re: *Board of Education of the Upper Freehold Regional School District, Monmouth County v. Board of Education of the Township of Millstone, Monmouth County and Board of Education of the Red Bank Regional High School District, Monmouth County, OAL Dkt. No. EDU 6068-16, Agency Dkt. No. 108-4/16*

Dear Counsel:

I have reviewed the papers filed in connection with petitioner's request for interlocutory review of Administrative Law Judge (ALJ) Sarah Crowley's order issued September 29, 2016, denying petitioner's motion for summary decision. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10; rather, all issues will be reviewed at the end of the contested case.

Accordingly, petitioner's request is denied.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

KH/MKD/BON
cc: Sarah G. Crowley, Administrative Law Judge
Clerk, Office of Administrative Law

**VIA FACSIMILE AND REGULAR MAIL**

360-16L


CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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

KIMBERLEY HARRINGTON
*Acting Commissioner*


October 19, 2016

Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
One Riverfront Plaza, Suite 320
Newark, New Jersey 07102-5410

Stephen J. Edelstein, Esq.
Schwartz Simon Edelstein & Celso, LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey, 07981

Re: Newark Teachers Union and John Abeigon, President v. Larisa Shambaugh, Chief Talent Officer and State-Operated School District of the City of Newark, Essex County, Agency Docket No. 233-9/16

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondents' motion to dismiss the petition and petitioners' opposition thereto.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a), and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioners' request for declaratory ruling is declined and this matter – including the fully briefed motion to dismiss – shall be transmitted forthwith to the Office of Administrative Law. Should the motion to dismiss be denied, respondents should file their answer directly with the Administrative Law Judge assigned to this matter.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

361-16LM

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

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

KIMBERLEY HARRINGTON
*Acting Commissioner*

October 19, 2016

Anthony P. Sciarrillo, Esq.
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Stephen B. Hunter, Esq.
Detzky Hunter & DeFillippo, LLC
33 North Bridge Street
Somerville, New Jersey 08876

Re: *In the Matter of the Tenure Hearing of Keith Mason, School District of the Borough of New Providence, Union County. Agency Dkt. No. 239-9/16.*

Dear Counsel:

I have reviewed the materials filed in connection with respondent Keith Mason's Motion to Dismiss tenure charges filed by the New Providence School District (District). In his motion papers, the respondent contends that the Certificate of Determination filed by the District does not comply with *N.J.A.C.* 6A:3-5.2 because there is no reference to the date, place or time of the meeting at which the Board of Education purportedly made a determination on the charges; there was no indication that the determination was made by a majority of the Board; and it did not state whether the respondent was suspended and, if so, whether the suspension was with or without pay. Therefore, the respondent requests that the tenure charges filed against him be dismissed for failure to comply with regulatory requirements.

On the other hand, the District maintains that *N.J.A.C.* 6A:3-5.2 does not require that the District provide the respondent with the information he seeks. While *N.J.A.C.* 6A:3-5.2 mentions date, place, and time of the meeting at which the determination was made and whether the employee was suspended, the District argues that the regulatory provision does not mandate the inclusion of the information in the Certificate of Determination. In the alternative, even if it is determined that that there may have been technical deficiencies with the Certificate of Determination, the District argues that there will be no prejudice to the respondent if the matter proceeds.

Upon review and consideration of the submissions, I find that the tenure charges filed in this matter do not comply with *N.J.A.C.* 6A:3-5.2, which provides for the specific information that must be certified and shall be contained in the Certificate of Determination. Here, the Certificate of Determination filed by the District did not include several requirements that are expressly mandated in *N.J.A.C.* 6A:3-5.2. Notably, it was not certified that the determination on the charges was made by a majority vote of the Board of Education, nor was it stated whether the respondent was suspended. The applicable regulatory provision clearly outlines the information that must be included in a Certificate of Determination, and tenure charges that are not accompanied by a conforming Certificate of Determination will not proceed.

Accordingly, the Motion to Dismiss is hereby GRANTED, and the tenure charges are dismissed without prejudice.[1]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

**Via Regular Mail**

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

362-16

362-16L


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

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

KIMBERLEY HARRINGTON
*Acting Commissioner*


October 24, 2016

Keith Waldman, Esq.
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Mount Laurel, New Jersey 08054-3823

Frances L. Febres, Esq.
Cleary Giacobbe Alfieri Jacobs LLC
169 Ramapo Valley Road
Oakland, New Jersey 07436

Re: *East Brunswick Education Association v. Board of Education of the Township of East Brunswick, Middlesex County. Agency Docket No. 250-9/16.*

Dear Parties:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's answer to the petition. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined, and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

363-16

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE TEACHING CERTIFICATES | : | COMMISSIONER OF EDUCATION |
| OF SAMUEL MCDONOUGH, SCHOOL | : | DECISION |
| DISTRICT OF THE TOWNSHIP | : | |
| OF DELRAN, BURLINGTON COUNTY. | : | |

## SYNOPSIS

In October 2015, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning his position without giving the notice required by his contract with the Board. A hearing in the matter was scheduled for June 1, 2016 at the Office of Administrative Law (OAL). Subsequently, demands for admissions were sent to the respondent via certified and regular mail. No response was received; accordingly, those admissions were deemed admitted. Respondent then failed to appear at the OAL for the scheduled hearing on June 1, 2016. On June 2, 2016, correspondence was received at the OAL advising that the respondent could not attend the scheduled hearing because of a medical emergency with his mother. A telephone conference was then scheduled for August 17, 2016 and written notice was sent to all parties. Respondent failed once again to appear for the telephone conference, and offered no explanation, notwithstanding the opportunity to do provide same.

Upon review, the Commissioner found the respondent guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning his position without giving the 60-day notice required in his employment contract. Accordingly, the respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Issued 10/20/16

OAL DKT. NO. EDU 17633-15
AGENCY DKT. NO. 323-10/15

| | | |
|---|---|---|
| IN THE MATTER OF THE SUSPENSION | : | |
| OF THE CERTIFICATES OF | : | COMMISSIONER OF EDUCATION |
| SAMUEL MCDONOUGH, SCHOOL | : | DECISION |
| DISTRICT OF THE TOWNSHIP, | : | |
| OF DELRAN, BURLINGTON COUNTY. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Delran School District. This matter involves a determination as to whether respondent Samuel McDonough's certificates should be suspended pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with the Delran Board of Education. In the Initial Decision, the Administrative Law Judge (ALJ) found that since the respondent failed to respond to the District's request for admissions, the admissions demanded by the Board are deemed admitted. The respondent also failed to appear at the scheduled August 17, 2016 telephone conference; therefore, pursuant to *N.J.A.C.* 1:1-14.4, the ALJ returned the file to the Commissioner.[1] The respondent filed no explanation for his failure to appear, notwithstanding the opportunity to do so.

Upon a comprehensive review of this matter, the Commissioner finds that the respondent is guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 because he breached his employment agreement with the Board when he resigned without giving the 60 days'

[1] Despite the fact that the ALJ found that the admissions were deemed to be true, she did not make a determination as to whether the respondent's certificates should be suspended under *N.J.S.A.* 18A:26-10.

notice required by his contract. Based on the admissions, it is clear that the respondent did not provide the Board with requisite 60 days' notice required before resigning from his teaching position. The respondent entered into a contract with the Board which provided for his employment as a teacher from September 1, 2015 through October 2, 2015. The employment contract allowed the parties to terminate the agreement as long as they gave the other party 60 days' notice in writing. On August 22, 2015, the respondent informed the Board that he was terminating his contract because he had accepted another long-term substitute teaching position with another school district. The respondent has not denied that he failed to provide the Board with 60 days' notice prior to resigning, nor did he appear at the proceeding at the OAL.

Accordingly, respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/20/16

Date of Mailing: 10/20/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**FAILURE TO APPEAR**
OAL DKT. NO. EDU 17633-15
AGENCY DKT. NO. 323-10/15

**IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF SAMUEL MCDONOUGH, SCHOOL DISTRICT OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY.**

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**Adam S. Weiss**, Esq., for petitioner (Busch Law Group, LLC, attorneys)

**Samuel A. McDonough**, respondent, pro se

Record Closed: August 17, 2016 Decided: September 8, 2016

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 4, 2015, the Bureau of Controversies and Disputes, of the New Jersey Department of Education transmitted this matter to the Office of Administrative Law (OAL) for a hearing. The petitioning district had filed a petition seeking among other relief, a suspension of the teaching certificates of respondent, Samuel McDonough, pursuant to N.J.S.A. 18A:26-10 and N..A.C. 6A:9-17.9.

## FINDINGS OF FACT

I **FIND** the following uncontested **FACTS**:

1. On November 21, 2015, the Office of Administrative Law (OAL) sent a notice of hearing to the parties advising that the hearing in this matter would be held on June 1, 2016, at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, 7th Floor, Newark, NJ.
2. Subsequent thereto, demands of admissions were sent to respondent, via certified and regular mail. No response was received to the demands for admissions and pursuant to N.J.A.C. 1:1-10.49c) those admissions are deemed admitted. The certified return of service indicates that the post office attempted delivery on May 11, 2016, at 10:14 a.m., however the certified mail was not claimed. The regular mail copy was not returned.
3. The five day disclosures were sent to Mr. McDonough on May 24, 2016, including the hearing exhibits, and those items were also sent via certified and regular mail. No response was received as to the certified mail and there was no return of the regular mail.
4. Samuel McDonough did not appear at the OAL on June 1, 2016.
5. Samuel McDonough did not contact any representative of the OAL on June 1, 2016 nor prior to that date to advise he could not appear.
6. On June 2, 2016, correspondence dated May 31, 2016 was received at the OAL from Mr. McDonough indicating that he could not attend the June 1, 2016 hearing due to a medical emergency with his mother.
7. A telephone conference was then scheduled for August 17, 2016, at 3:00 pm, and the written notice to all parties included the following:

> Parties appearing without an attorney should contact this office immediately at the above number to supply a telephone number where they can be reached at the date and time listed above.
>
> . . . .

. . . .

> If you do not participate in the prehearing conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief sought by the other party.

8. Mr. McDonough did not contact the OAL to provide a telephone number, and did not participate in the conference call. No communication whatsoever has been received from Samuel McDonough relative to his failure to appear on that date.

## CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that respondent has abandoned this matter and it should be returned to the agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Samuel McDonough failed to appear at the scheduled proceeding, and failed to provide an explanation for his nonappearance one day following the nonappearance; indeed more than two weeks have elapsed. Accordingly, the Clerk should return this matter to the Bureau of Controversies and Disputes.

## ORDER

It is **ORDERED** that the Clerk return this matter to the Bureau of Controversies and Disputes for appropriate disposition.

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

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

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

Sept. 8, 2016
DATE

**LESLIE Z. CELENTANO**, ALJ

Date Received at Agency: 9-8-16

Date Mailed to Parties: September 13, 2016
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

364-16

OAL DKT. NOS. EDU 05309-16 and EDU 07451-16 (consolidated)
AGENCY DKT. NOS. 34-2/16 and 104-4/16

M.M., on behalf of minor child, J.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

AND

DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,

PETITIONER,

V.

L.M., on behalf of minor child, J.M.,

RESPONDENT.

---

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, tuition payments are due on September 1, 2016, and October 1, 2016, and L.M. is required to become a resident of Montville Township before the inception of the 2016-2017 school year. These dates have preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a

settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the terms of the Agreement, or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms therein. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/20/16

Date of Mailing: 10/20/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION SETTLEMENT**
**CONSOLIDATED APPEALS**

**M.M., ON BEHALF OF J.M.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,**
Respondent.

OAL DKT. NO. EDU 05309-16
AGENCY DKT.NO. 34-2/16

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**BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,**
Petitioner,
v.
**L.M., ON BEHALF OF J.M.,**
Respondent.

OAL DKT. NO. EDU 07451-16
AGENCY DKT.NO. 105-4/16

---

**Shifra Tarica**, Esq., on behalf of petitioner M.M. and respondent L.M. o/b/o J.M. (Freeman Law Offices, attorneys)

**Stephen M. Bacigalupo**, Esq., for respondent/petitioner Board of Education of the Township of Montville (Schwartz Simon Edelstein & Ceslo, attorneys)

Record Closed: September 1, 2016 Decided: September 6, 2016

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

These two matters were each filed on the disputed issue of whether a minor child J.M. is properly a resident of the school district governed by the Board of Education of the Township of Montville (BOE). The first matter was the father's appeal from the adverse residency determination of the Board and a cross-claim by the Board for out-of-district tuition. It was referred to the Office of Administrative Law (OAL) for filing on April 7, 2016. The second matter was an affirmative complaint against the child's mother for out-of-district tuition. It was transmitted to the OAL on May 18, 2016, with direction to consolidate with the earlier matter.

During a case management conference I convened on May 17, 2016, counsel for the represented parties acknowledged that the matters should be consolidated and my chambers informed the mother of its status. During subsequent communications, counsel requested time to conduct some further settlement discussions. Accordingly, I agreed to adjourn temporarily scheduling any hearing dates on my calendar.

On September 1, 2016, counsel for the Montville Township Board of Education forwarded a fully executed Settlement Agreement and Release between the parties and requested that if approved, I incorporate same into an order. On August 23, 2016, the BOE forwarded to the undersigned a copy of its resolution formally approving the Settlement Agreement and Release. Both parents have also executed the Settlement Agreement and Release.

I have reviewed the record and the terms of Settlement Agreement and Release and I **FIND**:

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

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

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

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

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

September 6, 2016

DATE

Gail M Cookson

**GAIL M. COOKSON**, ALJ

Date Received at Agency:

9-8-16

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: SEP 8 2016

id

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for
Montville Township Board of Education

2016 SEP -1 A 11:37

| | |
|---|---|
| M.M. o/b/o J.M.,<br><br>Petitioner,<br><br>vs.<br><br>MONTVILLE TOWNSHIP BOARD OF EDUCATION,<br><br>Respondent-Counterclaimant. | BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION<br><br>OAL DOCKET NO.: EDU 05309-2016 N<br>AGENCY DOCKET NO.: 32-2/16 |
| MONTVILLE TOWNSHIP BOARD OF EDUCATION,<br><br>Petitioner,<br><br>vs.<br><br>L.M. o/b/o J.M.,<br><br>Respondent. | BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION<br><br>OAL DOCKET NO.: EDU 07451-2016 N<br>AGENCY DOCKET NO.: 105-4/16<br><br>**SETTLEMENT AGREEMENT AND RELEASE** |

**WHEREAS**, on or about December 23, 2015, the Montville Township Board of Education ("Board") issued a Notice of Initial Determination of Ineligibility regarding J.M. pursuant to N.J.A.C. 6A:22-4.2 and -4.3, informing M.M. and L.M. that J.M. would be removed

from the Montville Township School District's ("District") rolls in the event that they failed to document residency in Montville Township; and

**WHEREAS**, on January 19, 2016, a residency hearing regarding J.M. was held before the Board pursuant to N.J.A.C. 6A:22-4.3; and

**WHEREAS**, on January 19, 2016, the Board adopted a resolution that J.M. be removed from the District because he was not domiciled in Hillside; and

**WHEREAS**, on or about February 12, 2016, M.M., the father of J.M., filed a Petition of Appeal with the Commissioner of Education contesting the Board's residency determination, docketed as OAL Docket No. EDU 05309-2016 N; and

**WHEREAS**, on or about April 4, 2016, the Board filed an Answer and Counterclaim, against M.M., seeking back tuition; and

**WHEREAS**, on or about April 6, 2016, the Board filed a Petition of Appeal with the Commissioner of Education seeking back tuition from L.M., the mother of J.M., docketed as OAL Docket No. EDU 07451-2016 N; and

**WHEREAS**, on or about June 20, 2016, the Honorable Gail M. Cookson, A.L.J. entered an Order consolidating the aforementioned matters docketed as OAL Docket Nos. EDU 05309-2016 N and EDU -7451-2016 N; and

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

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

1. Neither M.M., L.M. nor J.M. resided in Montville Township during the 2015-2016 school year and do not currently residency in Montville Township.

2. J.M. was not legally eligible to attend school in the District during the 2015-2016 school year.

3. M.M. and L.M. are responsible to the Board for tuition for the 2015-2106 school year in the amount of $14,559.00 due to J.M.'s ineligible attendance that year.

4. M.M. and L.M. have agreed to pay and the Board has agreed to accept Thirty Percent (30%) of the total tuition for the 2015-2016 school year or Four Thousand Three Hundred Sixty-Seven Dollars and Seventy Cents ($4,367.70) as follows:

a. Fifteen Hundred Dollars ($1,500.00) on or before September 1, 2016;

b. Seven Hundred and Fifty Dollars ($750.00) on or before October 1, 2016;

c. Seven Hundred and Fifty Dollars ($750.00) on or before November 1, 2016;

d. Five Hundred Dollars ($500.00) on or before December 1, 2016;

e. Five Hundred Dollars ($500.00) on or before January 1, 2017; and

f. Three Hundred Sixty-Seven Dollars and Seventy Cents ($367.70) on or before February 1, 2017.

All payments as set forth above are to be in the form of a cashier's check, money order, or personal check, made payable to the Montville Township School District and delivered to the following address:

Montville Township School District
86 River Road
Montville, New Jersey 07045
Attn: James T. Tevis, Business Administrator

5. In the event M.M. and/or L.M. fail to comply with Paragraph 4, including, without limitation, by tendering insufficient funds, an event of "Default" shall have occurred. In the event M.M. and/or L.M. fail to cure the Default within five (5) business days, then the Board will be left to its right under Paragraph 6 below. The Parties expressly agree that an event of

"Default" will be self-executing and the Board need not send additional notices to either M.M. and/or L.M.

6. M.M., L.M. and the Board acknowledge, consent to and agree that in the event of Default as described in Paragraph 5 occurs and if M.M. and L.M. fail to cure the Default within five (5) business days, the Board will have the right to file a summary action in the Superior Court and enter judgment against M.M. and L.M. in the amount of Four Thousand Three Hundred Sixty-Seven Dollars and Seventy Cents ($4,367.70) less any payments made prior thereto and the Board may also take any and all necessary steps to collect the amount owed.

7. L.M. has represented that she will become a resident of Montville Township in advance of the start of the 2016-2017 school year, and will supply the necessary proof of residency pursuant to N.J.A.C. 6A:22-3.4. Such proof shall be provided either in person or mailed certified return receipt requested to Dr. René T. Rovtar, Superintendent of Schools, no later than September 1, 2016, at the following address:

Montville Township School District
86 River Road
Montville, New Jersey 07045

In the event L.M. furnishes the required proof of residency, then J.M. shall be permitted to attend the Montville Township Public Schools for as long as residency in the District is maintained.

8. In the event L.M. fails to provide such proof of residency as set forth in Paragraph 7 above, then M.M. and L.M. acknowledge and agree that J.M. shall be immediately disenrolled from the District and he shall not be able to re-enroll in the District until the legal residency requirements can be demonstrated. In the event L.M. fails to provide such proof of residency, M.M. and L.M. shall still be responsible for making those tuition payments as set forth in Paragraph 4 above.

9. This Agreement is subject to Montville Township Board of Education approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

10. M.M. and L.M. hereby acknowledge that they entered into this Agreement with a full understanding of their rights and that they do so without duress and of their own free will and volition, and that they have consulted with independent legal counsel prior to executing same.

11. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that neither the other party nor any agent or attorney of the other party has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

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

13. Confidentiality of this Agreement and the substance of it, along with the circumstances surrounding the negotiations which resulted in its execution, shall not be disclosed by any party, agent or employee thereof to any third person or entity other than required by law.

14. This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

15. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

**MONTVILLE TWP. BOARD OF EDUCATION**

_____ Dated: August 23, 2016
Dr. Matthew Kayne, Board President

**PARENT**

_____ Dated: _____
Michael Masino, Individually and o/b/o J.M.

**PARENT**

_____ Dated: _____
Laura Masino, Individually and o/b/o J.M.

15. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

**MONTVILLE TWP. BOARD OF EDUCATION**

_____ Dated: _____
Dr. Matthew Kayne, Board President

**PARENT**

Michael Masino Dated: 8-18-16
Michael Masino, Individually and o/b/o J.M.

**PARENT**

Laura Masino Dated: 8-18-16
Laura Masino, Individually and o/b/o J.M.

STATE OF NEW JERSEY )
SS:
COUNTY OF ~~MORRIS~~ Passaic )

I certify that on August 18, 2016, Michael Masino, Individually and o/b/o J.M., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

MICHAEL JASON PALMER
NOTARY PUBLIC, STATE OF NEW JERSEY
MY COMMISSION EXPIRES
AUG 31 2020
ID # 2333447

STATE OF NEW JERSEY )

SS:

COUNTY OF MORRIS )

I certify that on August 18, 2016, Laura Masino, Individually and o/b/o J.M., personally came before me and acknowledged under oath, to my satisfaction, that this person:

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

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

Attorney or Notary Public

SHIFRA TARICA, ESQ.
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 04012007

EXCTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK:

The board of education of the Township of Montville in the County of Morris, New Jersey, convened in regular session on August 23, 2016 at 7:47 p.m. in the meeting room of Montville Township Municipal Building, Montville, New Jersey.

The following members of the Board of Education were present:

Carmela Novi, Vice President

Charles Grau, Michael Johnson, David Modrak, John Morella, Michael O'Brien, and Michael Palma.

The following members of the Board of Education were absent:

Karen Cortellino and Matthew Kayne, President.

The following resolution was offered by Member Grau, seconded by Member Morella, and adopted by the board of education by the following roll call vote:

**Approval of Settlement**

RESOLVED that the Montville Township Board of Education hereby accepts and approves the negotiated Settlement Agreement and Release (the "Agreement") by and between the parties in the consolidated matters entitled M.M. o/b/o J.M. v. Montville Township Board of Education, OAL Docket No. EDU 05309-2016 N; Agency Reference No.: 32-2/16 and Montville Township Board of Education v. L.M. o/b/o J.M., OAL Docket No. EDU 07451-2016 N; Agency Reference No. 105-4/16, subject to the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED that the Montville Township Board of Education authorizes the Board President to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within settlement and carry out this action of the Board.

ROLL CALL AYES: 7 NOES: 0

STATE OF NEW JERSEY
COUNTY OF MORRIS

I, James T. Tevis, Secretary of the Board of Education of the Township of Montville in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district, duly called and held on August 23, 2016 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Montville Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 31st day of August, 2016.

Board Seal

James T. Tevis
Board Secretary

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~~365~~
365-16

OAL DKT. NO. EDU 11751-16
(EDU 13594-15 ON REMAND)
AGENCY DKT. NO. 225-8/15

L.S., on behalf of minor child, K.S.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On August 3, 2016, the Commissioner remanded the matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge contained a provision that was contrary to the law.

Upon review of the revised record on remand, the Commissioner finds that the deficiencies contained in the original settlement agreement have been corrected. Therefore, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/20/16

Date of Mailing: 10/20/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 11751-16

AGENCY DKT. NO. 225-8/15

**L.S., ON BEHALF OF MINOR CHILD, K.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,**

Respondent.

**ON REMAND**

OAL DKT. NO. EDU 13594-15

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**L.S.**, petitioner, pro se

**David Rubin**, Esq., for respondent

Record Closed: September 2, 2016

Decided: September 2, 2016

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On May 12, 2015, the parents of L.M., a fourth grade girl in the Spotswood public schools, filed a "harassment, intimidation, or bullying" (HIB) complaint against some of her fourth-grade classmates, including K.S., the daughter of L.S. The school staff at the elementary school distilled the allegations in the complaint into seven specific

charges. On June 22, 2015, the Spotswood Board of Education concluded that K.S. was responsible for six of the seven charges.

On August 8, 2015, L.S., on behalf of K.S., appealed the determination.

On September 1, 2015, the Department of Education (Department) transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On May 24, 2016, the parties appeared for the hearing but settled the case before it began. The parties worked long and hard to reach this settlement and were commended for their efforts in doing so. Given their hard work, the parties placed the terms of their settlement on the record that day.

Also appearing that day were the parents of L.M. and the parents of the other fourth-grade girls named in the complaint—none of whom were parties to the case—yet these non-parties also agreed to be bound by the terms of the settlement and they too placed their agreement on the record.

On June 16, 2016, I received the terms of the settlement in writing. The Spotswood Board of Education had approved the settlement in the interim. With the terms of the settlement in hand, and having heard the testimony of the parties after the terms of the settlement were read into the record on May 24, 2016, I found the parties had entered into their settlement voluntarily. I also concluded that the settlement was consistent with the law, was fully dispositive of all issues in controversy between the parties, and consistent with the requirements of N.J.A.C. 1:1-19.1. Therefore, I ordered the parties to comply with the terms of the settlement on June 17, 2016.

Parenthetically, no party to the case or party to the agreement had voiced any objection or concern about the settlement between May 24, 2016, and June 16, 2016.

On August 3, 2016, the Commissioner of Education (Commissioner) remanded the case to me. In his decision, the Commissioner observed that paragraph three of the agreement was inconsistent with the law. Paragraph three stated that the Spotswood Board of Education would rescind the finding that K.S. engaged in HIB and that it would revise all reports filed with the Department related to the HIB. The Commissioner noted that N.J.A.C. 6A:16-5.3(d)(1) requires the chief school administrator to submit each instance of HIB to the Commissioner using the Electronic Violence and Vandalism Reporting System (EVVRS) and that the Department is unable to delete or modify EVVRS data from the previous school year subsequent to district verification in mid-July of the school year in which it was reported. Thus, the Commissioner could not approve an agreement in which the Spotswood Board of Education represented that it would rescind the report of HIB that it had already provided and remanded the case to me for the parties to revise paragraph three of the agreement consistent with these concerns.

On August 29, 2016, the parties to the case appeared for a telephone conference and agreed to revise paragraph three of the agreement consistent with the Commissioner's concerns about the reporting of HIB. Later that day, the Spotswood Board of Education circulated an email containing the revised paragraph. In particular, the reference to "all related reports filed with the New Jersey Department of Education" was deleted from the paragraph. As such, the Spotswood Board of Education will rescind the finding of HIB from its records, but it will not revise its reports filed with the Department. So having reviewed the terms of this revised agreement, and having received the assent of the parties of this case to this revision, I once again **FIND** that the parties have entered into the settlement voluntarily.

In addition, I **CONCLUDE** that the settlement is now consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Only the parents of L.M. object to the revision. The parents of L.M., however, are not parties to this case. Moreover, their objections do not pertain to paragraph three, its

revision, or the specific concern for which the case was remanded. Their objections instead pertain to grievances the parents of L.M. have with other families who are not parties to this case and for alleged incidents that occurred after the parents of L.M. agreed to the terms of the settlement that were placed on the record on May 24, 2016. As such, no reason exists in law or fact to invalidate all of the other terms of the agreement. Accordingly, I **ORDER** that the parties comply with the terms of their settlement (the revised summary of which is attached to this decision) and that these proceedings are once again closed.

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

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

9/2/16
DATE

**BARRY E. MOSCOWITZ**, ALJ

Date Received at Agency: 9-7-16

Date Mailed to Parties: SEP 7 2016
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

**Terms of Settlement**

1. The families of Kayla Sabo, Garifalia ("Lia") Manoussakis, Haily Sosnowski and Jenna Chayko agree to abide by the following:
   a. All families agree to discuss with their children, at home, how to interact with the other students involved during the school year.
   b. Students will be able to say hello, wave, acknowledge each other inside and outside of the school, but there is no expectation that the students will interact with each other beyond being friendly with each other.
   c. Issues will arise during the year. However, all families agree that those issues will first be handled like any other school conflict. Each family's child will work with the principal, teachers and support staff to remediate the conflict. All families agree that the first step to remediating a conflict will ***not*** be filing a HIB report. Instead, families will work with the school to bring a positive resolution to the conflict.
   d. Each child will identify a staff member they feel comfortable working with should a conflict arise.
2. All children will participate in a social skills training program to be developed by the School District, which will be administered by a staff member other than Catherine Glass, and feature the following topics adapted as necessary to the

individual students' needs and their perception of the current situation:

- Sensitivity Skills
- Empathy Skills
- Conflict Resolution
- Friendship Skills
- Self Esteem
- Problem Solving
- Taking Turns in Conversations
- "I" messages that identify their emotions

Resources included but not limited to:

1. The book titled, "Ready to Use Social Skills Lessons and Activities," by Ruth Weltmann Begun.

2. The program" Words Work" as a curriculum resource with the following components:

- Part One: Breaking the Ice and Creating a Community
- Part Two: Communication: Telling It, Hearing It, Talking It out!
- Part Three: Relationships, People and Behavior, Think about It!
- Part Four: Leadership, Group Decision-Making, Using Skills and Reaching Goals
- Part Five: Problem Solving and Working Together

It is also recommend students join the Human Relations Club (HRC) after school (Wednesdays) when students are identified as needing mentors regarding friendship and social skills. Students from the High School work on different activities with the Middle School students.

3. The Board of Education will rescind the finding that Kayla Sabo engaged in "harassment, intimidation or bullying," with the understanding that this action does not constitute an acknowledgment that its decision was incorrect, but merely reflects the desire of all parties to address the children's

underlying issues through the mechanism of this settlement agreement.

4. All families acknowledge that all currently pending or threatened allegations of "harassment, intimidation or bullying" are hereby withdrawn, with the intention that any underlying issues be addressed as provided for in this settlement agreement.

367-16

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**In the matter of Tenure Charge of**

**JOEL DAWKINS** **Docket No. 277-9/15**

**-and-**

**State-Operated School**
**District of the City of Newark**
**County of Essex**

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**APPEARANCES**

For the District
Theresa L. Moore, Esq.

For the Respondent
Stuart Ball, Esq.

**BEFORE: ARBITRATOR STEPHEN M. BLUTH**

## BACKGROUND

The School District of the City of Newark (hereinafter "District") submitted a tenure charge of inefficiency against Joel Dawkins (hereinafter "Respondent") on or about September 17, 2015, alleging teacher inefficiency for the 2013-2014 and 2014-2015 school years. Subsequently, on or about October 2, 2015, Respondent filed an answer to the District's charges. Efforts to resolve the matter were not successful. Consequently, I was appointed arbitrator to hear and decide the matter, and the parties were so informed by M. Kathleen Duncan, Director of Controversies and Disputes, on or about October 13, 2015.

Hearings were held on May 17, May 19, and August 29, 2016. At these hearings both parties were afforded full opportunity to present evidence, make oral argument, and otherwise support their respective positions. Both submitted post-hearing briefs. Upon receipt of same, I closed the record. This Opinion and award follows.

## POSITIONS OF THE PARTIES

Joel Dawkins has been a high school mathematics teacher for approximately twenty years. In the 2013-2014

school year he was assigned to Sussex Avenue Renew School, a pre-kindergarten through grade 8 school. Early that year, the District advises, he and his principal, Ms. Darlene Gearheart, developed a Corrective Action Plan (hereinafter "CAP") to address areas of performance in need of improvement. According to the District, the CAP was implemented and resources were made available. Further, the District stresses, he was given support, coaching and assistance. In January 2014, Respondent sustained an injury at Sussex Renew and took a leave of absence. The District relates when Respondent returned to work, he requested his assignment be changed to teacher of mathematics at Weequahic High School, where he also had a CAP, was observed, and was provided with assistance and resources to improve his performance. However, the District relates, in spite of the assistance given Respondent, he received a rating of "partially effective" in his 2013-2014 annual evaluation.

In the beginning of the 2014-2015 school year Respondent took a three-month medical leave of absence. Upon his return to work he was assigned to teach mathematics at Girls' Academy of Newark, a middle school located at Weequahic High School. At Girls' Academy, he

and Vice Principal Westberry developed another CAP and he was again given substantial support and assistance. Nevertheless, for the second consecutive chargeable year he received a rating of "partially effective" in his annual evaluation. As a result, the tenure charge of inefficiency followed.

The District maintains the evidence presented at hearing demonstrated the exercise of informed professional judgment by qualified school administrators who evaluated Respondent's performance in accordance with the District's approved evaluation rubric, with the goal of achieving high quality teaching and improving student learning. It also avers, the arbitrator in this matter is not permitted to second-guess that judgment. In short, the evidence presented compels a conclusion that the charges be upheld and Respondent should be dismissed from his employment, the District argues.

Further, the District avers, it implemented a teacher performance evaluation system approved by the New Jersey Commissioner of Education called the "Newark Public Schools Framework for Effective Teaching." The Framework, it declares, contains five categories of teacher performance (Competencies), each comprised of several performance indicators rated as: highly

effective, effective, partially effective, and ineffective. The ratings for each indicator are combined and result in an overall rating for each competency. The District explains a similar system is used for mid-year and year-end summative evaluations, which also includes ratings of additional indicators not scored in observations during the years Respondent was observed and his teaching performance was evaluated in accordance with the Framework.

Also, the District explains, Respondent is certified as an elementary teacher as well as a teacher of mathematics. In the 2013-2014 school year, when Respondent was assigned to Sussex Avenue Renew School, he taught eighth grade students whose display of disruptive behavior in regular classes caused them to be placed a classroom where they remained the entire school day. He and his principal, Darlene Gearhart, developed a CAP that set professional improvement goals in several areas. Respondent also set student learning goals for the year. Principal Gearhart observed his teaching performance twice, after which they met within seven days of each observation to discuss each observation. As a result, the principal rated Respondent's performance as "partially effective" both times.

Further, the District informs, in January 2014 Respondent sustained an injury which led to a leave of absence of approximately one month. He returned to work in February 2014. However, at his request, Respondent did not return to Sussex Avenue because he preferred to teach at a high school. Therefore, he was assigned to Weequahic High School for the balance of the school year. At that high school, Respondent and his principal developed another CAP specific to the high school. During his stay, Respondent was observed by two different administrators on three separate occasions. In all three observations he was rated "partially effective." Also, the District stresses, Mr. Westberry, conducted a mid-year evaluation after he had observed Respondent at least a couple of times. That evaluation included more information than the three classroom observation reports, it informs. The District advises Respondent received "less than effective" ratings on most indicators, including measuring student progress towards goals. As a result, he received a mid-year rating of "partially effective." This rating demonstrated Respondent had only partially met the student learning goals he set for himself at the high school. Based on formal observations, informal walk-throughs and his

partial success in reaching students learning goals, Respondent received an annual summative rating of "partially effective" on May 15, 2014.

During the 2014-2015 school year, Respondent took a medical leave of absence from September to December 2014. When he returned to work in December or January, the District relates, he was assigned to Girls' Academy of Newark which served approximately 80 girls in grades 6-9. Respondent was assigned to teach mathematics to two sixth grade classes. There the principal, Tanishia Williams, and Respondent set out to develop a CAP. In that CAP he identified growth areas of pacing, momentum and continuity, the same growth areas he had identified for himself when he was at Sussex Avenue. Once assigned to a classroom, Respondent was observed four times: a long un-announced observation on March 18, 2015 by Ms. Williams, another unannounced observation on March 18, 2015, by Veronica Gerald, a long announced observation on May 1, 2015 and a short un-announced observation on May 11, 2015, also by Veronica Gerald. In three of the observations, Respondent was rated "partially effective" and in the final observation of the year's performance was rated "ineffective."

The District reports Respondent received a mid-year evaluation and an Annual Summative Evaluation. The ratings he received on the 2014-15 mid-year and summative evaluation were "partially effective." The District avers this was so because Respondent's students had only partially met the limited student learning goals in geometry and statistics he had set for them in March 2015.

The District advises that, based on Respondent's Annual Summative Evaluations of "partially effective" for at least two consecutive years, the principal of Girls' Academy recommended to the State District Superintendent a tenure charge of inefficiency be filed against Respondent. Thereafter, the State District Superintendent reviewed the charge and Respondent's answer and determined the District had complied with the evaluation process in all respects in both the 2013-14 and 2014-15 school years. The District Superintendent also determined there was probable cause to warrant dismissal or reduction in salary. Accordingly, the State District Superintendent certified the charge to the Commissioner of Education. As a result, Respondent was suspended without pay for 120 days. However, Respondent filed an answer with the Commissioner denying the charge

these four factors, the act requires the arbitrator to determine whether the employee can demonstrate these facts materially affected the outcome of the evaluations. If the arbitrator determines the facts had no such material effect, the arbitrator is required to render a decision in favor of the School District, and the employee must be dismissed. In the instant matter, the District maintains, the evidence does not show any facts that materially affected the outcome of respondent's performance evaluations.

Also, the District asserts, Respondent received proper pre- and post-observation conferences in the two school years at issue. For example, in 2013-14 Respondent had three announced observations at Weequahic High School and received pre-observation conferences from Mr. Westberry and Mr. Long. The evidence also shows in 2014-15 Respondent had one announced observation and received a pre-observation conference prior to it. Therefore, any criticism Respondent might have concerning the observations is unfounded, it argues. Even if the observations are found to have been defective in some way, there is no evidence they had a material effect on the outcome of his evaluations, the District maintains.

Further, the District rejects any notion that two evaluations that occurred the same-day should be counted only as one. It points out on March 18, 2015, Respondent received a long and short observation by two different observers for part of the same class. One observation was long, for a 45-minute period, and the other was short. The District argues nothing in the law prohibits overlapping long and short observations. Furthermore, the two observers purposely conducted observations that day in order to "norm" with each other because the principal was new to the District and the Framework.

Moreover, the District denies it failed to collaborate with Respondent with respect to the CAPs. It stresses each CAP was completed collaboratively between Respondent and his administrators, and that each set forth student learning goals and professional improvement goals Respondent himself chose. In like manner, the District maintains, contrary to Respondent's assertion, the School District incorporated student achievement in each of Respondent's summative evaluations. It relates Mr. Westberry and Ms. Williams confirmed they considered student achievement when preparing his Annual Summative Evaluations. It maintains Respondent's mid-year evaluations and summative

evaluations met the criteria. Also, the District emphasizes, the evidence presented demonstrated at all times Respondent taught subjects within the scope of his certifications as an elementary school teacher and a mathematics teacher.

Moreover, the District asserts, Respondent's 2013-2014 evaluations were legitimate even though they were based on his teaching at Weequahic High School and not at the Sussex Avenue school earlier in the year. To support this claim, it emphasizes the TEACHNJ regulations acknowledge there may be situations when a teacher on a CAP may be rated on fewer than four observations in a school year. Those regulations provide if a teacher is present for less than 40% of the total student schooldays in an academic year, he or she shall receive at least two observations. For that reason, the District argues, I should find the three observations done over a two- month period at the high school are consistent with the regulations, and did not materially affect the outcome of the evaluation.

Additionally, the District rejects Respondent's claim that he did not receive adequate support from the School Improvement Panel at the schools to which he was assigned. It reports both schools at which Respondent

taught had such panels when Respondent taught there. The District also avers the evidence does not support the claim it failed to substantially adhere to the evaluation process. Moreover, it also points out any such failure did not materially affect the outcome of Respondent's evaluations. It declares the evidence demonstrated Respondent's summative evaluations were based on formal observations of his teaching and were scored in accordance with the School District Framework for Effective Teaching. In both school years with which this proceeding is concerned, Respondent was observed in three different schools by five different administrators, all of whom had similar comments about his teaching skills and rated him similarly. The District concludes the evidence does not show any mistakes of fact that materially affected the outcome of Respondent's summative evaluations and should not be a consideration.

Also, the District insists its actions were not arbitrary and capricious. It rejects Respondent's claim his observations and evaluations were improperly done and scored, and that his evaluations and observations were discriminatory and retaliatory. It rejects, as well, Respondent's claim he was not provided with the

support required by the statute including CAP's, SIP reviews, classroom supports, and placement. Also, there is no basis for his claim his observations and evaluations did not properly include consideration of student achievement, it reports. The District explains Respondent was provided with support in the schools to which he was assigned, received CAPS in both 2013-14 and 2014-15, was observed in accordance with regulatory requirements, participated in pre- and post-observation conferences in which administrators coached him, and provided feedback on his professional development. Accordingly, the District maintains, Respondent has failed to show any arbitrary and capricious action by the School District.

Finally, the District posits, if the charge against Respondent is not upheld under N.J.S.A.18A:6-17.3c, the charge should be considered and upheld pursuant to N.J.S.A.18A:6-17.2 by using the preponderance of evidence rule. This would lead to the inevitable conclusion the District successfully demonstrated the charge of the efficiency against Respondent. It points out Respondent was unable to show, by a preponderance of the evidence, his ratings were anything but the result of a legitimate, good-faith exercise of professional

judgment by school administrators on the basis of their evaluation of Respondent's performance. The District concludes the evidence presented at hearing does not support any of the defenses available to Respondent. It insists Respondent has not demonstrated a statutory defense to the tenure charge of inefficiency. Accordingly, based on the evidence presented, the tenure charge of inefficiency against Respondent should be upheld, and he should be dismissed from his employment with the District, it maintains.

Respondent contends the charge of inefficiency against him does not stand up to scrutiny. He claims, after successfully teaching high school math for 21 years, he was assigned to the Sussex Avenue Renew School which was a K-8 school. However, Respondent reports, as such he spent the first several weeks doing lunch duty and painting lines on the playground. When he received a teaching assignment, he relates, it was as an assistant gym teacher which was outside his certification. Respondent relates when he was finally given a regular class, it was one that was formed by selecting the most difficult, problematic students from existing classes. Also he reports, the students in this class did not have an IEP. That this is so is clear from the testimony of

Ms. Gearhart, who testified she was aware that, until she became principal at the school, the students in Respondent's class had not been evaluated by a child study team. Further, there was no effort on the part of the administration that preceded her to classify students. Therefore, Respondent argues, the students had not been evaluated by a child study team because of the failures of the previous administration. Respondent also avers, he had responsibility for the students all day. He also had to teach them subjects other than math, and had mentoring and counseling responsibilities as well, he claims.

Respondent also insists during the early stages at the Sussex Avenue Renew School, he and the principal developed a Corrective Action Plan known as a CAP. However, he relates, during his assignment to Sussex Avenue, he suffered serious injuries which caused a lengthy absence. When he was able to work again, Respondent was assigned to high school at his request. Therefore, this reassignment rendered the development of his annual summative evaluation inapplicable in regard to this CAP, he argues. Additionally, Respondent reports, during the one observation Ms. Gearhart conducted, he was rated "partially effective." However,

a closer look at the report of the observation itself shows he was evaluated and rated on 15 separate indicators, of which he was rated "effective" on 10 of the 15 and "partially effective" on only five. Respondent disputes the principal's explanation there was some type of rule or directive requiring an evaluator always to round down when the indicators are split evenly between "effective" and "partially effective." He points out this principal was unable to cite any document that reflects such a requirement. Moreover, the indicators were not split evenly, he stresses. Respondent further emphasizes Ms. Gearhart did not conduct a mid-year evaluation or an Annual Summative Evaluation. Also, he points out, she conceded she had no recollection of communicating with the Vice Principal of Weequahic High School, Mr. Gary Westberry, with regard to these matters. In fact, Respondent stresses, Mr. Westberry confirmed there was no communication between Ms. Gearhart and her staff and him and his staff. Accordingly, the CAP developed at Sussex Avenue School became inoperative, Respondent contends, because Sussex Avenue was an elementary school and Weequahic was a high school. Respondent underlines the fact Mr. Westberry acknowledged he did not take into account any of the

observations Respondent had before he got to the high school.

Respondent also explains, his serious injuries of January 2014 occurred as a result of breaking up a fight in school. In spite of the multiple injuries that caused him significant pain and emotional distress, the District required him to return to work in late February 2014. Respondent relates as well, because of his disability and problems getting assignments, his annual evaluation was done approximately 3 months after he began teaching at Weequahic. Also, he points out, all of his observations and evaluations were done over the course of approximately 2 months. Further too, these observations were on consecutive days and the third was approximately 2 weeks later, Respondent declares. Therefore, he had almost no chance to take advantage of the observations and resulting feedback to make whatever adjustments the administration thought were in order. In fact, Respondent reports, Mr. Westberry testified the timing of the observations was hasty and did not allow for any meaningful growth on Respondent's part from one observation to the next. Since a primary purpose of observations and post-observation conferences is to support teachers and provide an opportunity to improve,

that concept was not embraced, especially with two observations occurring on consecutive days in the same grade. Accordingly, there was no reasonable time to show improvement between the evaluations, he maintains. Additionally, while his mid-year evaluation was conducted by Mr. Westberry on April 11, 2014, Respondent reports he was not observed for the balance of the year between his mid-year evaluation and his annual evaluation which occurred on May 15, 2014. Consequently, he argues, the entire purpose of the mid-year evaluation was defeated and he was denied the opportunity to show the improvement being asked of him.

Furthermore, according to Respondent, for the first indicator under Competency Four (Student Progress Toward Mastery; Checks for Understanding), he was rated "effective" by Ms. Gearhart in her long observation which was the only time she looked at Competency Four. Then, for the three observations conducted as required in high school, and in the mid-year evaluation by Mr. Westberry, he was also rated "effective." Nevertheless, Respondent stresses, in his annual evaluation he received a "partially effective" rating for that indicator in spite of having been observed and rated "effective" by the principal. In Respondent's view, this

is a clear and obvious example of an arbitrary and capricious evaluation.

Moreover, the District failed in its responsibility to have a functioning School Improvement Panel (SIP) in place, he maintains. The School Improvement Panel is supposed to ensure the observation evaluation process takes place as TEACHNJ and Achieve New Jersey meant it to, Respondent explains. The SIP insures a mid-year evaluation takes place and a teacher on a CAP must receive an additional observation and post-observation conference. Beyond that, the SIP takes overall responsibility for mentoring teachers, overseeing the observation process and making sure a working CAP is in place and operating effectively for every teacher who needs one. Not only did Weequahic High School fail to have a functioning SIP, Mr. Westberry did not know what it was doing and did not see to it its members dealt directly with Respondent. As his testimony demonstrated, Mr. Westberry knew virtually nothing about a SIP at his school, Respondent asserts. Also, Respondent relates, the District could not produce any records showing what it did or even who was on it. In fact, Respondent reports, Mr. Westberry testified neither the principal at Sussex Avenue nor at his school developed an

argues, and that failure, negates the Annual Summative Evaluation. As such, contrary to the District's claim, that failure is "material," he concludes.

Moreover, the evaluation has no legal force or effect, Respondent declares, because any "inefficiency" rating based on the Annual Summative Evaluation in the instant charges lacks a legal basis. It also fails the evaluation rubrics for all teachers required by NJSA 18A:6 - 17.3(2) including, but not limited to, measures of student achievement. Therefore, based on the foregoing, Respondent insists the district failed to prove it followed the requirements for student achievement goals. Consequently, the Annual Summative Evaluation for 2013-2014 is both invalid and material because the District did not follow the requirements for measuring student growth objectives in Respondent's Annual Summative Evaluation.

Respondent summarizes the 2013-2014 school year as follows: first, the long observation he received at Sussex Avenue School was scored in an arbitrary and capricious manner. Also, his only observations during the spring semester occurred over the period of approximately 2 weeks and included two observations conducted on consecutive days. Such an action

effectively negated his ability to learn, change, or improve, based on these observations as required by the regulations. Additionally, since nothing from the semester at Sussex Avenue Renew School was carried forward, his effective school year was only approximately 2 months during which he received only three observations. Moreover, Respondent points out, he was not observed between the time of his mid-year evaluation and his annual evaluation; that he had no opportunity to benefit from the mid-year evaluation and to get credit for improvement in his Annual Summative Evaluation. For that reason, his Annual Summative Evaluation reflects an arbitrary and capricious process, he argues. Further, there was no School Improvement Panel (SIP) in place and doing its job during this school year. Respondent stresses, too, he did not receive a score based on student growth, a crucial component required by the regulatory process. As a result, no score for student growth was factored into his annual evaluation. Therefore, he could not receive a summative evaluation rating because the minimum observation requirements were not met, he declares.

Also, Respondent cites the Cuntrera case that made it clear arbitrary and capricious timing alone could

result in the statutory dismissal of charges against a teacher. Additionally, he cites a decision from Arbitrator Daniel Brent, who held in that matter the respondent's performance for the year was fatally tainted by arbitrary and capricious action that materially impaired the respondent's right to be judged and rated on the basis of valid observations and evaluations as required under the TEACHNJ statute. Accordingly, based on the foregoing, the charges based on the 2013-2014 school year are unfair, arbitrary, capricious and violate the law. For these reasons, these charges against him must be dismissed, Respondent maintains.

During the 2014-2015 school year, the pattern established in the previous year continued, Respondent explains. For that year, he was reassigned prior to the beginning of the school year to the Girls' Academy of Newark, a relatively new middle school. Once again, he was required to change the focus of his teaching, he explains. Further, as a result of the injuries and disability he sustained while breaking up the fight Sussex Avenue School, he applied for, and was granted, a leave of absence. This disability kept him away from the classroom from the beginning of the 2014 school year

until December 2014 or January 2015. When he returned to Girls' Academy, Respondent relates, he did not receive a regular class assignment but was asked to "push in" and assist other teachers in existing classes. He emphasizes he finally received a regular class assignment in mid-March, 2015, and his annual evaluation was done on May 12, 2015. Therefore, the period of time during which he could be evaluated was only two months, he relates. However, the observation/evaluation system anticipates teachers will be observed and evaluated over the course of a full school year. This is so because, if done correctly, a teacher can be observed and evaluated over the course of a full-year, receiving feedback and support to maximize chances of success. Respondent stresses the manner in which he was observed/evaluated was both arbitrary and capricious.

Moreover, the evaluation and regulatory scheme given Respondent required him to be observed on four occasions, with feedback, guidance and support after each observation so that he could improve and become a more effective educator. That did not happen, Respondent relates. In the 2013-2014 school year he was evaluated on two consecutive days with no opportunity to learn and improve. In the 2014-2015 school year, he relates, he

was evaluated twice on the same day at the same time in the same classroom. Clearly, then, there was no opportunity for feedback, guidance or support between these two evaluations. Respondent argues this process was conducted essentially as an exercise to benefit a new principal and vice-principal to "coordinate" and "norm" their efforts. This completely negated the ability of the administration to fulfill its duty to provide support, Respondent claims. Indeed, the process of completing two observations on the same day at the same time in the same class means that he received only three observations instead of the legally required four, he claims.

Additionally, the last of Respondent's observations was conducted on May 11, 2015 the day before his annual evaluation. Clearly then, he emphasizes, he had no opportunity whatsoever to benefit from the May 11, 2015 observation. Once again, Respondent insists, a primary purpose of the observation/evaluation process was again negated and the entire process was completely arbitrary and capricious.

During this same year, Respondent and his principal, Ms. Tanishia Williams, developed a CAP as part of the process for measuring student growth.

Respondent claims, although a CAP is supposed to address and encompass an entire school year, this one could only address the time during which his student growth was to be assessed, which in this case was four months. However, Respondent reminds, this CAP was signed on March 25, 2015 and the Annual Summative Evaluation was done on May 12, 2015. That, in itself, demonstrates the time frame for student growth was both arbitrary and capricious. Respondent relates the teacher evaluation rubric requires the inclusion of student achievement. These student growth objectives are required to be specific, measurable, and based on available student learning data. To implement these requirements, there must be a starting point that is measured and identified, Respondent relates. Further, he advises, the principal and he determined the goal of each of the achievement network assessments was that 45 - 57% of the students would reach a score of 75% on district performance based assessments from "Math in Focus" and teacher assessments. However, it is not clear how much growth would be reflected by obtaining such a result, as the number of students who were at certain percentages at the outset was not known. Respondent argues there was no way from reading the CAP to see if a process for actually

measuring or assessing student growth over the approximately 6-week period of time available to do any measuring was ever established. Moreover, the CAP sections that address the second student learning goal are also deficient in much the same way, Respondent stresses. He relates Principal Williams admitted it was not a growth goal, but rather a mastery goal. As such, it did not qualify as an SGO according to the statute, he claims. Respondent emphasizes the statutory scheme also requires him to be rated on his progress, and to have this rating converted to a numerical score. However, in his case there was no such score computed, he points out. To support this claim, Respondent reports, at the hearing, Principal Williams evaded answering a direct question on this matter. Ultimately, however, she never identified a numerical score for student growth, nor did she provide any evidence of such a score being factored into his evaluation, Respondent emphasizes. Further, the principal admitted she did not do the numerical calculations to ensure that the SGO accounted for the 20% for the 2014-15 school year. Here he refers to her testimony that, although student achievement scores count for 20% of a teacher's overall evaluation, she did not compute such a number for

Respondent as required by the regulations. Further, he reports, she conceded she rated Respondent's performance as "Partially Met" only from the summative data of all observations. Consequently, he argues, there was no way to implement his CAP to assess or measure the growth of his students from the end of March to May. Therefore, the administration in that school year failed to compute a separate score based on student growth and factor this score into Respondent's overall evaluation as required by the regulatory scheme. Thus, as in 2013-2014, this failure renders the Annual Summative Evaluation legally null and void.

Accordingly, for both school years, it is clear he was not treated fairly, Respondent reports. This is so because he was subjected to an arbitrary and capricious observation and evaluation process and the District completely failed to follow the legally required process in observing and evaluating him. Therefore, both Annual Summative Evaluations were invalid, Respondent repeats. Additionally, the Annual Summative Evaluation for both years in question did not include the required computation and inclusion of numerical scores measuring his students' growth pursuant to the law, Respondent maintains. He points out there is no discretion or

flexibility in this regard. Respondent avers tenure charges, in fact, are highly dependent on two consecutive Annual Summative Evaluations that follow this standard. However, in his case, there were no valid evaluations at all, Respondent claims. He points out if even one of the ASE's is negated, the charges fail as a matter of law. However, in this case both evaluations are invalid, he insists.

As for the issue of materiality, which provides that in reviewing various failures of the District to properly observe, support and evaluate a teacher, the arbitrator determines if the fact materially affected the outcome of the evaluation. Respondent points out there can be no doubt the District's glaring multiple errors are material and completely undermine the validity of the case against him. He declares the District's total failure in both years to adhere to the requirements for setting student growth objectives, measuring student growth, scoring Respondent on the basis of student growth and including such scoring in his ASE negates both of them. Further, without valid ASE's there is no statutory basis for any of the charges herein. Clearly he argues, the lack of the statutory basis for charges can never be immaterial.

Finally, although the District may claim the minor problems in its efforts should be considered less than determinative, the errors are not minor, Respondent maintains. Rather, they are significant in every area herein discussed. Moreover, the cumulative effect of the astounding number of failures on the part of administration clearly establishes the process was fatally flawed. Respondent insists the District cannot prove he had been given the process he was due and the support to which he was entitled. For the reasons set forth above, Respondent concludes he was treated unfairly, was not supported as he should have been by law and regulation, and was victimized by the complete breakdown of the legal process in place to properly observe and evaluate teachers. Accordingly, Respondent emphasizes, the charges must be dismissed.

## DISCUSSION AND FINDINGS

I have carefully examined the testimony and other evidence in this matter. Based on my examination I find the District did not have just cause to discharge Respondent. I so find for several reasons. First, during the 2013-2014 school year Respondent was transferred from a high school to Sussex Avenue Renew School, a

middle school, although his extensive experience was at the high school level. Further, upon his arrival, he was assigned lunch and playground duty, and painting lines on the playground. This was hardly appropriate for a teacher with more than twenty years teaching experience, I find. Additionally, subsequent to those assignments, he was given the position of assistant gym teacher. Not only was this outside his certification, in my view this was a waste of a valuable resource by the District.

Moreover, I observe, Respondent was assigned to a class in October 2013 comprised of the most difficult students from existing classes. I note Principal Gearhart acknowledged these students did not receive IEP's although, had they been classified, they would have been given such a program. Also, she testified these children had not been evaluated by the previous school administration. Thus, in my opinion, Respondent was given a class that was designed to produce failure. Moreover, I find merit in Respondent's claim the CAP he developed at Sussex Avenue became inapplicable to the development of his Annual Summative Evaluation upon his reassignment to Weequahic High School. I observe as well, at Sussex Avenue School, Respondent was seriously injured in January 2014 when breaking up a fight in his

classroom. Thus, the high school vice principal, Mr. Westberry, evaluated Respondent without any thought to his time at Sussex Avenue School. Therefore, his ASE was incomplete at best. As a result, I determine, this fact negated whatever was included in Respondent's CAP because it could not be measured by anything that occurred at the high school.

Additionally, I observe, upon his arrival at Weequahic High School, he was assigned to teach math to both ninth and twelfth grade classes. The ninth grade class was "challenging and difficult," while the other classes was more successful, according to Vice Principal Westberry. Nonetheless, Mr. Westberry observed Respondent teaching only grade nine students. I find Westberry's failure to observe Respondent in the grade twelve class constitutes a serious error on his part. How does one observe only one grade level and ignore the other when evaluating a teacher? The clear answer, in my view, is that the situation should not have occurred, as it violates educational principles as well as any semblance of fairness. Thus, Westberry's failure to evaluate Respondent in his grade twelve class constitutes an incomplete evaluation and should be accorded little weight, I determine.

Further, given his serious injuries and disability, I note Respondent had approximately only three months of teaching, from late-March to mid-June, and his annual evaluation was done on May 15, 2014. Therefore, all his observations and evaluations were done within an approximately two-month period. I believe it is difficult, if possible at all, to compress all evaluation procedures in this short time span.

Additionally, I note, two observations occurred on consecutive days in the same grade. Thus, Respondent had no opportunity to implement any changes suggested by his evaluators. Also, I find, Westberry's explanation for this anomaly was that "it wouldn't have made no difference because Mr. Dawkins was an experienced teacher." This, in my opinion, lacks any reasonable educational basis and renders these evaluations meaningless. This is so because, as Arbitrator Mattye M. Gandel noted, the requirements to observe a teacher are designed to assist him to improve on his weaknesses, and provide guidance for him to improve. Therefore, there has to be a reasonable time period between evaluations to show improvement for the balance of the year.[1]

[1] Patsy Cuntrera and Passaic County Vocational School District. Agency Docket No.2283-8/15; R4).

However, Respondent was not observed for the balance of the year during the time between the mid-year and annual evaluation on May 15, 2014. This demonstrates to me the District was more interested in discharging Respondent rather than assisting him to be a more effective teacher. Any teacher with twenty plus years in a district deserves at least that consideration, I believe.

Further, the District failed to properly implement the evaluation system when Mr. Westberry conducted an evaluation on April 11, 2014, but did not observe Respondent for the remainder of the year between Respondent's mid-year and his evaluation on May 15, 2014. This undermined a major purpose of a mid-year evaluation, which was designed to set goals for improvement and adjustment for the balance of the year. Clearly, Mr. Westberry's failure to do this contributed to Respondent's problems, I determine.

Additionally, I am taken aback by the fact Ms. Gearhart rated Respondent "effective", the only time she reviewed Competency Four. Also, Mr. Westberry observed Respondent three times and rated him "effective" in Competency Four, as he did in Respondent's mid-year evaluation. Yet, to my chagrin, I see, after being rated effective by two principals for that category, he

received only a "partially effective" rating for that indicator. An action such as this leads me to consider the possibility there is more than meets the eye in this matter. To me, a teacher rated "effective" four times in several months should obviously be rated "effective" in that category. The District's failure to do so seriously undermines the "inefficiency" finding on Respondent's evaluations, and, frankly, District officials should consider investigating this anomaly, in my opinion.

As for the School Improvement Panel, I note the District either did not have such a panel or, while one may have existed on paper, it certainly did not function as required. A simple reading of Mr. Westberry's testimony demonstrates he had no knowledge of the Panel and certainly had no idea what it was supposed to achieve. For these reasons, I find, the charges against him for 2013-2014 are arbitrary, capricious, and contrary to N.J.S.A. 18A:6-17.2

Moreover, I determine, as well, the District has not sustained its burden for the 2014-2015 school year. As a result of the injuries he had sustained while breaking up a fight in January 2014, he was again granted a leave of absence which extended from the beginning of the school year to December 2014 or January 2015. When

he returned, he was reassigned to a different school, this one being a newly created middle school called Girls' Academy of Newark. Since he had taught high school the previous year, he again had to make adjustments required to teach middle school mathematics. However, I observe, once again he was not assigned to teach a regular class, but was assigned to assist other teachers in existing classes. Also, I note, he did not receive a regular class assignment of his own until mid-March 2015. However, his annual evaluation was done on May 12, 2015, resulting in an approximate two-month period of time. This, I find disturbing. It appears to me it is virtually impossible for a teacher to have an annual evaluation based on his performance over only a two-month time period. This act, in and of itself, was arbitrary and capricious, I determine.

Further, I note, in the 2014-2015 school year, the district's behavior was thoughtless. While Respondent was observed on two consecutive days in the previous year, in this situation he was evaluated twice in the same day, at the same time, in the same classroom. The District's excuse during the hearings was that it was attempting to coordinate and "norm" the observations of the new Principal and her Vice-Principal. However, in my

opinion, it was done so the two observers would come up with similar, if not exact evaluations. This is not why evaluation systems were developed. The goal of these evaluations is to assist a teacher in improving performance. However, with two evaluations on the same day, such an opportunity does not exist. Additionally, Respondent's last observation occurred on May 11, 2015 one day before his annual evaluation. Such an act completely obliterates the purpose of observation/evaluation which is to improve instruction. In this, I agree with Respondent's claim the process of observing and evaluating him was arbitrary and capricious. This term is a serious one which I do not take lightly. However, I am surprised and dismayed any district would engage in such actions, as did the administration of Girls' Academy.

Moreover, I determine, the District's actions in the matter of Respondent's CAP was also improperly implemented. Due to his extended absence, Respondent's CAP was signed on March 25, 2015 and his Annual Summative Evaluation was done approximately one and one-half months later. This was so even though the CAP stated the time to assess student growth was four months.

Therefore, the timing of this evaluation was, once again, in my view, arbitrary and capricious.

As for the CAP itself, I see it did not provide a process for assessing student growth. The requirement for this area requires the evaluator to consider the SGO based on available student data and on growth and/or achievement. However, in this instance I find Principal Williams' testimony was unconvincing, as she failed to provide a numerical score for the SGO and did not provide any evidence she factored the SGO into Respondent's score. Accordingly, I determine, during the school year 2014-2015, the District committed the same error as did the administration in a different building the previous year; that is, it failed to properly compute a separate score for Respondent based on student growth and, therefore, could not have factored this into his Annual Summative Evaluation. Accordingly, I find, that evaluation bears no weight in Respondent's evaluation process. It also constitutes a material error, I determine

Finally, I find, the District's reliance on the doctrine of materiality is misplaced. The fact is, there were multiple observation/evaluation errors in both years at issue here. As discussed herein, both the timing

and content of these factors were insufficient to establish anything except certain administrators were asleep at the switch when it came to observation/evaluation and, especially, when it came to SGO's. Accordingly, I find the observations/evaluations and Annual Summative Evaluations were material because without valid SGO's and Annual Summative Evaluations there can be no statutory basis for charges against Respondent. For the reasons delineated herein. I find the District did not have cause to discharge Respondent. The appropriate remedy is reinstatement with full back pay. It is so ordered.

**AWARD**

The District did not have cause to discharge Respondent Joel Dawkins. The appropriate remedy is reinstatement with full back pay.

10/21/15

STEPHEN M. BLUTH, ARBITRATOR

*State of New York)*
*)ss:*
*County of Nassau)*

*On this, the 21 day of October, 2016, before me a notary public, the undersigned officer, personally appeared Stephen M. Bluth, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.*
*In witness hereof, I hereunto set my hand and official seal.*

*Cherie L Bluth*
*Notary Public No. 01BL6253737*

368-16

MICHELLE GREEN, JACK GREEN IV, DANIELLE SINTIC, LEXA SKOWRENSKI, AND CHRISTANA KMECZ.

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

Petitioners sought a finding that the respondent Board violated *N.J.S.A.* 18A:36-34 when it administered an "Attitudes and Behaviors Survey" (Survey) to sixth graders in the Ocean Township school district without obtaining written informed parental consent, and by failing to provide parents the opportunity to view the pupil survey at convenient times and locations prior to administering the survey. Petitioners alleged that the Survey posed questions that required students to reveal personal information related to mental or psychological issues, "sexual behavior and attitudes," and "illegal, anti-social, self-incriminating and demeaning behavior" which was potentially embarrassing to students or their families. Petitioners additionally sought attorneys' fees and related costs, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: on November 14, 2014, the respondent Board administered the Survey to all District sixth graders whose parents or guardians had not signed and returned an "opt-out" form; petitioners in this matter, except Danielle Sintic, had standing to challenge the Board's alleged violation of the consent and viewing requirements of *N.J.S.A.* 18A:36-34; the Board violated the "prior written informed consent" requirement of the statute, but did not violate the requirement that parents be provided a chance to view the Survey at "convenient locations and time periods"; petitioners are not entitled to an award of counsel fees; however, a monetary penalty that punishes the Board for its actions and serves as a deterrent to similar behavior by other school boards is justified. The ALJ concluded that the Board must redact the results of the survey from pupil records if any results are contained therein; must identify any outside agencies or persons to whom the results of the surveys were given, and must retrieve all survey information from these outside agencies or persons. Accordingly, the motion for summary decision was granted in part and denied in part, and a penalty of $1000 was imposed against the Board for its violation of *N.J.S.A.* 18A:36-34.

Upon comprehensive review, the Commissioner concurred with the ALJ's decision but rejected the ALJ's assessment of a $1000 penalty, noting, *inter alia*, that the Board has already taken remedial measures – including revising its policy to reflect proper procedures for administration of future surveys and destroying completed copies of the Survey at issue – to voluntarily comply with the provisions of *N.J.S.A.* 18A:36-34 going forward. Accordingly, the Initial Decision of the OAL – as modified herein – was adopted as the final decision in this case.

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

October 24, 2016

OAL DKT. NO. EDU 4867-15
AGENCY DKT. NO. 3-1/15

| | | |
|---|---|---|
| MICHELLE GREEN, JACK GREEN IV, DANIELLE SINTIC[1], LEXA SKOWRENSKI, AND CHRISTANA KMECZ. | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, | : | |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the respondent. In this matter, petitioners allege that the Board violated *N.J.S.A.* 18A:36-34 by failing to obtain "prior written informed consent" from parents before administering an "Attitudes and Behaviors Survey" ("Survey") to the District's students. Petitioners further allege that the Board also failed to provide the parents an opportunity to view the Survey at convenient times and locations prior to administering it to the students, in violation of *N.J.S.A.* 18A:36-34. Respondent contends that the Board did not violate *N.J.S.A.* 18A:36-34, and that the petitioners do not have standing.

The ALJ concluded that the petitioners – except Danielle Sintic – have standing to challenge the Board's administration of the Survey, and that the Board violated the "prior written informed consent" requirement of *N.J.S.A.* 18A:36-34. The ALJ also concluded that the Board did not violate the requirement that the parents be provided the opportunity to view the Survey at

[1] Petitioner Danielle Sintic is no longer a party in this matter following issuance of an order by the Administrative Law Judge ("ALJ") on October 9, 2015, finding that Ms. Sintic did not have standing to pursue this litigation against the Board, which the Commissioner accepts as proper.

"convenient locations and time periods." Furthermore, the ALJ found that petitioners are not entitled to an award of counsel fees[2], but imposed a monetary penalty of $1000 on the Board for its violation of *N.J.S.A.* 18A:36-34. The ALJ further ordered the Board to redact the results of the Survey from pupil records if any such results are contained therein, identify any outside agencies or persons to whom the results of the Survey were given, and request that such agencies or persons return all Survey information to the Board. Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's decision, as modified herein.

Petitioners take exception to the ALJ's denial of counsel fees and the amount of the monetary penalty imposed on the Board. Petitioners also seek additional remedies not requested below. Respondent takes exception to the ALJ's determination that the petitioners have standing, that the Board violated *N.J.S.A.* 18A:36-34, and the ALJ's imposition of the monetary penalty on the Board. While reflecting their obvious disagreements with the findings and conclusions contained within the Initial Decision, the parties' exceptions pertaining to counsel fees, petitioners' standing, and the Board's violation *N.J.S.A.* 18A:36-34, are unpersuasive and, substantially recast and reiterate the arguments made below. The Commissioner finds that the issues were properly raised and adjudicated below, and agrees with the ALJ's determination with regard to counsel fees, petitioners' standing, and the Board's violation of the consent requirement of *N.J.S.A.* 18A:36-34. Furthermore, the Commissioner will not consider the additional remedies that are now being improperly sought by petitioners by way of their exceptions.

With regard to the monetary penalty of $1000, petitioners argue that a penalty of $10,000 for each year the Board has administered the Survey is appropriate, the total sum of which is $90,000, as the Board has conducted the Survey annually from November 2005 to

[2] *See* October 9, 2015 Order on Motion to Dismiss.

November 2014. Respondent challenges the ALJ's authority to impose a monetary penalty and argues that only the Commissioner may impose such a penalty. Respondent further argues that a monetary penalty is discretionary, not mandatory. Lastly, respondent submits that any penalty in this case would be punitive in nature and the financial burden of the penalty would be on the tax-payers, such as the petitioners[3].

A review of the legislative history of *N.J.S.A.* 18A:36-34 indicates that the statute is intended to follow the Protection of Pupil Rights Amendment ("PPRA"), 20 *U.S.C.A.* § 1232h[4]. Therefore, the interpretation and application of *N.J.S.A.* 18A:36-34 must be consistent with the PPRA. The enforcement mechanism under the PPRA provides the following:

> The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that – (1) there has been a failure to comply with such section; and (2) compliance with such section cannot be secured by voluntary means.

Notably, *N.J.S.A.* 18A:36-34's enforcement provision – "[a] school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the Commissioner" – leaves the determination of a monetary penalty at the Commissioner's sole discretion. In the absence of further guidance or restrictions from the Legislature on the monetary penalty, the Commissioner relies on the plain language of *N.J.S.A.* 18A:36-34 and its Federal counterpart in determining whether any monetary penalties should be assessed.

The PPRA's termination of assistance is akin to the monetary penalty under *N.J.S.A.* 18A:36-34. As such, before imposing a monetary penalty, the Commissioner will consider whether the Board failed to comply with the statute and whether voluntary compliance

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[3] The Commissioner recognizes that assessment of penalty on the Board is ultimately borne by the taxpayers, and therefore, the penalty should not be unreasonable or excessive.

[4] The identical Sponsor Statements issued in the State Assembly and Senate during the introduction of the underlying bill notes in relevant part, "[t]his bill is modeled on 20 *U.S.C.A.* § 1232h, commonly referred to as the Protection of Pupil Rights Amendment." L. 2001, c. 364.

cannot be secured. The Commissioner has already determined that the Board failed to comply with the consent provision of *N.J.S.A.* 18A:36-34; however, voluntary compliance from the Board can be secured as the Board has already taken certain remedial measures, including revising its policy to reflect the proper procedures to be followed prior to administration of future surveys and assessments, and destroying copies of the completed Survey[5]. Therefore, the Commissioner will not impose a monetary penalty on the Board and rejects the ALJ's assessment of $1000 on the Board.

Accordingly, the ALJ's Initial Decision – as modified herein – is adopted as the final decision in this matter.

IT IS SO ORDERED.[6]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/24/16
Date of Mailing: 10/25/16

[5] Respondent's representation that it has destroyed the completed Survey and withheld administration of same to the remaining grades has not been refuted.

[6] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 4867-15
AGENCY REF. NO. 3-1/15

**MICHELLE GREEN, JACK GREEN IV, DANIELLE SINTIC, LEXA SKOWRENSKI, AND CHRISTANA KMECZ,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,**
Respondent.

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**James T. Hundley**, Esq., appearing for petitioners (Hundley, Parry & Bradley, LLC, attorneys)

**Jodi S. Howlett**, Esq., appearing for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: July 25, 2016 Decided: September 8, 2016

BEFORE **SUSAN M. SCAROLA**, ALJ:

## STATEMENT OF THE CASE

The petitioners, Michelle and Jack Green (Greens), Danielle Sintic (Sintic), Lexa Skowrenski (Skowrenski), and Christana Kmecz (Kmecz) (collectively "petitioners"), allege that the respondent Board of Education of the Township of Ocean (Board) violated N.J.S.A. 18A:36-34 by failing to obtain written informed parental consent and by failing to provide parents the opportunity to view an "Attitudes and Behaviors Survey" ("survey") at convenient times and locations prior to administering the survey to sixth-grade students in 2014.[1]

## PROCEDURAL HISTORY

On January 7, 2015, the petitioners filed a petition with the Commissioner of Education (Commissioner) alleging the wrongful administration of the survey to sixth-graders. On March 16, 2015, the Board filed a motion to dismiss in lieu of an answer to petitioners' petition with the Commissioner. On April 9, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

## FACTUAL DISCUSSION

The petitioners allege that the Board violated the law governing the administration of school surveys, N.J.S.A. 18A:36-34, by failing to obtain written informed parental consent and by failing to provide parents the opportunity to view an "Attitudes and Behaviors Survey" (survey) at convenient times and locations prior to administering the survey to sixth-grade students. Under N.J.S.A. 18A:36-34,

> a. Unless a school district receives prior written informed consent from a student's parent or legal guardian and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or

[1] As discussed below, one of the original petitioners, Danielle Sintic, is no longer a petitioner in this matter.

> nonacademic survey, assessment, analysis or evaluation which reveals information concerning:
>
> > (1) political affiliations; (2) mental and psychological problems potentially embarrassing to the student or the student's family; (3) sexual behavior and attitudes; (4) illegal, anti-social, self-incriminating and demeaning behavior; (5) critical appraisals of other individuals with whom a respondent has a close family relationship; (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; (7) income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or (8) social security number.
>
> b. The school district shall request prior written informed consent at least two weeks prior to the administration of the survey, assessment, analysis or evaluation.
>
> c. A student shall not participate in any survey, assessment, analysis or evaluation that concerns the issues listed in subsection a. of this section unless the school district has obtained prior written informed consent from that student's parent or guardian.
>
> d. A school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner.

According to the Board's Policy No. 2415.05, "Pupil Surveys, Analysis and/or Evaluations," which was created in April 2004 and was in effect at the time the challenged survey was administered, "[t]he Protection of Pupil Rights Amendment (PPRA) (20 U.S.C. § 1232h; 34 CFR Part 98) . . . requires written consent from parents/legal guardians . . . before minor students are required to participate [in a federally funded] survey" that includes questions about the political and religious beliefs of the student or the student's parent, a student's sexual behavior or psychological problems, and other personal information.[2] (Petition at Ex. 3.) The policy also gave parents the right to inspect such a survey prior to administration. (Ibid.)

[2] The Board does not dispute that the survey at issue was federally funded.

At its meeting on October 21, 2014, the Board approved participation by sixth-, ninth-, and twelfth-grade students in an "Attitude[s] and Behavior Survey." (Id. at Ex. 1.) In a letter dated "October 2014" the Board's superintendent advised parents of students in the relevant grades that "[t]he survey addresses attitudes and behaviors related to family life, school, extracurricular activities, personal relationships, and drugs and alcohol." (Id. at Ex. 2.) According to the letter, the intent of the survey was to create a report from the responses to "guide the development and implementation of programs and services in our community." (Ibid.) The letter further notified parents, in pertinent part:

> **Students will complete the survey anonymously, meaning that no personal identifying information will be requested or sought**.
>
> In late November, 2014 the school district will once again collect information from all 6th, 9th, and 12th grade students, in our fourth tri-annual survey. **Both parents and students have the right to opt out of participating in the survey. The taking of this survey is voluntary. If you do not wish your child to participate, please complete the bottom portion of this letter and return to** your child's homeroom teacher no later than November 5, 2014.
>
> . . . The survey will be available in the main office of your child's school, the Superintendent's office . . . and at the [Ocean Township] Department of Human Services should you wish to view it.
>
> [Ibid.]

According to the superintendent, "[t]he letter dated 'October 2014' was distributed for the purpose of providing parents additional notice of the questionnaire, and give them the option to review the questionnaire, and provide the opportunity to waive their consent for the child to . . . participate." (Stefankiewicz Cert., ¶ 7.) The superintendent maintains that on November 14, 2014, the survey "was given to the students whose parents consented," and that "[t]he student of any parent who waived consent was not given a survey, and those students were removed from the classroom and did not view the questionnaire." (Id. at ¶¶ 10–11.) The survey was composed of 160 questions, including personal questions about mental and psychological problems, sexual behavior

and attitudes, and illegal, anti-social, and demeaning behavior. (Board's Brief in Opposition to Petitioners' Motion for Summary Decision, Ex. A.)

On December 16, 2014, the Board adopted Policy No. 9560, which replaced Policy No. 2415.05. (Petitioners' Brief in Support of Motion for Summary Decision, Ex. A.) Under the new policy,

> [w]hen administering [a survey] . . . the Superintendent . . . shall request written informed consent at least two weeks prior to the administration of the survey. The request for consent shall provide the parent/legal guardian the opportunity to view a copy of the document at a convenient location and time. The pupil shall not participate in the [survey] if the requested written informed consent is not obtained.
>
> [Ibid.]

On January 7, 2015, petitioners filed with the Commissioner of Education a petition in which they allege that "[o]n October 21, 2014, respondent Board adopted a Resolution authorizing the administration of [the survey] to sixth, ninth and twelfth grade pupils enrolled in the District"; that "[p]rior to November 14, 2014, respondent Board forwarded an 'Opt A Pupil Out Notice' to the parents and legal guardians of pupils scheduled to participate in the [survey]" and that "[t]he Notice was formulated in accordance with Board Policy 2415.05 Pupils Surveys, Analysis and/or Evaluations"; that the Board "failed to make copies of the [survey] available for viewing at the various District school sites attended by sixth grade pupils who were scheduled to be administered the survey" and that parents of these students "were required to travel to respondent Board's offices . . . during Board business hours"; that "[o]n November 14, 2014, respondent Board administered the [survey] to all District sixth grade pupils whose parents or legal guardians did not sign and return the "Opt A Pupil Out Notice" and that "[a]s of the date of this Petition, respondent Board has not administered the [survey] to the District's ninth and twelfth grade pupils"; and that the survey "required participating pupils to reveal personal information regarding "mental or psychological problems potentially embarrassing to the pupils or the pupils' families," "sexual behavior

and attitudes," and "illegal, anti-social, self-incriminating and demeaning behavior." (Petition, ¶¶ 6–9, 11.)

At all relevant times, the Greens, Skowrenski, and Kmecz were parents of a sixth-grade student. (Id. at ¶ 1–4.) The Greens, Skowrenski, and Kmecz all signed and returned the bottom portion of the October 2014 letter, and none of their children took the survey. (Green Cert., ¶¶ 7–8.)

As relief, petitioners seek an order from the Commissioner finding that the Board's actions violated N.J.S.A. 18A:36-34; requiring the Board to redact from pupil records the results of the survey and to identify any outside agencies or persons to whom the results of the survey were given and to request that such agencies or persons return all survey information to the Board; imposing a monetary penalty against the Board in accordance with N.J.S.A. 18A:36-34(d); and awarding counsel fees to petitioners. (Petition, ¶¶ A–G.)

On April 9, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case. On March 16, 2015, the Board filed with the Commissioner a motion to dismiss in lieu of an answer to the petition. In its motion, the Board argued: (1) that petitioners do not have standing to bring this action because petitioners filed the petition on their own behalf, and not on behalf of their children, and that, as such, they are "seeking relief without being affected by a school's policy in a direct and meaningful way," or, in the alternative, that Sintic does not have standing because neither of her children was in a grade to which the survey was administered; (2) that the petition is moot because, on December 16, 2014, the Board revised Board Policy 2415.05, which is now codified as Board Policy 9560, "Administration of School Surveys," and which complies with the requirements of N.J.S.A. 18A:36-34, and "[s]ince Policy 2415.05 has been deemed null and void by the Board, and has been effectively superseded by Policy 9560, it is no longer the subject of a 'concrete contested' issue which affects the parties in this matter"; and, (3) that petitioners are not entitled to counsel fees because the Commissioner is not statutorily authorized to award counsel fees. (Board's Motion at 2–9.)

On October 9, 2015, the Board's motion to dismiss was granted in part and denied in part. The Order provided that all of the petitioners, except Danielle Sintic, had standing in this matter, that the matter was not moot, and that petitioners would not be entitled to counsel fees if they ultimately prevailed in this matter. (October 9, 2015, Order.)

On March 21, 2016, petitioners filed a motion for summary decision finding that the Board violated N.J.S.A. 18A:36-34 by failing to obtain "prior written informed consent" and to allow parents to view the survey at "convenient locations and time periods" before administering the survey to sixth-graders. On the latter issue, Michelle Green certified that she went to the Ocean Township Middle School to view the survey, but she was told that it was not available there and she had to travel three miles to the superintendent's office to view the survey. (Green Cert., ¶ 3.)

In its April 18, 2016, opposition brief, the Board argues that it did not violate N.J.S.A. 18A:36-34 because the Board provided parents the opportunity to "waive consent" for their children to take the survey and the survey did not "reveal" any sensitive information because the children took the survey anonymously. The Board further argues that it did not violate the survey statute with respect to petitioners because the consent and viewing requirements are preconditions of the actual administration of the survey to a student and, here, none of petitioners' children actually took the survey. In this regard, the Board again argues that petitioners do not have standing to challenge the administration of the survey.

## LEGAL DISCUSSION

### Standing

As an initial matter, the Board contends that petitioners do not have standing to challenge any violation of the consent and viewing requirements of N.J.S.A. 18A:36-34 because none of their children actually took the survey. Generally, the Commissioner of Education has jurisdiction to hear and determine all disputes and controversies arising under the school laws. N.J.S.A. 18A:6-9. However, standing is "a threshold justiciability

determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). In New Jersey, there exists a rather liberal approach to questions of standing. Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 101, 107–11 (1971). Standing is nonetheless limited to "situations where the litigant's concern with the subject matter evidence[s] a sufficient stake and real adverseness." Id. at 107. These requirements are designed to prevent litigation by those who are "merely interlopers or strangers to the dispute." Ibid.

Standing "is not automatic, and a litigant usually has no standing to assert the rights of a third party." In re Six-Month Extension, supra, 372 N.J. Super. at 85 (citing Spinnaker Condo. Corp. v. Zoning Bd., 357 N.J. Super. 105 (App. Div.), certif. denied, 176 N.J. 280 (2003)). However, "[t]he standing of taxpayers and citizens, under appropriate circumstances and without any showing of increased tax burden, to maintain proceedings seeking to remedy wrongful acts of public officials has long been recognized in our State." Haines v. Burlington Cnty. Bridge Comm'n, 1 N.J. Super. 163, 171 (App. Div. 1949), aff'd sub. nom. Driscoll v. Burlington Bridge Co., 8 N.J. 433, cert. denied, 344 U.S. 838, 73 S. Ct. 34, 97 L. Ed. 652 (1952).

In certain cases, taxpayers or residents of a school district may have standing if they have a "'slight private interest, added to and harmonizing with the general public interest.'" Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427, 432–33 (App. Div. 1995) (quoting Hudson Bergen Cnty. Retail Liquor Stores Ass'n v. Bd. of Comm'rs, City of Hoboken, 135 N.J.L. 502, 510 (E. & A. 1947)). For example, in Ridgewood, two part-time supplemental teachers employed by a school board had standing to challenge a board policy limiting the employment of supplemental teachers even though they had acquired tenure and would be unaffected by the policy. According to the court, "[w]here the challenge is to an exercise of legislative or quasi-legislative power, the public interest is necessarily involved" and, thus,

> [t]o the extent their status as residents and taxpayers of the school district was not itself an adequate basis for according

> standing—a proposition of questionable validity—[the petitioning teachers], by reason of their professional status and involvement, must be seen as having satisfied any additional requirement that may exist for a "slight private interest, added to and harmonizing with the general public interest," in order for their standing to be recognized.
>
> [Id. at 430–31, 432–33 (citation omitted).]

However, in D.H. ex rel. J.M.H. v. Board of Education of Montclair, EDU 9419-04, Initial Decision (November 22, 2004), adopted, Comm'r (December 29, 2004), <http://www.njlaw.rutgers.edu/collections/oal>, a father who sought to have his son admitted to an algebra class without having to take a screening test required by the school board did not have standing to challenge the board's testing policy because the board had waived the testing requirement for the child and enrolled him in the class and, thus, he "no longer ha[d] a personal interest [in] the outcome of [the] matter," and he also did not "have standing based solely on the public interest of the taxpayers [of the school district], whom [he] did not represent."

Similarly, in Herron v. Board of Education of Montclair, EDU 14067-13, Initial Decision (April 16, 2014), <http://www.njlaw.rutgers.edu/collections/oal>, adopted, Comm'r (June 2, 2014), <http://www.state.nj.us/education/legal/commissioner/2014>, a school-district resident did not have standing to challenge the school board's plan to administer quarterly achievement tests to its students because he did not have any children attending school in the district when he filed his petition and because, even though he sought to advocate for the school community, he "had no personal stake in the outcome of [the] dispute but, rather, ha[d] brought [the] action on behalf of unnamed others." As the Commissioner noted, the petitioner did not have third-party standing because he "d[id] not hold a confidential relationship with [district] students and their parents—who could bring a petition on their own if they chose."

Here, as in Ridgewood and unlike in D.H. and Herron, the petitioners have taxpayer or resident standing to challenge the Board's administration of the survey because, even though none of their children actually took the survey, petitioners have a "slight private interest, added to and harmonizing with the general public interest," in

ensuring that the Board complies with the requirements of N.J.S.A. 18A:36-34. While the Board correctly argues that any violation of the survey statute flows from the actual administration of a survey to a student ("Unless a school district receives prior written informed consent from a student's parent . . . and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or nonacademic survey"), and petitioners' children did not take the survey, petitioners are not "interlopers" or "strangers to the dispute." At the time the dispute arose, they were parents of sixth-grade students in the district. They have a sufficient private interest in this matter because they were directly affected by the Board's former policy regarding student surveys and the "October 2014" letter, and their children would have taken the survey if petitioners had not been diligent in withholding their consent.

**Written Consent**

Since petitioners have standing to challenge the Board's administration of the survey, the question becomes whether the Board violated N.J.S.A. 18A:36-34 by failing to obtain written informed parental consent and by failing to provide parents the opportunity to view the survey at convenient times and locations prior to administering the survey to sixth-grade students. As explained by the sponsors of the bill that eventually became N.J.S.A. 18A:36-34, "[t]his bill is modeled on 20 U.S.C.A. § 1232h, commonly referred to as the Protection of Pupil Rights Amendment," which "provides, in part, that school districts must receive written parental consent before students are required to fill out any survey . . . that is funded with moneys from the federal Department of Education and that deals with certain sensitive issues." Statement to A3359 (March 26, 2001).

The parties dispute the meaning of "prior written informed consent" under N.J.S.A. 18A:36-34(a). Petitioners maintain that this language requires parents to "opt in," or provide active consent prior to the administration of a survey, while the Board argues that "[c]onsent is informed when the person giving or waiving consent is provided with a reasonable amount of time to deliberate, and is aware of the right to refuse to give consent." (Board's April 18, 2016, Brief at 4.) According to the Board, the

October 2014 letter "was distributed for the purpose of providing parents additional notice of the questionnaire, and give them the option to review the questionnaire, and provide the opportunity to waive their consent for the child to . . . participate."

A plain reading of the statute supports petitioners' argument that "prior written informed consent" requires parents to "opt in." Indeed, the law is intended to require school districts to "receive written parental consent before students are required to fill out any survey." A school district does not "receive written parental consent" if a parent stays silent or fails to "opt out" of a survey. Instead, as petitioners correctly argue, a school district cannot administer a survey to a student unless the student's parent "opts in," or provides express written consent. See Zelma v. Market U.S.A., 343 N.J. Super. 356, 360–61 (App. Div. 2001) (stating that "opt in" means a party "must expressly consent," while "opt out" means a party's "consent is presumed unless it acts to bar such actions"). While the Board disputes petitioners' characterization of the October 2014 letter as an "Opt a Pupil Out" notice, it is clear from the content of the letter itself that parents were provided an opportunity to "opt out" rather than "opt in," and it is also clear that the Board administered the survey to children of parents who did not "opt out." As such, the Board violated the statutory "prior written informed consent" requirement when it administered the survey to sixth-grade students.

The Board unpersuasively maintains that it did not violate N.J.S.A. 18A:36-34 because the survey was anonymous and, thus, the children who took the survey did not "reveal" any sensitive information. Again, N.J.S.A. 18A:36-34 requires "school districts [to] receive written parental consent before students are required to fill out any survey . . . that deals with certain sensitive issues." The Board's argument regarding the anonymity of the survey misses the point, as the statute is designed to protect children from exposure to personal questions about mental and psychological problems, sexual behavior and attitudes, and illegal, anti-social, and demeaning behavior without their parents' active consent. Whether anonymous or not, the students who took the survey "revealed" sensitive information by answering personal questions on the survey.

Accordingly, the Board must redact the results of the survey from pupil records if any such results are contained therein. It must also identify any outside agencies or

persons to whom the results of the survey were given and request that such agencies or persons return all survey information to the Board.

**Opportunity to View Survey**

Finally, however, the petitioners have failed to show that the Board did not offer parents the opportunity to view the survey "at convenient locations and time periods." Even if, as Michelle Green alleges, she was told that she could not view the survey at the middle school, it could hardly be said that having to drive three miles to the superintendent's office during business hours to view the survey was an inconvenient location and time.

**Penalty**

Under N.J.S.A. 18A:36-34, "[a] school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner." There are no reported cases in which the Commissioner has imposed monetary penalties on a school board for a violation of the survey statute and, thus, there is no precedent on which to rely in determining the appropriate penalty for the Board's violation of the statute. Indeed, N.J.S.A. 18A:36-34 may be the only statute under which the Commissioner has been given the power to impose a monetary penalty.

Nonetheless, a monetary penalty that punishes the Board for its actions and also serves as a deterrent for other school boards who may administer surveys on sensitive topics to impressionable children should be imposed. In determining the penalty, the substantial mitigating factor of the amendment to the Board's policy to comport with the requirements of N.J.S.A. 18:36-34, made shortly after administering the survey to the sixth-grade students, should be taken into consideration. In light of this consideration, a $1,000 penalty against the Board would appear to be appropriate.

## CONCLUSION

In conclusion, the remaining petitioners have standing to challenge the Board's administration of the survey. The petitioners' motion for summary decision is granted in part, in that the Board did violate the "prior written informed consent" requirement of N.J.S.A. 18A:36-34. The motion is denied in part in that the Board did comply with the requirement that parents be afforded the opportunity to view a survey at "convenient locations and time periods."[3] The Board must redact the results of the survey from pupil records if any such results are contained therein; identify any outside agencies or persons to whom the results of the survey were given; and request that such agencies or persons return all survey information to the Board.

## ORDER

For the reasons set forth above, the motion for summary decision is **GRANTED** in part in that the Board did violate the "prior written informed consent" requirement of N.J.S.A. 18A:36-34. The motion is **DENIED** in part in that the Board did comply with the requirement that the parents be afforded the opportunity to view a survey at "convenient locations and time periods."

A penalty of $1,000 shall be imposed against the Board of Education of the Township of Ocean for its violation of N.J.S.A. 18A:36-34 and shall be paid within sixty days.

Furthermore, the Board must redact the results of the survey from pupil records if any such results are contained therein; identify any outside agencies or persons to whom the results of the survey were given; and request that such agencies or persons return all survey information to the Board.

[3] In light of the determination that the provisions of N.J.S.A. 18A:36-34 were violated by the failure to obtain written consent, it is not necessary to take additional testimony as to the "opportunity to view the survey." This matter is therefore concluded.

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

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

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

Susan Scarola

September 8, 2016
DATE

**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: September 8, 2016

Date Mailed to Parties: September 8, 2016

/cb

## APPENDIX

## WITNESSES

**For petitioner**

None

**For respondent**

None

## EXHIBITS

**For petitioner**

Brief

**For respondent**

Brief

369-16LM

369-16


CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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

KIMBERLEY HARRINGTON
*Acting Commissioner*


October 25, 2016

Benjamin B. Brenner, Esq.
The Carroll Law Firm
1 North New York Road
Suite #39
Galloway, New Jersey 08205

Jason E. Sokolowski, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, New Jersey 08608

Re: *In the Matter of the Tenure Hearing of Frank Vergara, School District of the City of Pleasantville, Atlantic County, Agency Dkt. No. 220-8/16.*

Dear Counsel:

I have reviewed the correspondence filed by the District, seeking to withdraw the tenure charges against respondent, Frank Vergara, based on the District's failure to provide notice to respondent of the tenure charges being certified against him. Upon review of the submissions, I find that this procedural defect is sufficient cause for the tenure charges to be withdrawn.

Accordingly, the withdrawal of the tenure charges is approved pursuant to *N.J.A.C.* 6A:3-5.6, and this matter is hereby dismissed without prejudice.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

370-16

| | | |
|---|---|---|
| SEVGI POLSUK GILROY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD ESSEX COUNTY, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

Petitioner – a non-tenured staff member formerly employed by the respondent Board – challenged the non-renewal of her employment as a teacher in respondent's schools. Petitioner was employed by the school district during the 2013-2014 school year, but her contract was not renewed for the following year. Petitioner filed an appeal on September 8, 2014, seeking a statement of reasons and a *Donaldson* hearing for the purpose of making her case for continued employment in the district. The matter was transmitted to the Office of Administrative Law in October 2014, and two subsequent hearing dates were adjourned as the parties engaged in settlement discussions. The parties reached an agreement that petitioner would be given a statement of reasons and a *Donaldson* hearing, even though two years had already passed since her non-renewal; they further agreed that upon completion of the hearing, the within appeal would be dismissed or withdrawn – irrespective of the outcome of the hearing. Petitioner received the statement of reasons in April 2016 and participated in a *Donaldson* hearing in June 2016, but subsequently refused to dismiss or withdraw the appeal. The respondent Board filed a motion to dismiss on the basis of mootness.

The ALJ found, *inter alia*, that: courts normally do not entertain cases when a controversy no longer exists, and the disputed issues have become moot; a case is moot when the original issue presented has been resolved; in the instant matter, petitioner requested relief that included a statement of reasons and a *Donaldson* hearing; and the parties reached an agreement whereby petitioner received a statement of reasons and a *Donaldson* hearing. The ALJ concluded that the original issue in this matter has been resolved, and further proceedings would have no practical effect; accordingly, the matter is moot, and the petition was dismissed with prejudice.

Upon careful review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein, and dismissed the petition with prejudice.

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

October 25, 2016

OAL DKT. NO. EDU 13495-14
AGENCY DKT. NO. 243-9/14

| | | |
|---|---|---|
| SEVGI POLSUK GILROY, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD ESSEX COUNTY, | : | |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the issue became moot once the Board provided petitioner with a statement of reasons and a *Donaldson* hearing. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition is dismissed with prejudice.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/25/16
Date of Mailing: 10/26/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 13495-14
AGENCY DKT. NO. 243-9/14

**SEVGI POSLUK GILROY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,**

Respondent.

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

**Rita F. Barone**, Esq., and **Robert M. Tosti**, Esq., for respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, attorneys)

Record Closed: September 12, 2016 Decided: September 12, 2016

BEFORE **RICHARD McGILL**, ALJ:

Sevgi Posluk Gilroy ("petitioner") challenges the nonrenewal of her employment as a teacher by the Board of Education of the Township of Bloomfield ("respondent"). As a relief, petitioner seeks a statement of reasons and a Donaldson[1] hearing.

[1] In Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), the Court determined that an untenured teacher was entitled to a statement of reasons for nonrenewal and that a timely request for an informal appearance before the board of education should ordinarily be granted.

Respondent moves to dismiss the petition, or alternatively for summary decision, based on a contention that it has provided a statement of reasons and a Donaldson hearing and that the matter is now moot.

## PROCEDURAL HISTORY

Petitioner filed the petition with the Department of Education on September 8, 2014, pursuant to the authority of the Commissioner of Education under N.J.S.A. 18A:6-9 to hear and determine controversies and disputes arising under the school laws. The matter was transmitted to the Office of Administrative Law on October 17, 2014, for determination as a contested case.

Hearings scheduled for September 25, 2015, and April 28, 2016, were adjourned as the result of settlement discussions. Respondent's pending motion was filed on July 15, 2016, and is unopposed.

## MOTION TO DISMISS

Respondent's motion is supported by a certification and attached exhibits setting forth the facts in this matter. The undisputed facts are as follows:

1. During the 2013-2014 school year, petitioner was employed by respondent as a teacher.
2. Petitioner did not have tenure.
3. Respondent advised petitioner that her employment would not be renewed for the following school year.
4. On September 8, 2014, petitioner filed a petition of appeal with the Commissioner of Education.
5. The relief sought by petitioner included a statement of reasons and a Donaldson hearing.

6. The parties reached an agreement that petitioner would be given a statement of reasons and a Donaldson hearing so that petitioner could make her case for employment, even though two years had passed since her nonrenewal.
7. Respondent provided petitioner with a statement of reasons in the form of a letter dated April 5, 2016.
8. A Donaldson hearing was conducted on June 7, 2016. Petitioner was accompanied by her union representative, and she had the attention of the Board for approximately one hour.
9. The parties had further agreed that upon completion of the hearing, irrespective of the outcome, this appeal would be dismissed or withdrawn.
10. Subsequent to the Donaldson hearing, respondent through counsel requested dismissal or withdrawal of the petition in this matter.
11. Petitioner would not agree to dismissal or withdrawal of the petition.

Respondent seeks dismissal of the petition on the basis of mootness, or alternatively, summary decision to enforce the settlement agreement. Courts normally will not entertain cases when a controversy no longer exists, and the disputed issues have become moot. DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). A case is moot when the original issue presented has been resolved. Ibid. Likewise, an issue is moot when the decision sought in the matter can have no practical effect on the existing controversy. Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006). The concept of mootness has been applied to cases before the Commissioner of Education, e.g., Price v. Bd. of Educ. of Washington Twp., OAL Dkt. No. EDU 6121-07, Initial Decision (December 7, 2007), adopted, Comm'r, (January 23, 2008).

Here, petitioner's request for relief included a statement of reasons and a Donaldson hearing. In accordance with the agreement of the parties, petitioner received a statement of reasons and a Donaldson hearing. Under the circumstances, the original issue in this matter has been resolved, and further proceedings will have no

practical effect. Therefore, I **CONCLUDE** that the matter is moot and that the petition should be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed with prejudice.

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

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

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

Sept. 12, 2016
DATE

**RICHARD McGILL**, ALJ

Date Received at Agency: September 12, 2016

Date Mailed to Parties: September 13, 2016

ljb

DIRECTOR AND
**CHIEF ADMINISTRATIVE LAW JUDGE**

375-16

375–16

AGENCY DKT. NO. 225-8/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF GLADYS PORTACIO, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE | : | DECISION |
| BOROUGH OF BOUND BROOK, | : | |
| SOMERSET COUNTY. | : | |
| | : | |

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

The Commissioner notes that the settlement indicates respondent will resign, effective August 31, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

In light of the foregoing, the parties' settlement is hereby approved and the tenure matter dismissed – subject to compliance with the terms of the Agreement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Additionally, this matter is being forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/16
Date of Mailing: 10/26/16

376-16

OAL DKT. NO. EDU 13098-16
(EDU 14816-14 ON REMAND)
AGENCY DKT. NO. 272-9/14

| | | |
|---|---|---|
| GERRY RESNICK, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On August 26, 2016, the Commissioner remanded this matter to OAL because the file did not contain a copy of the Board's resolution approving the settlement and designating the Board President to sign the Agreement on its behalf, nor was the Agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation.

Upon review of the revised record on remand, the Commissioner finds that the Agreement has been signed by the Board's attorney. Therefore, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberly Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/16
Date of Mailing: 10/26/16

*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 13098-16
AGENCY DKT. NO. 272-9/14
On remand
OAL DKT. NO. EDU 14816-16

**GERRY RESNICK,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,**
Respondent.

---

**Timothy A. Pedergnana**, Esq., for petitioner (Flicker, Garelick & Associates, LLP, attorneys)

**Richard A. Brovarone**, Esq., for respondent (Brovarone Law Firm, attorneys)

Record Closed: September 7, 2016 Decided: September 12, 2016

BEFORE **IRENE JONES**, ALJ:

On November 17, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearings on July 28 & 29, 2016, but the dates were adjourned because the parties agreed to settle the matter. A signed

copy of the Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on September 7, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

September 12, 2016
DATE

Irene Jones
**IRENE JONES** ALJ

Date Received at Agency: September 13, 2016

Date Mailed to Parties: September 13, 2016
sej

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FLICKER, GARELICK & ASSOCIATES, LLP
45 Broadway
New York, New York 10006
(212) 319-5240
Attorneys for Petitioner
ID No: 025724012

2016 SEP -7 A 8:02

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| GERRY RESNICK,<br><br>Petitioner,<br><br>v.<br><br>PALISADES PARK JR/SR HIGH SCHOOL,<br>PALISADES PARK BOARD OF EDUCATION,<br><br>Respondents, | AGENCY DKT. No. 272-9/14 |

**SETTLEMENT AGREEMENT**

The parties hereto agree to settle this case under the follow terms and conditions:

Palisades Park Jr/Sr High School and Palisades Park Board of Education (collectively "Respondents") herein agree to the following: (1) During the remainder of Gerry Resnick's career in the Palisades Park School District, Patrick Bott and Sandy Vazquez may not combine as Gerry Resnick's two evaluators in a single school year for any evaluations and/or assessments performed pursuant to the TEACHNJ Act, P.L. 2012, c. 26; and (2) During the remainder of Gerry Resnick's career in the Palisades Park School

District, the relevant school's Principal will be one of the two evaluators for any evaluations and/or assessments of Gerry Resnick performed pursuant to the TEACHNJ Act, P.L. 2012, c. 26.

In consideration of Respondents' aforementioned agreement, Gerry Resnick, Petitioner, herein agrees to voluntarily dismiss, with prejudice, all allegations set forth in her complaint filed with the Commissioner of the New Jersey State Department of Education, AGENCY DKT. No. 272-9/14.

Dated: 7/27, 2015

Gerry Resnick

Dated: July 22, 2015

Palisades Park Board of Education
JEFFREY WOO, PRESIDENT

2 RICHARD A. BROADHURST
PALISADES PARK BOARD OF EDUCATION
ATTORNEY
SEPTEMBER 2, 2016

377-16

| | | |
|---|---|---|
| A.B., ON BEHALF OF MINOR CHILD, T.B. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter, T.B., seeking a determination that T.B. is entitled to a free public education in the Red Bank Regional High School District. The respondent Board alleged that a residency investigation completed in February 2016 showed that A.B. and T.B. are domiciled in the Tinton Falls School District, and not the Red Bank Regional High School District.

The matter was transmitted to the Office of Administrative Law (OAL) in March 2016 and a hearing was scheduled for August 29, 2016. Petitioner failed to appear at the scheduled hearing. Correspondence from petitioner, explaining her failure to appear, was received by the Commissioner on August 29, 2016 and on September 14, 2016; copies of the August correspondence were forwarded to the Administrative Law Judge (ALJ) on August 30, 2016. The OAL sent a notice of petitioner's failure to appear to the Commissioner on August 30, 2016, and subsequently returned the file to this agency.

Upon review, the Commissioner found that the ALJ did not issue an Initial Decision in accordance with *N.J.A.C.* 1:1-14.4(a). Further, the ALJ's dismissal of the matter for failure to appear was improper pursuant to *N.J.A.C.* 1:1-14.4(a). Accordingly, the Commissioner remanded the matter to the OAL for such proceedings as are necessary to bring the matter to conclusion.

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

Issued 10/26/16

377-16

OAL DKT. NO. EDU 4961-16
AGENCY DKT. NO. 87-3/16

| | | |
|---|---|---|
| A.B., ON BEHALF OF MINOR CHILD, T.B. | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, transmitted by the Office of Administrative Law (OAL) on September 7, 2016, has been reviewed.[1] Petitioner failed to appear at the hearing scheduled on August 29, 2016. The Commissioner received correspondence from the petitioner on August 29, 2016 and September 14, 2016, explaining her failure to appear for the scheduled hearing.[2] Copies of the August 29, 2016 correspondence were forwarded to the Administrative Law Judge (ALJ) by this office on August 30, 2016.

Upon review of the record, the Commissioner finds that the ALJ did not issue an Initial Decision in accordance with *N.J.A.C.* 1:1-14.4. Furthermore, the ALJ's dismissal of the matter on the record at the time of the hearing – for failure to appear – was improper. *See N.J.A.C.* 1:1-14.4(a). Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/16
Date of Mailing: 10/26/16

[1] The Commissioner was not provided with a copy of the transcript of the August 29, 2016 hearing.

[2] It appears that petitioner failed to serve the respondent with her explanations as required under *N.J.A.C.* 1:1-14.4(b).

378-16

378-17

OAL DKT. NO. EDU 09056-16
AGENCY DKT. NO. 158-6/16

| | | |
|---|---|---|
| DEVON RUSSAW, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

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

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/26/16

Date of Mailing: 10/26/16

# State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 09056-16

AGENCY DKT. NO. 158-6/16

**DEVON RUSSAW,**

Petitioner,

v.

**WILLINGBORO BOARD OF EDUCATION, BURLINGTON COUNTY,**

Respondent.

---

**Carol R. Smeltzer,** Esq., for petitioner

**Caitlin Lundquist** Esq., for respondent (Methfessel & Werbel, attorney)

Record Closed: August 25, 2016 Decided: September 14, 2016

BEFORE **JOSEPH A. ASCIONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 17, 2016, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have prepared a Settlement Agreement, indicating the terms thereof, as well as the Board's Approval of Resolution, which is attached and fully incorporated herein as exhibit J-1.

Petitioner has executed a Notice of Withdrawal form, which is attached hereto as exhibit J-2.

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

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

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

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

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

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

September 14, 2016
DATE

**JOSEPH A. ASCIONE**, ALJ

Date Received at Agency: 9/14/16

Date Mailed to Parties: 9/14/16

/lam

**WILLINGBORO PUBLIC SCHOOLS**
WILLINGBORO, NEW JERSEY 08046-2847

KELVIN L. SMITH, CPA, MBA
BUSINESS ADMINISTRATOR/BOARD SECRETARY

COUNTRY CLUB ADMINISTRATION BUILDING
440 BEVERLY-RANCOCAS ROAD
TELEPHONE: (609)835-8600 EXT. 1020
FAX: (609)871-1566

Date: August 23, 2016

I hereby certify that the attached Agenda Item 12.1.1 "Approval of Resolution to Accept the Settlement Agreement between WBOE vs. D.R. for the 2016-2017 School Year was approved by the Willingboro Board of Education at its Board Meeting on August 22, 2016.

Moved by: Sarah Holley; Seconded by Theresa Owens

A roll call resulted as follows:

| | | | | | |
|---|---|---|---|---|---|
| Tonya Brown | - | Yes | Garland Hearn | - | Yes |
| Sarah Holley | - | Yes | Gary Johnson | - | Yes |
| Theresa Owens | - | Yes | Dennis Tunstall | - | Yes |
| Felicia Hopson | - | Yes | Kimbrali Davis | - | Yes |

8 Voting: 8 Affirmatives, 0 Negatives, 0 Abstentions

**MOTION PASSED**

Kelvin L. Smith
Business Administrator/Board Secretary

8/23/16
Date

Caitlin Lundquist - ID #020422009
METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
(732) 248-4200
1(732) 248-2355
lundquist@methwerb.com
Attorneys for Willingboro Board of Education
Our File No. 82994 CAL

| | |
|---|---|
| DEVON RUSSAW<br><br>Petitioner,<br><br>V.<br><br>WILLINGBORO BOARD OF EDUCATION<br><br>Respondent. | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br>OAL DOCKET NO.: EDU 09056-2016S<br>AGENCY REF NO.: 158-6/16<br><br>**SETTLEMENT AGREEMENT** |

THIS AGREEMENT made this ___ day of August, 2016, by and between Petitioner Devon Russaw ("Petitioner"), and Respondent, Willingboro Board of Education ("Board"), with offices located at 440 Beverly Rancocas Road, Willingboro, New Jersey 08046; and

WHEREAS, for the 2015-2016 school year, the Board employed Petitioner as an assistant principal at Memorial Middle School; and

WHEREAS, on or about May 10, 2016, the Board approved the non-renewal of Petitioner's employment in the assistant principal position effective July 1, 2016; and

WHEREAS, on or about May 23, 2016, the Board notified Petitioner that she would be reassigned to a classroom teaching position for the 2015-2016 school year; and

WHEREAS, on or about May 31, 2016, Petitioner filed a petition of appeal with the New Jersey Department of Education, Office of Controversies and Disputes, alleging that the Board had acted in violation of her tenure rights to the assistant principal position pursuant to New Jersey statute; and

WHEREAS, the Board filed an answer to the petition of appeal on or about June 16, 2016; and

WHEREAS, on or about June 17, 2016, the Office of Controversies and Disputes transmitted the petition of appeal to the Office of Administrative Law; and

WHEREAS, neither the Office of Controversies and Disputes nor the Office of Administrative Law has made any findings based upon the merits of this matter; and

WHEREAS, the parties, having a desire to settle this dispute amicably, hereby agree as follows:

1. Subject to the terms of this Agreement, the Board agrees to employ Petitioner in the position of assistant principal at Memorial Middle School for the 2016-2017 school year up to and including June 30, 2017.

2. Petitioner will receive a summative evaluation of her performance in the assistant principal position for the 2016-2017 school year, which will conclude in a written summative evaluation report to be completed and provided to Petitioner no later than June 30, 2017. The evaluation process shall be conducted by and the summative evaluation report for the 2016-2017 school year shall be prepared by the building principal at Memorial Middle School and an Assistant Superintendent to be designated by the Board.

3. Petitioner will acquire tenure in the assistant principal position effective June 30, 2017 if she receives a rating of "effective" or "highly effective" in the summative evaluation report for the 2016-2017 school year. If Petitioner does not receive a rating of "effective" or "highly effective" in the summative evaluation report, she will not acquire tenure in the assistant principal position and the Board may reassign her to a classroom teaching position after June 30, 2017, and such a reassignment will not constitute any violation of tenure rights.

4. Prior to the first day of school in September 2016, Petitioner will be offered the opportunity to attend an in-person meeting with an Assistant Superintendent to be designated by the Board and the building principal at Memorial Middle School for the purpose of reviewing the performance expectations for Petitioner in the assistant principal position for the 2016-2017 school year. Petitioner and the Board will each be permitted to be accompanied by legal counsel during the meeting.

5. In exchange for the consideration set forth in the paragraphs above, and other promises contained herein, Petitioner further agrees as follows:

a. The petition of appeal filed with the Office of Controversies and Disputes shall be considered withdrawn and dismissed with prejudice. Petitioner hereby warrants, represents and certifies that she has not filed or instituted, jointly or individually (and no person or agency has filed or instituted on her behalf) any other complaints, suits, actions, charges, claims and/or proceedings against the Board, in any forum, including, but not limited to, the Equal Employment Opportunity Commission, the New Jersey Division on Civil Rights, the United States Department of Labor, the New Jersey Department of Labor, or any other state or federal court or agency; and

b. Petitioner agrees to knowingly and voluntarily release, waive, acquit, disclaim and forever discharge the Board, its partners, members, officers, employees, agents, servants and all other persons, who or which are or might be liable in the premises from any and all claims which Petitioner has or might have against them, their successors, heirs and executors from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to, claims arising under the Americans with Disabilities

Act, the National Labor Relations Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Workers' Compensation Act, New Jersey Wage and Hour laws, and/or any other federal, state or local employment, human rights, civil rights, wage-hour, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, loss of consortium, or any action similar thereto against the Board, including any claim for attorneys' fees, that Petitioner, her heirs, executors, administrators, successors, and assigns, now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of Petitioner's employment with the

Board from the beginning of time, up to and including the date of execution of this Agreement. This Paragraph is not intended and shall not preclude Petitioner from instituting claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1, et seq., the TPAF Act, N.J.S.A. 18A:66-1 et seq., and seeking to enforce the terms of this Agreement.

6. The parties agree to refrain from filing any proceeding, action or complaint regarding Petitioner's employment with the Board from the beginning of time through the date of this Agreement. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

7. The terms of this Agreement represent the compromise of disputed claims between the parties. It shall not be treated as an admission on the part of the Board that it has engaged in any wrongful or unlawful conduct with respect to Petitioner or any other employee, nor an admission that Petitioner has engaged in any wrongdoing or that either party has failed to act in accordance with the law.

8. Petitioner and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims which each has or might have against each other, because of all damages, liabilities, losses or injuries to person or property, or both, whether developed or undeveloped, including attorneys' fees, resulting

from Petitioner's employment with the Board from the beginning of time through the present date.

9. The parties recognize that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties, obligations, requirements and limitations enumerated herein. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties hereby acknowledge that they have been represented by counsel throughout the above-referenced matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel regarding this Agreement.

10. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

11. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release and waiver of any and all claims, known or unknown, including retaliation, which were or

could have been raised by Petitioner against the Board since the beginning of time until execution and/or entry of this Agreement.

12. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioner is not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioner.

13. This Agreement contains the entire agreement between the parties hereto and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement.

14. This Agreement shall become effective upon entry of an Initial Decision incorporating its terms by the Administrative Law Judge assigned to this matter and approval by the Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

DATED: 8/22/16

WILLINGBORO BOARD OF EDUCATION

BY: _____

DATED: 8/22/16

WITNESS:

_____

DATED: _____

_____
Petitioner Devon Russaw

DATED: _____

have been raised by Petitioner against the Board since the beginning of time until execution and/or entry of this Agreement.

12. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioner is not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioner.

13. This Agreement contains the entire agreement between the parties hereto and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement.

14. This Agreement shall become effective upon entry of an Initial Decision incorporating its terms by the Administrative Law Judge assigned to this matter and approval by the Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

| | |
|---|---|
| WITNESS: | WILLINGBORO BOARD OF EDUCATION |
| _____ | BY: _____ |
| DATED: _____ | DATED: _____ |
| WITNESS: | |
| _____ | _____ |
| | Petitioner Devon Russaw |
| DATED: 8/10/2016 | DATED: 8-10-16 |

378-17

379-16E

OAL DKT. NO. EDU 13154-16
AGENCY DKT. NO. 212-8/16

| | | |
|---|---|---|
| S.P., on behalf of minor child, S.P., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/16
Date of Mailing: 10/28/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER DENYING EMERGENT RELIEF**
OAL DKT. NO. EDU 13154-2016
AGENCY DKT. NO. 212-8/16

**S.P., ON BEHALF OF MINOR CHILD, S.P.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,**
Respondent.

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**Kendall S. Murphy,** Esq. for petitioners

**Arnold Robinson,** Esq., for respondent (Robinson and Robinson, attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 2, 2016, petitioner appealed the June 3, 2016, expulsion of S.P. Petitioner seek to have S.P. immediately returned to the regular High School as opposed to the Alternate High School which he is attending pursuant to the discipline imposed in June 2016. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on August 31, 2016 as a contested case.

N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Thereafter on August 31, 2016,

*New Jersey is an Equal Opportunity Employer*

petitioner filed an application seeking emergent relief. Oral argument was heard on the matter before the undersigned on October 7, 2016, and the record closed on the emergent matter after submissions by the parties on October 11, 2016.

## FACTUAL BACKGROUND

S.P. is a ninth grade student enrolled in the Alternative High School in City of Millville. He attended the eighth grade at Lakeside School in the City of Millville for the 2015-2016 school year. In the spring of 2016, S.P was found in possession of marijuana in school. The parents were notified and a disciplinary hearing was scheduled for May 26, 2016. The hearing was held on June 3, 2016. Both parents attended the hearing and the student did not contest the possession of marijuana as alleged and the following discipline was imposed:

> "[S.P.] would be placed in the alternative school program from September 7, 2016 through January 24, 2017 and complete a drug education program with random drug screening. If he successfully completes the drug program and the alternative school program including academic performance, he would be returned to the regular school program on January 24, 2017."

There was no objection made to the imposition of the above discipline until the petition was filed in the within matter. The petitioner challenges the expulsion as well as the placement of S.P. in the alternate high school. The petition raises due process questions and challenges the underlying discipline imposed on S.P. The petitioner seeks to have S.P. reinstated in his normal school, alleging deficiencies in the Alternate Program for a college bound student. The respondent maintains that the discipline imposed is consistent with the discipline imposed for all drug offenders as well as the two other students caught with S.P. in possession of marijuana. Allowing S.P. to return to the normal high school is inconsistent with their policy.

## LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that the following is demonstrated by clear and convincing evidence.

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the test by clear and convincing evidence.

In this matter, the first prong of the test requires the petitioner to demonstrate that S.P. will suffer irreparable harm if the requested relief is not granted. The petitioner has argued that the courses that are offered at the alternative high school are online and they are not taught by a live teacher. S.P. confirmed this fact in a letter submitted at the oral argument on October 7, 2016. Counsel for S.P. argues that S.P. is a college bound student and that this semester at an alternative high school will negatively impact his ability to get into college. In terms of extracurricular activities, S.P. has being permitted to participate in the band. Petitioner presents no evidence, testimony, or even an allegation that S.P.'s transcript will indicate that the courses were taken at an alternate high school, or how one semester at the alternate school will irreparably harm him.

The second prong of the requirement for obtaining emergent relief is that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, such relief may "not be granted when the principal of law on which it depends is disputed, and

has not been settled in this state." Stevens v. Paterson & N.R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869). In this matter, the petitioner seeks to have S.P. placed back in the District's high school, but fails to set forth any legal basis for such relief.
Accordingly, the second prong of the test for emergent relief has not been met.

The third prong of the test for emergent relief requires a petitioner to demonstrate a likelihood that they will prevail on the merits of the underlying claim. Petitioner argues that S.P. is a good student and has not been in trouble in the past and thus, the discipline imposed to severe. The District argues that they have a no tolerance policy to drugs and this discipline is consistent with that imposed on all other student. The District also points out that it is consistent with the discipline imposed on the two other students who were caught with S.P. in possession of marijuana. The petitioner does not provide any legal basis for finding that the discipline imposed will be overturned on substantive or procedural grounds, and thus, has failed to demonstrate a likelihood of success on the merits.

Finally, in order to obtain emergent relief, the relative equities of each party must be balanced to determine who will suffer greater harm if they do not prevail on the question of emergent relief. The District has a no tolerance to drugs policy and imposed discipline that is consistent with that imposed on all other students. There is no evidence to dispute this claim. The District also argues that imposing discipline which is inconsistent with their policy, and would present problems for all discipline in the future.
Accordingly, I **CONCLUDE** that the balance of equities argument favors respondent.

## CONCLUSION

Based on the foregoing, I **CONCLUDE** that petitioner has not demonstrated that emergent relief is appropriate in this matter. Petitioner's request is **DENIED**.

## ORDER

Having **CONCLUDED** that petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**, it is **ORDERED** that the underlying petition in this matter will proceed on a non-emergent track.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Sarah G. Crowley

October 12, 2016
DATE

**SARAH G. CROWLEY**, ALJ

380-16

AGENCY DKT NO. 241-9/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF NILUFAR RAHMAN, | : | COMMISSIONER OF EDUCATION |
| SCHOOL DISTRICT OF THE TOWNSHIP | : | DECISION |
| OF FRANKLIN, SOMERSET COUNTY. | : | |

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/16

Date of Mailing: 10/28/16

***SEPARATION AGREEMENT AND GENERAL RELEASE***

**THIS SEPARATION AGREEMENT AND GENERAL RELEASE** is made this 22nd day of September 2016, by and between the **FRANKLIN TOWNSHIP BOARD OF EDUCATION** (hereinafter **"BOARD"**), with principal offices located at 1755 Amwell Road, Somerset, New Jersey 08873, and **NILUFAR RAHMAN** (hereinafter **"RAHMAN"**).

**WHEREAS, RAHMAN** is employed as a teaching staff member by the **BOARD**; and,

**WHEREAS, RAHMAN** and the **BOARD** desire to settle all aspects of **RAHMAN'S** employment rights and benefits by executing this **SEPARATION AGREEMENT AND GENERAL RELEASE ("AGREEMENT")**.

**IT IS HEREBY AGREED** by and between **RAHMAN** and the **BOARD**, as follows:

1. **RAHMAN**, for and in consideration of the undertakings of the **BOARD** set forth in ¶3 herein, and intending to be legally bound, does hereby remise, release and forever discharge the **BOARD** and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereinafter may have, or which her heirs, executors or administrators hereinafter may have with respect to her employment relationship with the **BOARD,** with the following exceptions: claims for Unemployment Compensation that **RAHMAN** may have arising out of her employment by the **BOARD** and claims arising from the breach of this **AGREEMENT**. **RAHMAN** is unaware of any factual basis for any such claims at this time, except those filed prior to the entry into this **AGREEMENT**. Specifically, **RAHMAN** hereby consents to irrevocably and unconditionally release and discharge **BOARD** and its agents, employees and servants (collectively "**RELEASEES**"), from any and all obligations,

claims, demands, judgments, or causes of action of any kind whatsoever in tort, contract, by statute, or on any other basis for compensatory, punitive, or other damages, expense, reimbursements or costs of any kind, including but not limited to any and all federal, state and local law claims which RAHMAN had or may have had as of the date she signs this agreement, whether statutory or common law, including, but not limited to claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Civil Rights Act of 1866, the Age Discrimination in Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Americans With Disabilities Act, Executive Orders 11246 and 11141, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and all federal, state and local law claims, whether statutory or common law, including but not limited to, claims of personal injury, breach of contract, unlawful discharge from employment, defamation, malicious interference with economic advantage, or discrimination on the basis of age, ancestry, atypical hereditary cellular or blood trait, liability for service in the Armed Forces of the United States, color, creed, handicap, marital status, national origin, nationality, sex, race, sexual orientation or veteran's status, and/or claims growing out of any legal restrictions, express or implied, on **BOARD'S** right to control or terminate the employment of its employees.

2. The **BOARD**, for and in consideration of the undertakings of **RAHMAN** set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge **RAHMAN** and her heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereinafter may have, or which its officers, members, employees and/or agents, and its respective successors and assigns, heirs, executors or administrators

hereinafter may have with respect to her employment relationship with the **BOARD,** except for claims arising from the breach of this **AGREEMENT.**

3. In full consideration of the mutual execution of this **AGREEMENT** and the mutual agreement to be legally bound by its terms and in recognition that **RAHMAN'S** release of claims as set forth above represents good and valuable consideration:

a. **Separation: RAHMAN'S** employment with the **BOARD** shall end effective the close of the school day on October 31, 2016. **RAHMAN** agrees that her signature on this **AGREEMENT** constitutes an acknowledgement that she is relinquishing all present rights to employment, including but not limited to any and all tenure rights, as well as any and all current and/or future rights to employment and/or re-employment with the **BOARD,** except as specifically set forth in this **AGREEMENT.** In that regard, **RAHMAN** will execute and provide the **BOARD** with her signed Letter of Resignation in the form as attached hereto as ***Exhibit A***.

b. **Return of School Property**: Within seven (7) days of signing this **AGREEMENT, RAHMAN** shall return all District property, materials and/or other items, including but not limited to her District-issued laptop computer, with its case, power cords and peripherals; any and all keys; any and all electronic access cards; any and all District-issued credentials; and the "Enhancing Professional Practice: A Framework for Teaching" book and materials.

c. **Payment of Salary:** The **BOARD** agrees to pay **RAHMAN** her salary for the months of September ($7,537.40) and October ($7,537.40) 2016 on September 30, 2016. The payment shall be calculated as follows: gross total of $15,074.80 ($7,537.40 + $7,537.40), less "Chapter 78" deductions for health insurance

premiums through December 31, 2016 ($1,597.04), for an estimated net payment of $13,477.76 ($15,074.80 - $1,597.04), subject to any other applicable payroll deductions, including but not limited to pension deductions. The **BOARD** shall make one (1) payment to **RAHMAN** for both her September and October 2016 monthly salary. **RAHMAN** agrees that her signature on this **AGREEMENT** constitutes an acknowledgement that she is relinquishing any and all future rights to salary from the **BOARD**.

d. **Health Insurance Benefits:** **RAHMAN** will receive health insurance benefits at the expense of the **BOARD**, less the State-mandated "Chapter 78" premium payments payable by **RAHMAN**, up to and including December 31, 2016. **RAHMAN** agrees that her signature on this **AGREEMENT** constitutes an acknowledgement that she is relinquishing any and all future rights to health insurance benefits from the **BOARD**.

e. **Unemployment:** The **BOARD** will not dispute that **RAHMAN** is entitled to receive unemployment benefits nor will the Board assert, for purposes of unemployment benefits, that **RAHMAN** is not entitled to unemployment benefits due to misconduct.

f. **Inquiries:** The **BOARD**, through the Superintendent of Schools and/or the Superintendent's designee(s), shall respond to any inquiries regarding **RAHMAN'S** employment only by indicating her dates of employment, position held, and the amount of her final salary. No other information shall be released with respect to **RAHMAN'S** employment to prospective employers or other third parties. Neither Party shall disparage the other Party.

4. **RAHMAN** will have seven (7) calendar days from the date she signs this AGREEMENT to withdraw her consent to the terms of this **AGREEMENT**. Provided that **RAHMAN** does not withdrawn her consent to the terms of this **AGREEMENT**, the **BOARD** will withdraw the Tenure Charges filed with the Commissioner of Education and take no further action to with respect to the filing of Tenure Charges and shall not notify the New Jersey State Board of Examiners regarding the circumstances of her resignation.

5. It is expressly agreed and understood that the **BOARD** does not have and will not have any obligation to provide **RAHMAN** at any time in the future with any payments, benefits or considerations other than those recited above.

6. **RAHMAN** hereby agrees and recognizes that her employment relationship with the **BOARD** is permanently and irrevocably severed as of October 31, 2016, and that the **BOARD** does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ **RAHMAN** in the future.

7. **RAHMAN** agrees and acknowledges that the agreement by the **BOARD** described herein is not and shall not be construed to be an admission of any liability, violation of any federal, state or local statute or regulation, or of any duty owed by the **BOARD** to her. **RAHMAN** further agrees and acknowledges that the execution of this **AGREEMENT** to provide an amicable conclusion of her employment relationship with the **BOARD.**

8. It is agreed that the terms of this **AGREEMENT** are and shall remain confidential.

9. The **BOARD** agrees that its officers, agents and administrators will be bound by a covenant of good faith and fair dealing with respect to this **AGREEMENT.**

10. Nothing in this **AGREEMENT** shall constitute evidence of a past practice on the part of the **BOARD**, nor shall it be binding upon the **BOARD** with respect to any other employee of the Franklin Township School District. The **BOARD** and **RAHMAN** have entered into this **AGREEMENT** based upon the particular facts and circumstances unique to **RAHMAN'S** employment situation.

11. By signing this **AGREEMENT,** the Parties certify that they have had the opportunity to discuss this **AGREEMENT** with their respective counsel. The Parties are fully satisfied with the services of their respective counsel with regard to both this **AGREEMENT** and all other aspects of this case and the Parties enter into this **AGREEMENT** knowingly, willingly and without any coercion or improper inducements.

12. The Parties agree that this **AGREEMENT** may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

**INTENDING TO BE** legally bound hereby, **RAHMAN** and the **BOARD** execute the foregoing **AGREEMENT** dated September 22, 2016.

NILUFAR RAHMAN

FRANKLIN TOWNSHIP BOARD OF EDUCATION

BOARD PRESIDENT

BOARD SECRETARY

WITNESS:

WITNESS:

Nilufar Rahman
32 Margaret Drive
Somerset, New Jersey 08873

September 26, 2016

Mr. Brian Bonanno
*Manager of Human Resources and Personnel Services*
FRANKLIN TOWNSHIP BOARD OF EDUCATION
1755 Amwell Road
Somerset, New Jersey 088773

Dear Mr. Bonanno:

Please accept this letter as notice of my resignation, effective at the close of the school day on October 31, ~~206~~ 2016, from my position with the Franklin Township Board of Education, subject to and in accordance with the terms of the Separation Agreement and General Release executed by myself and the Board of Education.

Very truly yours,

Nilufar Rahman

Nilufar Rahman

381-16

381-16M

OAL DKT. NO. EDU 13766-16
AGENCY DKT. NO. 242-9/16

| | | |
|---|---|---|
| D.M.T., on behalf of minor child, A.R.T., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY, RALPH AIELLO, PRINCIPAL AND STEVEN PRICE, SUPERINTENDANT, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENTS. | : | |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/16
Date of Mailing: 10/28/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER**
**EMERGENT RELIEF**
OAL DKT. NO. EDU 13766-16[1]
AGENCY DKT. NO. 242-9/16

**D.M.T. ON BEHALF OF A.R.T.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY; RALPH AIELLO, PRINCIPAL; AND STEVEN W. PRICE, SUPERINTENDENT,**
Respondents.

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**James E. Schroeder**, Esq., appearing for petitioner (Schroeder Law Group, attorneys)

**John G. Geppert, Jr.**, Esq., appearing for respondent Board of Education of the Cumberland County Regional High School District, Cumberland County (Schwartz, Simon, Edelstein & Celso, attorneys)

BEFORE **SUSAN M. SCAROLA**, ALJ:

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[1] This matter is related to EDU 12252–16. See infra.

## STATEMENT OF THE CASE

D.M.T., the parent of A.R.T. (the petitioner), a student at the Cumberland County Technical Education Center (CCTEC) and a resident within the Cumberland County Regional High School District (CRHS), seeks an emergent order compelling the respondent, the Board of Education of the Cumberland County Regional High School District (CRHS), to permit A.R.T. to participate in CRHS's athletic programs effective during the 2016–2017 school year.

## PROCEDURAL HISTORY

On September 8, 2016, the petitioner filed a Petition for Emergent Relief arguing that respondents' decision not to allow A.R.T. and other students to participate in respondents' athletic programs was arbitrary, capricious, and unreasonable. The matter was transmitted to the Office of Administrative Law on September 13, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Letter briefs were filed by each party with supporting certifications. Oral argument was heard on September 21, 2016.[2]

## FACTUAL DISCUSSION

### Background

CCTEC operates one of the five public high schools in Cumberland County. In September 2016 it began a full-time program consisting of both vocational and academic courses for ninth-graders.[3] Within four years, all of CCTEC's students from ninth through twelfth grade will be full-time students.

[2] The petitioner objected to the submission of respondents' brief on the eve of oral argument and was permitted to file a brief reply on September 21, 2016.

[3] Students in grades ten, eleven and twelve will continue their part-time program until graduation, as the new full-time program is phased in.

CCTEC will not presently be offering an athletic program to its students. The CRHS claimed that no representative from CCTEC contacted their superintendent or principals to meaningfully discuss the possibility of an agreement to allow CCTEC's students to participate in CRHS's athletic programs.

In April 2016 the superintendent of the CRHS district sent a letter to all eighth-grade students stating that if they chose to attend CCTEC, they would be unable to participate in CRHS's athletic programs.

On August 11, 2016, CCTEC filed a Petition for Emergent Relief (docketed as EDU 12252-16) arguing that CRHS's decision to not allow CCTEC's full-time students to participate in CRHS's athletic programs was arbitrary, capricious, and unreasonable. On August 23, 2016, an Order was entered which denied the emergent relief requested and denied students at CCTEC from participating in athletic activities at CRHS. On September 20, 2016, the Commissioner adopted the Order.[4]

**Facts**

A.R.T. is a ninth grader at CCTEC who resides with her parents in a township in Cumberland County, New Jersey. A.R.T.'s home school is CRHS. CRHS is paying for the cost of tuition and transportation of A.R.T.'s attendance at CCTEC. (Verified Petition at 1.) A.R.T. is a member of the first full-time class at CCTEC. (Petitioner's Brief in Support of Motion for Emergent Relief at 1.)

A.R.T. was admitted to CCTEC and accepted to attend on March 17, 2016. (Id. at 2.) A.R.T. wishes to play high-school sports, specifically, tennis and track. (Id. at 3.) CCTEC does not offer any sports teams. (Id. at 1.) Although it does not have an interscholastic athletics program, CCTEC had advised prospective students that they would be able to participate in sports and extracurricular activities in their "home" districts. (Id. at 3.) However, CCTEC representatives did not initiate discussions with

[4] That matter is now pending hearing.

and extracurricular activities at CRHS. (Petitioner's Brief in Support of Motion for Emergent Relief at 4.) Aiello responded on the same day, stating that only CRHS students were permitted to participate in these programs and that A.R.T. would not be able to participate if she was not a student at CRHS. (Ibid.) On July 6, 2016, after receiving an email from A.R.T.'s father requesting a response, Superintendent Price e-mailed A.R.T.'s father stating that A.R.T. would not be able to participate in CRHS's athletic or extracurricular programs and that the decision was because it was not practical or reasonable "due to various issues, including but not limited to unforeseen related costs and logistical difficulties." (Ibid.; Respondent's Brief at 8.)

A.R.T.'s father then filed this Petition appealing the decision of the CRHS district to not allow CCTEC students to participate in CRHS's athletic programs, and also filed this motion for emergent relief, contending that the child would suffer irreparable harm if she were not permitted to participate in CRHS's athletic activities. (Ibid.)

## LEGAL ANALYSIS AND CONCLUSION

The petitioner advances several arguments: he contends that this matter is factually distinguishable from EDU 12252-16 because this involves a particular student who wishes to participate in athletics; that the evidence is different because the CRHS district is one of very few districts in the state that does not permit vo-tech students to participate in athletics; and also that the petitioner does not have the individual capability of addressing the issues between the CCTEC and CRHS. He argues that based upon these three distinctions he is entitled to emergent relief, unlike the CCTEC/CRHS decision.

### Emergent Relief

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on its motion. See Crowe, supra, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed and satisfied if emergent relief is to be granted:

**1. Whether A.R.T. will suffer irreparable harm if she is not permitted to participate in CRHS's athletic programs.**

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioners. Crowe, supra, 90 N.J. at 132–32. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

"In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, supra, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

"[T]he Commissioner has repeatedly held that students do not suffer irreparable harm if they are prohibited from participating in extracurricular activity, including sport activities. "S.L. ex rel. A.L. v. Bd. of Educ. of W. Orange, EDU 1729-03 (Mar. 11, 2003), adopted, Comm'r (April 15, 2003), <http://njlaw.rutgers.edu/collections/oal/final/edu1729-03.pdf>; Bd. of Educ. of Trenton v. N.J.S.I.A.A., 91 N.J.A.R.2d (EDU) 158; Elmwood Park Bd. of Educ. v. N.J.S.I.A.A., 94 N.J.A.R.2d (EDU) 106. "Indeed it has been held that participation in an extracurricular activity is not a fundamental right under the federal or state constitution." Ibid.; Camden Co. Bd. of Educ. v. N.J.S.I.A.A., No. A-2802-91T2 (App. Div. 1992). "While the importance of sports cannot be lost on the education process, there is no evidence that irreparable harm will be suffered." Ibid.

In the related matter of Board of Education of the Cumberland County Technical Education Center v. Board of Education of the Cumberland Regional High School District, OAL Dkt. No. EDU 12252-16, Initial Decision (August 23, 2016) adopted, Comm'r (September 20, 2016), the Commissioner adopted the administrative law judge's determination that concluded that vocational-school students do not suffer irreparable harm when a sending school does not allow the vocational-school students to participate in its interscholastic sports.

Here, petitioner claims that A.R.T. will suffer irreparable harm if she is unable to participate in interscholastic sports because she will be deprived of the opportunity for physical exercise, developing relationships with peers, and learning teamwork, problem-solving, and leadership skills. However, as decided in Cumberland County, while participation in sports is important for the educational process, denial of participation does not result in irreparable harm. Thus, petitioner has not satisfied this element.

**2. Whether the legal right underlying A.R.T.'s claim is well-settled.**

Petitioner claims that the legal right underlying its claim is well-settled because the Appellate Division stated in Burnside v. N.J.S.I.A.A., No. A-625-84T7 (App. Div. Nov. 15, 1984), certif. denied., 101 N.J. 236 (1985), that "each pupil has a right to the opportunity to participate in interscholastic athletics and other extracurricular activities." Petitioner claims that since Burnside, the courts and the Legislature have determined that interscholastic athletics are integral components to a student's education. N.J.S.A. 18A:11-3.2; Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 645 (2003) (LaVecchia, J., dissenting).

Here, the benefits of interscholastic sports to a student's education are not being disputed. Instead, the question is whether there is a legal right to participation in interscholastic athletics. Petitioner's reliance on Burnside is misplaced. While the court in Burnside stated that "each pupil has a right to the opportunity to participate in interscholastic athletics and other extracurricular activities," it also stated that "participation [in these activities] is subject to eligibility requirements or other preconditions." "Eligibility requirements are within control of the N.J.S.I.A.A. subject to review and approval of the Commissioner of Education."

The NJSIAA Bylaws state, "[i]f a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her sending school **upon agreement of both Principals**, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy. NJSIAA Bylaws, Article V, Section 4(G)(2), CL3 (emphasis added).

Under Burnside, the NJSIAA may impose the precondition of an agreement between the principals of CCTEC and CRHS to determine eligibility of students for interscholastic sports in respondent's school. It is within CRHS's principal's discretion whether to enter into an agreement to allow CCTEC's full-time students to participate in its athletic programs. Thus, the legal right underlying petitioner's claim is not well-settled.

**3. Whether A.R.T. is likely to be successful on the merits of her claim.**

A.R.T. claims that she is likely to succeed on the merits because the decision to not allow her to participate on CRHS's interscholastic sports teams is arbitrary, capricious, and unreasonable.

Article V, Section 4(G)(2), CL3, of the NJSIAA Bylaws gives the sending school's principal the discretion to permit a full-time county vocational/technical student to participate in interscholastic sports in the sending school if the vocational/technical school does not offer the particular sport. This "discretionary authority must be reasonably exercised based on bona fide, legitimate considerations." G.W.S. ex rel. A.F.S. v. Petrino and Rahway Bd. of Educ., Union Cnty., EDU 09797-99, Final Decision, Comm'r (Nov. 29, 1999), <http://njlaw.rutgers.edu/collections/oal/>.

In Cumberland County, the Commissioner decided that budgetary constraints and the ability to ensure the eligibility of a vocational school's students for interscholastic sports to avoid NJSIAA sanctions were legitimate considerations upon which a decision to deny participation by the vocational school's students could be made. Cumberland Cnty., supra, EDU 12252-16, Comm'r. (September 20, 2016). Because there was no agreement between the principals of the vocational school and the sending school, and because consideration of the budget and NJSIAA sanctions was an exercise of reasonable discretion, the Commissioner concurred that the vocational school was unlikely to be successful on the merits of its claim that its students must be allowed to participate in the sending school's sports program. Ibid.

Here, the Board claims that it is impractical and not reasonable to allow CCTEC students to participate in its athletic programs for various reasons including, but not limited to, costs and logistical difficulties.

Petitioner claims that it will be able to prove that the decision was not based on legitimate considerations but was for the purpose of discouraging students to attend CCTEC to minimize the amount of money the Board would have to pay for the tuition of

students attending CCTEC. Petitioner argues that the letter from Superintendent Price shows this purpose because the letter was sent to students after they had accepted attendance at CCTEC; it was addressed to students rather than the parents; and it told these students that they would not be able to participate in CRHS's athletic programs if they attended CCTEC.

During argument, petitioner's attorney also argued that CRHS's decision was arbitrary because CCTEC would provide busing for A.R.T., and CCTEC could designate an officer to gather A.R.T.'s medical and disciplinary information and relay that information to CRHS. However, these terms are not outlined by any formal agreement between the schools. Under NJSIAA Bylaws, Article V, Section 4(G)(2), CL3, an agreement between the principals of CCTEC and CRHS is required to allow students from CCTEC to participate in CRHS's athletic programs. The few terms discussed by petitioner's attorney highlight the need for discussions to commence between CCTEC and CHRS so an agreement can be reached.[6]

Petitioner has not established that she is substantially likely to succeed on the merits of her claim. While petitioner discussed the substance of the letter notifying students that they will not be able to participate in CRHS's athletic programs, she does not offer evidence to refute the Board's claim that the decision to deny participation was based on costs and logistical difficulties. As in Cumberland County, these appear to be legitimate considerations that must be addressed before an agreement to allow CCTEC students to participate in CRHS's athletic programs can be reached.

Because there was no agreement between CCTEC's and CRHS's principals, and because CRHS's principal is reasonably exercising discretionary authority, petitioner is not likely to be successful on the merits.

[6] According to respondent, a meeting has been scheduled for October 4, 2016, between CCTEC and CRHS, to begin discussions about permitting CCTEC students to participate in CRHS athletic activities.

**4. Whether A.R.T. will suffer greater harm than the Board if she is not permitted to participate in CRHS's athletic programs.**

A.R.T. claims that she will suffer greater harm if the requested relief is not granted because she will suffer irreparable harm, and the Board's harm is merely the cost of an additional uniform.

As discussed above, students do not suffer irreparable harm if they are prohibited from participating in extracurricular activities, including sport activities. Further, the Board's cost likely far exceeds the cost of a uniform. If students from CCTEC were permitted to participate in CRHS's athletic programs, CRHS will likely be forced to incur more administrative costs and may be vulnerable to penalties from the NJSIAA. Therefore, it is likely that the balance of interests tips in favor of the Board. Accordingly, A.R.T. has not shown that she will suffer greater harm if her requested relief is not granted.

## CONCLUSION

Petitioner has not satisfied the four prongs required to obtain emergent relief. He has not shown that his daughter will suffer irreparable harm, that the legal right underlying his claim is well-settled, that he is likely to be successful on the merits, or that the child will suffer greater harm than respondents if the requested relief is not granted. The petitioner has also not demonstrated that the determination of the CRHS was arbitrary or capricious.

## ORDER

The petitioner's application for emergent relief is **DENIED**.

The matter shall be scheduled for a telephone conference so that a hearing date may be set.

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

September 22, 2016
DATE

**SUSAN M. SCAROLA**, ALJ

Date Received at Agency: September 22, 2016

Date Mailed to Parties: September 22, 2016

## APPENDIX

## WITNESSES

**For petitioner:**

None

**For respondent:**

None

## EXHIBITS

**For petitioner:**

Brief and reply

**For respondent:**

Brief

384-16R

384-16
386-16

OAL DKT. NO. 11825-16
(EDU 04711-15 ON REMAND)
AGENCY DKT. NO. 310-10/14

| | |
|---|---|
| IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DAWN MCDERMID, UNION COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, UNION COUNTY. | COMMISSIONER OF EDUCATION<br><br>DECISION |

The record of this matter, the proposed settlement agreement and general release, and Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's August 3, 2016 determination that the prior settlement agreement did not comply with *N.J.A.C.* 6A:3-1.13 as it was neither signed by the Board attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf. Since the settlement agreement now contains the signature of the Board attorney, the Commissioner can approve the within settlement agreement in its present form.

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

IT IS SO ORDERED. Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/03/16

Date of Mailing: 11/03/16

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 11825-16
AGENCY DKT. NO. 310-10/14
**(ON REMAND EDU 04711-15)**

**IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DAWN MCDERMID, UNION COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, UNION COUNTY**

---

**Christina M. DiPalo**, Esq., for Union County Vocational Technical School District (La Corte, Bundy, Varady and Kinsella, attorneys)

**Leonard C. Schiro**, Esq., for Dawn McDermid (Mets Schiro McGovern, attorneys)

Record Closed: August 31, 2016 Decided: September 23, 2016

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

This matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case on April 7, 2015, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 under OAL Docket No. EDU 04711-15.

Prior to a hearing the parties settled the matter. A Settlement Agreement and Release dated June 1, 2016 was executed by Dawn McDermid and Peter A. Capodice, Superintendent of Schools, Union County Vocation Technical Schools and was received by the OAL on June 17, 2016. An Initial Decision approving the settlement was decided on June 20, 2016.

Pursuant to the Decision of the Commissioner of Education (Commissioner), dated August 3, 2016, the matter remanded to the OAL for revision of the settlement agreement. In accordance therewith, the parties submitted a Resolution and Extract of Official Minutes, reflecting that on August 11, 2016, Peter A. Capodice was designated by the Union County Vocational-Technical School District Board of Education to sign the Settlement Agreement and Release and that the Settlement Agreement and Release was approved by the Board.

Having reviewed the contents of the attached Settlement Agreement and Release, Board Resolution and Extract of Official Minutes, I **FIND**:

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

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

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

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

9.23.16
DATE

**KELLY J. KIRK**, ALJ

dlc

Date Received at Agency: 9-27-16

Date Mailed to Parties: SEP 27 2016
Attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

## SETTLEMENT AGREEMENT AND RELEASE

**THIS SETTLEMENT AGREEMENT AND RELEASE,** (hereinafter referred to as "Agreement"), is made between Petitioner (Union County Vocational Technical School District); and Respondent (Dawn McDermid).

**WHEREAS**, Petitioner commenced an action against Respondent in a matter entitled, McDermid, Dawn/Union County Vocational-Technical School District, Union County , OAL Dkt. No. EDU-04711-2015N- Agency Ref. 310-10/14, (hereinafter referred to as the "Petition"); and

**WHEREAS**, the parties to this Petition having reached a negotiated agreement to fully, and finally, settle all claims among them, including those asserted in the Petition; and

**NOW, THEREFORE,** in consideration of the mutual promises and undertaking said forth herein, the parties agree as follows:

1. Respondent, Dawn McDermid, agrees that she signed an Employment Contact with the Board of Education of the Union County Vocational-Technical School District on July 15, 2014 to work as a non-tenured teacher from September 1, 2014 to June 30, 2015. The Employment Contract signed by Ms. McDermid required her to give sixty (60) days written notice to terminate the contract. On September 4, 2014, Ms. McDermid resigned from her position as a teacher without the proper notice required by contract.

2. Respondent, Dawn McDermid, shall have her teaching certification suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 for a period of three (3) months, commencing the date this Agreement is approved by the Commissioner of Education.

3. This Agreement shall be forwarded to the State Board of Examiners for implementation.

2016 AUG 31 P 12:00

4. The parties agree that the language of this Agreement has been negotiated, is a product of the draftsmanship of all of the parties and that the usual rule that the provisions of a document are to be construed against the drafter shall not apply to the interpretation of any provisions hereof.

5. The signatures of the parties below indicate they have had an opportunity to review this Agreement with their respective Counsel, that they have read and understood the provisions, and that they have executed it voluntarily with full knowledge of the significance of all provisions.

6. This Agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

7. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

Dawn McDermid

Peter A. Capodice, Superintendent of Schools
Union County Vocational Technical Schools

Dated: June 1, 2016

**UNION COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT BOARD OF EDUCATON**

**RESOLUTION**

**WHEREAS**, The Union County Vocational Technical School District commenced an action against Dawn McDermid in a matter entitled, McDermid, Dawn/Union County Vocational-Technical School District, Union County , OAL Dkt. No. EDU-04711-2015N-Agency Ref. 310-10/14, to suspend Dawn McDermid's teaching certification for unprofessional conduct pursuant to N.J.S.A. 18A:26-10, and

**WHEREAS**, negotiations between the Union County Vocational Technical School District and Dawn McDermid have taken place in regard to resolution of this matter, and

**WHEREAS**, the attached Settlement Agreement and Release was entered on June 1, 2016 suspending Dawn McDermid's teaching certification for a period of three (3) months, commencing the date the Agreement is approved by the Commissioner of Education, and

**NOW THEREFORE BE IT RESOLVED** the Union County Vocational Technical School District Board of Education hereby designates Peter A. Capodice, Superintendent of the Union County Vocational Technical School District, to sign the Settlement Agreement and Release on behalf of the Union County Vocational Technical School District Board of Education.

**NOW THEREFORE BE IT FURTHER RESOLVED** that the Board approves the attached Settlement Agreement and Release dated June 1, 2016.

2016 AUG 31 P 12:00

# UNION COUNTY VOCATIONAL - TECHNICAL SCHOOLS

1776 Raritan Road, Scotch Plains, New Jersey 07076-2997
(908)889-8288, Ext. 115 Fax: (908)889-7324 www.ucvts.tec.nj.us

*PRESIDENT*
*Jane Lorber*

*VICE PRESIDENT*
*Lawrence Caroselli*

*BOARD MEMBERS*
*Jean Perkins*
*Juan Torres*
*Executive County Superintendent of Schools*

*SUPERINTENDENT*
*Mr. Peter A. Capodice*

*BOARD SECRETARY*
*Janet Behrmann*

*BOARD ATTORNEY*
*Robert F. Varady, Esq.*

## EXTRACT OF OFFICIAL MINUTES

**THIS IS A CERTIFIED TRUE COPY** of a resolution adopted at a special Board Meeting of the Union County Vocational-Technical School District Board of Education held at 8:30 a.m. on Thursday, August 11, 2016.

**********

**Roll Call:**
Present – Mrs. Perkins, Mr. Caroselli, and Ms. Lorber

Absent – Executive County Superintendent of Schools

**Resolution:**

RESOLVED, the Board of Education approve the attached agreement with Dawnmarie McDermid, as recommended by the Superintendent. (See Attachment D.)

Moved by Mrs. Perkins; Seconded by Mr. Caroselli

**Vote:**
Ayes: Mrs. Perkins, Mr. Caroselli, and Ms. Lorber
Nays: None
Abstains: None

I, Gwendolyn Franklin, Assistant Business Administrator of the Union County Vocational-Technical School District Board of Education in the County of Union and State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Union County Vocational-Technical School District Board of Education duly called and held on August 11, 2016 has been compared by me with the original minutes as officially recorded in my office in the minutes book of said Union County Vocational-Technical School District Board of Education is true complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. In witness I have here unto set my hand and affixed the corporate seal of the Union County Vocational-Technical School District Board of Education this 29th day of August, 2016.

ATTEST:

Gwendolyn Franklin, Assistant Business Administrator
August 29, 2016

dsc

2016 AUG 31 P 12:00

382-16

AGENCY DKT NO. 246-9/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE | : | |
| HEARING OF DEBRA CLYBURN, | : | COMMISSIONER OF EDUCATION |
| STATE-OPERATED SCHOOL DISTRICT OF | : | DECISION |
| THE CITY OF CAMDEN, CAMDEN COUNTY. | : | |

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/28/16

Date of Mailing: 10/28/16

385-16LM

3856

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

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

KIMBERLEY HARRINGTON
*Acting Commissioner*

November 03, 2016

Susan Lavelle, Esq.
1814 Kennedy Blvd.
Union City, New Jersey 07087

Sabino Valdes
[redacted]
Paramus, New Jersey 07653

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No.328-9/00.*

Dear Parties:

I have reviewed the materials filed in connection with Sabino Valdes' motion to reopen the tenure charges filed against him by the Union City Board of Education (Board).[1] It is well established that administrative agencies have an inherent authority to reconsider, reopen or revise a prior decision made by the agency. A motion to reopen, however, will only be granted when good cause is shown and the motion is made with reasonable diligence. *See*, *Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978).

Upon review and consideration of the parties' submissions, I find that Mr. Valdes has not satisfied the requirements necessary to reopen the tenure charges filed against him by the Board. First, Mr. Valdes' motion to reopen was not made with reasonable diligence. The motion to reopen was filed 12 years after the State Board of Education's August 4, 2004 decision affirming the decision of the Commissioner removing Mr. Valdes from his tenured employment with the District for insubordination and unbecoming conduct.

Despite his endless assertions to the contrary, Mr. Valdes has not provided any new evidence nor has he alleged the existence of any new information that was not previously argued throughout the litigation of this matter. Among a myriad of other things, Mr. Valdes argues that

[1] This is the second motion to reopen the tenure charges that has been filed by Mr. Valdes. In a decision dated June 14, 2014, the Commissioner denied Mr. Valdes' first motion to reopen the tenure charges.

– since the Board did not certify the tenure charges within the 45-days that is required by *N.J.S.A.* 18A:6-13 – the charges filed against him should be dismissed. Additionally, Mr. Valdes contends that the adoption of *N.J.A.C.* 6A:3-5.1(b)4 and *N.J.A.C.* 6A:3-1.16 on April 3, 2000 nullifies the tenure charges certified against him on September 13, 2000.[2] The arguments raised by Mr. Valdes in his current motion do not amount to new evidence or information that would suggest a need to revisit the tenure charges filed against him in 2000. In fact, Mr. Valdes has already had the opportunity to raise his 45-day defense before various tribunals in connection with these charges. Therefore, it is unequivocal that no good cause has been shown to compel the reopening of this case after more than a decade.

Accordingly, the motion to reopen the tenure charges filed against Mr. Valdes by the Union City Board of Education is hereby DENIED.[3]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

**Via Regular Mail**

[2] The provision in *N.J.A.C.* 6A:3-1.16 upon which Mr. Valdes relies is nothing more than a recitation of the legal principle – true long before April 2000 – that an agency head may not relax a statutorily imposed timeframe.

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

386-16

M.M., ON BEHALF OF MINOR CHILDREN F.S., T.S., AND K.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT

COMMISSIONER OF EDUCATION

DECISION

## SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in January 2016, seeking a determination that F.S., T.S., and K.S. were entitled to a free public education in South Orange-Maplewood Schools. The matter was transmitted to the Office of Administrative Law as a contested case, and hearings were scheduled and conducted. Prior to the last hearing date, a telephone conference was conducted wherein the petitioner advised that she had moved out of the district and wished to withdraw her appeal. The respondent Board's counsel submitted a letter stating that the Board would withdraw its counterclaim seeking tuition. Petitioner, to date, has not submitted a letter withdrawing her request for a hearing, despite being directed by the ALJ to do so.

The ALJ concluded that this matter is no longer a contested case before the Office of Administrative Law. Accordingly, the ALJ issued an Initial Decision in which she ordered the matter dismissed.

Upon review of the record in this matter, the Commissioner concurred with the ALJ conclusion and adopted the Initial Decision as the final decision in this matter for the reasons expressed therein. Accordingly, the petition was dismissed.

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

Issue Date 10/31/16

OAL DKT. NO. EDU 02453-16
AGENCY DKT. NO. 1-1/16

| | | |
|---|---|---|
| M.M., ON BEHALF OF MINOR CHILDREN F.S., T.S., AND K.S., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, | : | |
| RESPONDENT | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision in this matter for the reasons set forth therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/31/16

Date of Mailing: 11/04/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**DISMISSAL**
OAL DKT. NO. EDU 02453-16
AGENCY DKT. NO. 1-1/16

**M.M., ON BEHALF OF MINOR CHILDREN F.S. T.S. AND K.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY**

Respondent.

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**M.M.** pro se

**Philip E. Stern**, Esq., for respondent

Record Closed: September 13, 2016 Decided: September 22, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.M., challenges the South Orange-Maplewood School District (Board) residency determination. The Board filed a counterclaim seeking tuition. The matter was transmitted to the Office of Administrative Law on February 18, 2016 as a contested case. Hearings were scheduled and conducted, the last one being September 8, 2016. Prior to the September hearing date a telephone conference was conducted wherein petitioner advised that she moved out of the District and wished to withdraw her hearing request. Respondent's counsel stated that the Board would withdraw their counterclaim seeking tuition. The parties were directed to submit a letter withdrawing their requests for hearing. Respondent's counsel submitted a letter stating same, which is attached hereto for reference. My secretary made several attempts to contact petitioner regarding her letter. Petitioner advised that she was out of state at the time of the conference but she is now in New Jersey and will submit the letter via fax. To date, petitioner has not submitted a letter withdrawing her request for a hearing.

## CONCLUSION AND ORDER

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

9-22-16

DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency: Sept. 22, 2016

Date Mailed to Parties: SEP 23 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

387-16

| | | |
|---|---|---|
| GLENN CIRIPOMPA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner – a tenured teacher employed in respondent's school district – filed an appeal alleging that a statement placed on the respondent Board's website, following an Appellate Division decision that reinstated petitioner to his teaching position, was factually inaccurate, misleading and defamatory. The website statement expressed the Board's concern that it was required "to put back in to the classroom a teaching staff member found guilty of utilizing his school district computer and school district email account to engage in conduct of a highly inappropriate nature, including sending and receiving nude photographs and soliciting sexual liaisons and services." The petitioner sought an order declaring that all of the named respondents engaged in conduct unbecoming when they approved and posted the website statement; petitioner further sought to have the respondents removed from their positions. The Board filed a motion to dismiss on the grounds that petitioner alleged no violations of the school laws, and the matter is therefore not within the jurisdiction of the Commissioner of Education.

The ALJ found, *inter alia*, that: petitioner sought an order declaring that members of the Board and administrators in the school district engaged in unbecoming conduct for their role in posting what petitioner contended was a willful and malicious statement on the district's website; even if petitioner's contention was factually accurate, it does not create a cause of action under New Jersey school laws against the Board and/or its administrators; any action to remove school administrators must be brought under the tenure provisions of *N.J.S.A.* 18A:6-10; any action against individual school board members should be brought before the School Ethics Commission pursuant to *N.J.S.A.* 18A:12-21 *et seq.*; and any action alleging a willful and malicious interference with petitioner's employment, and/or a claim for defamation – including a claim for damages – must be brought in the Superior Court. The ALJ concluded that there is not cause of action that falls under the school laws in this matter. Accordingly, the Board's motion to dismiss was granted.

Upon review, the Commissioner concurred with the ALJ's determination that the within petition must be dismissed for lack of jurisdiction. In so finding, the Commissioner noted that – while *N.J.S.A.* 18A:6-9 grants the Commissioner jurisdiction to hear and decide controversies arising under the school laws – the Commissioner's jurisdiction does not extend to all matters involving school personnel, nor does *N.J.S.A.* 18A:6-9 authorize the Commissioner to ignore the requirements contained in the school law statutes. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition was dismissed.

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

November 7, 2016

387-16

OAL DKT. NO. EDU 121-16
AGENCY DKT. NO. 354-11/15

| | | |
|---|---|---|
| GLENN CIRIPOMPA, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, ET. AL., SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Glenn Ciripompa, and the Board of Education's reply thereto. This matter stems from a statement that was placed on the Board's website following an Appellate Division decision that reinstated the petitioner to his teaching position. The statement expressed the Board's concern that it was required "to put back in to the classroom a teaching staff member found guilty of utilizing his school district computer and school district email account to engage in conduct of a highly inappropriate nature, including sending and receiving nude photographs and soliciting sexual liaisons and services."[1] The petitioner seeks an Order declaring that all individuals responsible for the website posting – including various Board members and school personnel – engaged in unbecoming conduct contrary to their individual and collective responsibilities as required under Title 18A of the New Jersey Statutes. The Administrative Law Judge found that the Commissioner's jurisdiction is limited to matters falling under the school laws and, even if the

[1] The full statement was included in the Initial Decision and will not be restated here.

alleged facts are true, there is no cause of action under the school laws. As a result, the ALJ granted the Board's motion to dismiss the petition for lack of jurisdiction.

In his exceptions, the petitioner maintains that the reasoning outlined in the Initial Decision improperly limits the Commissioner's authority in the context of remedies available to the petitioner. The petitioner emphasizes that the petition does not seek to merely remove the respondents from their positions, but rather seeks broader relief in the form of an Order declaring that the respondents have engaged in unbecoming conduct pursuant to *N.J.S.A.* 18A. Instead of submitting to the Commissioner's primary jurisdiction, the Initial Decision wrongfully suggests that the petitioner seek relief from multiple, non-primary sources. Therefore, the petitioner contends that the Initial Decision should be rejected and the matter should proceed at the OAL.

In reply the Board contends that the arguments raised by the petitioner are essentially the same arguments made in his opposition to the Board's motion to dismiss. Despite the fact that the petitioner alleges that school laws have been violated, the petitioner points to no specific violation of any statute. Additionally, the cases relied upon by the petitioner in his exceptions and before the ALJ are wholly inapposite to the within situation. Under the circumstances, the ALJ correctly held that the petitioner has failed to state a cause of action under the school laws, and the petition of appeal was appropriately dismissed.

Upon review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal must be dismissed for lack of jurisdiction. Under *N.J.S.A.* 18A:6-9, the Commissioner has jurisdiction to hear and decide controversies arising under the school laws. However, that jurisdiction does not extend to all matters involving school personnel. *Bd. of Educ. v. Twp. Council of E. Brunswick*, 48 *N.J.* 94, 102

(1966) ("Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel"). Furthermore, *N.J.S.A.* 18A:6-9 does not authorize the Commissioner to make declarations without conforming to the requirements contained in the school law statutes. For instance, a potential charge of unbecoming conduct against a tenured employee must be filed by the board of education and proceed under the applicable statutory and regulatory provisions; the Commissioner may not simply declare that an employee has engaged in unbecoming conduct. See, *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6A:3-5. Likewise, in order to allege a violation of the School Ethics Act against a school board member, a complaint must be filed with the School Ethics Commission in accordance with *N.J.S.A.* 18A:12-29. Finally, the Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result, as the arguments advanced therein were considered and fully addressed by the ALJ in the Initial Decision. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/07/16
Date of Mailing: 11/07/16

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 00121-2016
AGENCY DKT. NO. 354-11/15

**GLENN CIRIPOMPA,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY, ET. AL**
Respondent.

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**Arnold M. Mellk**, Esq., for petitioner (Wills, O'Neill and Mellk, attorneys)

**Robert J. Merryman, Jr.,** Esq., for respondents (Apruzzese, McDermott, Mastro, and Murphy, P.C., attorneys)

Record Closed: June 15, 2016 Decided: September 22, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Glen Ciripompa filed a verified petition on November 24, 2015, seeking to have the respondents found to have engaged in conduct unbecoming,

conduct contrary to their collective responsibilities under Title 18A, and seeking to have them all removed from their public positions. The respondents filed a Motion to Dismiss in lieu of an answer on December 14, 2015. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case on December 21, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Petitioner filed opposition to the Motion to Dismiss on May 27, 2016, and respondents filed a reply brief on June 15, 2015.

## FACTUAL BACKGROUND

The petitioner Glenn Ciripompa is a tenured teacher in the School District of the Borough of Bound Brook (the Board). On or about July 14, 2015, the Board certified tenure charges against petitioner pursuant to N.J.S.A. 18A:6-10, seeking his removal for charges of unbecoming conduct. On October 20, 2014, an arbitration award was issued in the matter. The arbitrator determined that the Board had proven the charges of improper use of the Board-provided laptop and iPad to send and receive sexually explicit emails and nude photographs of women and of himself via the internet in violation of the Board computer and internet use policy. The second charge of inappropriate behavior towards female staff member was not sustained. The arbitrator imposed a 120 day suspension without pay. The Board filed an action in Superior Court, Chancery Division challenging the arbitrator's award, and on January 8, 2015, the Chancery Court vacated the award and remanded the matter for a new hearing. The petitioner appealed and the Appellant Division reversed the Chancery Division decision and reinstated the arbitration penalty of 120 day suspension.

Following the decision by the Appellate Division, the District[1] posted the following statement on its web site:

> The Bound Brook School District is extremely disappointed with the decision of the Appellate Division to reverse the well-reasoned decision of

[1] Although the Board of Education was named in the within action, there is no allegation that the Board of Education considered and/or approved of the subject posting either formally or informally.

> Judge Coleman and, thereby, reinstate the Arbitrator's ruling which will require the Board to put back in to the classroom a teaching staff member found guilty of utilizing his school district computer and school district e-mail account to engage in conduct of a highly inappropriate nature, including sending and receiving nude photographs and soliciting sexual liaisons and services. The District is particularly disturbed the Appellate Court's apparent minimization of the seriousness of a staff member's inappropriate conduct and behavior towards co-workers. The District believes that by this decision, the Appellate Court has sent a very clear message that engaging in inappropriate conduct and behavior towards one's co-workers, even in the presence of students, does not provide a basis for the discipline of a teacher. The District can only hope that the tenure laws will be reviewed and revised to make sure that teachers who engage in such irresponsible and inappropriate behavior can be removed, and will not be reinstated by Arbitrators who can apparently act without any accountability to the public. The District and the Board of Education will consider all available options and will take every step possible to protect the students and staff of the District from employees who engage in the type of behavior demonstrated in this matter.

Based on the foregoing entry on the Board's website[2], the within petition was filed alleging that the statement was factually inaccurate, misleading, and defamatory. The petitioner alleges that it was a willful and malicious statement made with the intent to interfere with petitioner's quiet enjoyment of his job. The petitioner seeks an order declaring the conduct of all the named respondents unbecoming and having them all removed from their positions. The petitioner maintains that the Commissioner of Education has jurisdiction to hear disputes concerning these actions, and it is incumbent on the Commissioner of Education to intervene.

The respondent has filed a motion seeking to dismiss on the grounds that the petition has failed to set forth a legal basis for which relief can be granted under the Educational Laws of the State of New Jersey. The respondents claim that the petitioner is seeking an advisory opinion that this tribunal is not authorized to issue. Respondent further argues that the petitioner has not alleged any violations of the school laws and that there is no claim for relief under the jurisdiction of the Commission of Education.

[2] The undersigned has been advised that the entry has been removed from the District website.

## LEGAL ANALYSIS

The issue presented here is whether the respondent is entitled to a decision dismissing the petition as a matter of law. The respondent has filed a motion to decision pursuant to N.J.A.C. 6A:3-1.10 which provides: "at any time prior to transmittal of the pleading to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petitioner on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction for failure to prosecute or other good reason." The motion was filed with the Department of Education and has been transmitted here for consideration. The basis of the motion is that the petitioner has alleged no claim under the education laws of the state of New Jersey and thus, the undersigned has no jurisdiction to hear the matter.

The first allegation in the verified petition is that the statement on the District's website regarding the petitioner's tenure matter is a willful and knowingly malicious misstatement of the facts. Petitioner therefore, seeks an order declaring and adjudging that all the school board members and the administrators in the District have engaged in unbecoming conduct, and further seeks their removal. Even assuming that the statement is factually inaccurate, it does not create a cause of action under School Law against the Board and/or administrators. An action to remove the administrators must be brought under the tenure provisions of Title 18A:6-10. Moreover, an action against the individual school board members should be brought before the School Ethics Commission pursuant to N.J.S.A. 18A:12-21 et seq. Finally, an action for a willful and malicious interference with petitioner's employment and or a claim for defamation, including a claim for damages, must be brought in the Superior Court.

The undersigned's jurisdiction is limited to those matters falling under the Education Laws in the State of New Jersey, and even assuming all facts alleged as true, I **FIND** no cause of action under the Education Laws in the State of New Jersey. Accordingly, the respondent's motion to dismiss pursuant to N.J.A.C. 6A:3-1.10 is hereby granted.

## ORDER

It is **ORDERED** that the Motion to Dismiss is hereby **GRANTED** and the petition is **DISMISSED**.

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

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

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

September 22, 2016
DATE

**SARAH G. CROWLEY, ALJ**

Date Received at Agency: September 22, 2016 (emailed)

Date Mailed to Parties: September 22, 2016 (emailed)

/mel

359-16

389-16L


CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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

KIMBERLEY HARRINGTON
*Acting Commissioner*


November 9, 2016

Louis Lessig, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

Lisa Crowe
[redacted]
Mickleton, New Jersey 08056

Re: *In the Matter of the Tenure Hearing of Lisa Crowe, State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 269-10/16.*

Dear Parties,

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of Lisa Crowe, State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 269-10/16.* The record includes the District's request to withdraw the tenure charges filed in this matter, as well as the respondent's formal resignation filed with the District on October 21, 2016. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice, and dismiss the matter as a contested case before me.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: Amy L. Gillette, Esq.
County Superintendent
State Law Library

KH/MKD/JKH

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112
Jennifer.Cavin@dol.lps.state.nj.us

By: Jennifer L. Cavin
Deputy Attorney General
(609) 292-8572
ID No: 011252010

| | | |
|---|---|---|
| | : | STATE OF NEW JERSEY |
| | : | OFFICE OF ADMINISTRATIVE LAW |
| | : | |
| IN THE MATTER OF | : | OAL Dkt.: EEC 09003-2015S |
| | : | AGENCY Dkt: C25-14 |
| MARK DICKERMAN, | : | |
| | : | ADMINISTRATIVE ACTION |
| BROOKLAWN BOARD OF EDUCATION, | : | |
| CAMDEN COUNTY | : | **CONSENT ORDER** |
| | : | |

**WHEREAS,** Petitioner, the New Jersey Department of Education, School Ethics Commission ("SEC"), and Respondent, Mark Dickerman ("Respondent"), have mutually agreed to settle the above-captioned matter, with CHRISTOPHER S. PORRINO, Attorney General of New Jersey, by Jennifer L. Cavin, Deputy Attorney General, appearing on behalf of the SEC, and Mark Dickerman, appearing pro se; and

**WHEREAS**, this matter arose from the SEC's decision of May 27, 2015, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b) and (c), and N.J.S.A.

18A:12-24.1(c) and (i); and

**WHEREAS**, the settlement of this matter shall not constitute precedent or be considered an admission of guilt in other pending or future litigation,

**NOW, THEREFORE**, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that his actions constitute a violation of N.J.S.A. 18A:12-24(b) and (c), and N.J.S.A. 18A:12-24.1(c) and (i).

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a censure.

3. The Commissioner agrees that she will adopt the SEC's recommendation and impose the penalty of a censure for the conduct described in the attached affidavit.

4. By accepting the penalty of a censure, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the censure.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's May 27, 2015 Probable Cause Notice.

Mark Dickerman
Respondent

Date: 10/26/16

Jennifer L. Cavin
Deputy Attorney General
Attorney for Petitioner

Date: 11/1/16

Approved as to penalty:

Kimberley Harrington
Acting Commissioner of Education

Date: 11/9/16

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
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| IN THE MATTER OF | : | OAL Dkt.: EEC 09003-2015S |
| | : | AGENCY Dkt: C25-14 |
| MARK DICKERMAN, | : | |
| | : | ADMINISTRATIVE ACTION |
| BROOKLAWN BOARD OF EDUCATION, | : | |
| CAMDEN COUNTY | : | **AFFIDAVIT OF MARK DICKERMAN** |
| | : | |

I, MARK DICKERMAN, of full age, being duly sworn upon his oath, deposes and says:

1. I was a member of the Brooklawn Board of Education in June 2014.
2. As a member of the Brooklawn Board of Education, I worked with the Brooklawn Superintendent, Dr. John Kellmayer.
3. My son-in-law was employed by the Brooklawn Board of Education in June 2014.
4. I acknowledge that on June 3, 2014, while a member of the Brooklawn Board of Education, after learning that Dr.

Kellmayer had inspected my son-in-law's backpack, I called Dr. Kellmayer to reprimand him for his search of my son-in-law's backpack and to express concerns about Dr. Kellmayer's legal rights to inspect my son-in-law's backpack.

5. My wife was employed by the Brooklawn Board of Education in June 2014.

6. My wife as an employee of the Brooklawn Board of Education was indirectly supervised by Dr. Kellmayer.

7. I acknowledge that on June 26, 2014, while a member of the Brooklawn Board of Education, I participated in the vote to approve the submission of Dr. Kellmayer's contract to the Executive County Superintendent for review and approval.

8. I acknowledge that my conduct set forth above violated the New Jersey School Ethics Act, N.J.S.A. 18A:12-24(b) and (c), and the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1(c) and (i), and agree to accept a penalty of censure for that conduct.

9. I acknowledge that in signing this affidavit I understand the terms of this agreement.

Mark Dickerman

Sworn and Subscribed before me this 26th day of October, 2016.

Lisa Herman
Notary Public

NOTARIAL SEAL
Lisa Herman
NOTARY PUBLIC
Kelly Twp, Union County
My Commission Expires 01/07/2019

392-16

| | | |
|---|---|---|
| NICOLE FLYNN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner filed an appeal challenging the Board of Examiners' determination to deny her application for a Certificate of Eligibility with Advanced Standing (CEAS) in the State of New Jersey, on the basis of her failure to meet the grade point average (GPA) requirement pursuant to *N.J.A.C.* 6A:9B-8.1(a)(2)(i) (2015). This regulation went into effect on September 1, 2014, and the GPA requirement is currently codified at *N.J.A.C.* 6A:9B-8.2(c)(1). Petitioner asserted that she did meet the licensure requirements for the CEAS as published on the Department's website and as represented to her by Board employees. The Board of Examiners (Board) filed a motion to dismiss, contending that the regulations clearly outline the GPA requirement, which cannot be waived.

The ALJ found, *inter alia*, that: the articulated standard of review for the within controversy is whether the Board's ruling was reasonable, or whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; the statute governing the Board's decision herein is clear, and states that the Board of Examiners shall not "waive any test, GPA, degree completion, or approved educator preparation program completion requirements"; petitioner's GPA of 2.54 falls below the minimum GPA requirement for certification of 2.75; and petitioner failed to exercise her option to supplement the GPA requirement by submitting a Praxis test score of passing plus ten percent, as permitted by regulation. The ALJ concluded that the petitioner failed to meet her burden to prove that the Board's determination to deny her application for a CEAS was arbitrary, capricious or unreasonable. Accordingly, the ALJ granted respondent's motion to dismiss the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

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

November 14, 2016

OAL DKT. NO. EDU 07688-16
AGENCY DKT. NO. 31-2/16

| | | |
|---|---|---|
| NICOLE FLYNN, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| NEW JERSEY STATE BOARD OF EXAMINERS, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners (Board) did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Certificate of Eligibility with Advanced Standing (CEAS) for failing to meet the grade point average (GPA) requirement. The regulation at the time of petitioner's application required that applicants for a CEAS who graduated before September 1, 2016 achieve a cumulative GPA of at least 2.75, and petitioner's 2.54 GPA fell short of this requirement. *N.J.A.C.* 6A:9B-8.1(a)(2)(i) (2015).[1] Further, the Commissioner is in accord with the ALJ that the Board did not have authority to waive the GPA requirements for certification. *See N.J.A.C.* 6A:9B-4.16(b) (2015)[2] (stating that

[1] This regulation went into effect on September 1, 2014. Currently, this requirement is codified at *N.J.A.C.* 6A:9B-8.2(c)(1).

[2] The current version of the regulations contains the same mandate at *N.J.A.C.* 6A:9B-4.12(c)(1).

"[u]nder no circumstances may the Board of Examiners waive any test, GPA or degree requirements for certification").

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.[3]

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/14/16

Date of Mailing: 11/14/16

[3] To the extent that the ALJ made findings regarding a cause of action for equitable fraud, such findings are not appropriate as that claim is not before the Commissioner, nor does the Commissioner have jurisdiction over it. *N.J.S.A.* 18A:6-9.

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

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 07688-16
AGENCY DKT. NO. 31-2/16

**NICOLE FLYNN,**
Petitioner,
v.
**NEW JERSEY STATE BOARD OF EXAMINERS,**
Respondent.

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**Shepard Kays**, Esq., for petitioner (Shepard Kays, attorneys)

**Kristen L. Settlemire**, Esq., for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 1, 2016 Decided: September 27, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

## STATEMENT OF THE CASE

Petitioner submitted an application for a Certificate of Eligibility with Advanced Standing (CEAS) in the State of New Jersey. On or about July 1, 2015, the New Jersey State Board of Examiners informed Petitioner that she did not meet the eligible grade point average (GPA) requirement. On or about February 1, 2016, Petitioner appealed this decision to the Commissioner of Education, Bureau of Controversies and Disputes.

On or about March 21, 2016, the Board of Examiners requested a sixty-day extension of time to answer the petitioner or to otherwise respond to the appeal. On or about May 19, 2016, the Board of Examiners filed a Motion to Dismiss in Lieu of Answer.

On May 23, 2016, the Commissioner of Education transmitted this matter to the Office of Administrative Law on May 23, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On or about July 13, 2016, Petitioner filed a reply to the Motion to Dismiss. On or about August 1, 2016, Respondent filed a reply in support of the Motion to Dismiss and the record closed.

## STATEMENT OF FACTS

Petitioner, Nicole Flynn, was issued a Florida PreK-3 and K-6 Certification through an online graduate program called *TeacherReady*. Before enrolling in the program, she spoke by phone and e-mail to representatives of the New Jersey Department of Education (NJDOE) to confirm her eligibility for receiving a reciprocal CEAS in New Jersey through the Florida Certificate, despite her 2.54 GPA. Each representative confirmed her eligibility. She consulted with the representatives again after the receipt of the Florida Certification and reviewed the New Jersey Teacher Certification Information System. The online manual reflected the same assertions, and stated that a 2.50 GPA for candidates graduating prior to September 1, 2004, is sufficient to meet the requirement.

On or about June 11, 2015, Petitioner submitted her application for Teacher of Preschool through Grade 3 and Teacher of Elementary Certificates of Eligibility with Advanced Standing. On July 1, 2015, she was informed by mail that she did not meet the required GPA of 2.75 standards for certification and was denied. In fact, despite what she was told, the required GPA for candidates for certification graduating before September 1, 2016, was changed to 2.75 as mandated by N.J.A.C. 6A:9B-8.1(a)(2)(i). Ms. Flynn then appealed this decision to Respondent State Board of Examiners. The Petitioner's appeal was denied by the Board on October 30, 2015. Specifically, the decision read as follows:

> The regulations governing eligibility for certification are clear and are carried out with consistency and objectivity. The Board cannot waive the GPA requirement despite a misunderstanding regarding disseminated information. N.J.A.C. 6A:9B-4.16(b). The regulations are unambiguous in this regard. Under no circumstances may the Board waive any test, GPA, or degree requirements for certification. N.J.A.C. 6A:9B-4.16(b).

Ms. Flynn sent a petition challenging the decision of the Board of Examiners' denial on January 25, 2016, to the Commissioner of Education. The Board of Examiners submitted a Notice of Motion to Dismiss in Lieu of Answer on May 19, 2016.

**Parties' Arguments**

Petitioner

Petitioner argues that she did, in fact, meet the licensure requirements for the Certificate of Eligibility for Advanced Standing as published by the NJDOE. Furthermore, she argues that the Board did not properly evaluate the evidence provided in the initial appeal, and should use its discretion to grant the applied for certificate. She followed the guidelines and the published procedures using the proper channels of The Department's recommendation. She asserts that it is the Board's responsibility to keep the standards that it publishes up to date and current. It would be unfair to expect the average user to be aware of every change to the website.

Petitioner asserts that as a direct result of relying on the representations of both Board employees and its website, she was misled and expended time and financial resources to her detriment. Petitioner argues that, while the Board cites that the eligibility regulations are clear and are carried out with "consistency and objectivity," that should not be an excuse for erroneous communications or misrepresentations. Petitioner claims that the Board has the ability and authority to determine that she is entitled to the certificate when the denial is due to its error.

Respondent

Respondent argues that Petitioner has failed to advance a cause of action, and the Petition of Appeal should be dismissed. Petitioner was clearly advised that the Board does not "waive requirements." It instead is responsible for determining if Petitioner fulfilled the requirements and should therefore receive equitable consideration. Accordingly, in its written decision, the Board determined that the guidelines are very clear pursuant to N.J.A.C. 6A:9B-4.16(b). The statute states that under no circumstances may the Board waive any GPA or degree requirements for certification. The regulation change regarding the minimum GPA requirements was listed in several locations on the Department's website, as well as on other public forums.

Respondent relies on Walder v. N.J. State Board of Examiners, Agency Dkt. No. 124-5/14, Commissioner (December 29, 2014), http://www.nj.gov.education/legal/commissioner/2014/, which states that the Board's denial of a request to issue a certificate will not be disturbed so long as the decision "is consistent with the applicable statutory and regulatory provisions." It is undisputed that the Petitioner has an undergraduate GPA of 2.54, falling below the GPA requirement of 2.75 as set forth in N.J.A.C. 6A:9B-8.1(a)(2)(i), which was in affect at the time of her application. Since the regulatory requirement was not met, this falls well within the applicable statutory and regulatory provisions. The board is not permitted to waive this requirement.

Additionally, the Board foresaw possible implications with the change in GPA requirement. In a willingness to accommodate, those applicants who have a minimum GPA of 2.5 and have a "passing plus ten percent score" on the appropriate content-area Praxis examination will automatically meet the requirements for certification. Petitioner also could have taken a teacher preparation program that awarded grades, unlike the program that she enrolled in. Petitioner took none of these steps.

## LEGAL ANALYSIS AND DISCUSSION

Petitioner argues that the main issue is whether the regulations for certification eligibility were "clear and carried out with consistency and objectivity." However, in most decisions where the Commissioner has reviewed determinations by a governing board, the articulated standard of review has been an assessment of whether the Board's ruling was reasonable, or whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Gr., 216 N.J. 370, 385 (2013). This will result in three inquiries:

> (1) whether the agency's action violates expressed or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

In In re Proposed Quest Academy Charter School, the Court upheld the denial of a certification as a charter school. Id. at 390. There, the statutory and regulatory program requirements provided no guidance to the Commissioner on how to assess the application. Id. at 377. Petitioner applicant argued that the Commissioner's denial should be supported by "substantial credible evidence." Id. at 382. However, the Court instead articulated the "arbitrary, capricious, or unreasonable" standard for reviewing administrative agency decisions. Id. at 385. The Commissioner used her administrative expertise and commentary from the Superintendent of Montclair Public Schools in weighing her decision to deny the certification. Id. at 389. In light of this sound reasoning, the court found her decision satisfied the "deferential" arbitrary and capricious standard. Id. at 385-89.

In the present case, the statute governing the Board of Examiners' decision is quite clear. "[t]he Board of Examiners shall not: 1. [w]aive any test, GPA, degree completion, or approved educator preparation program completion requirements."

N.J.A.C. 6A:9B-4.12(c)(1). With a GPA of 2.54, Petitioner falls below the minimum GPA requirement for certification of 2.75. See N.J.A.C. 6A:9B-8.1(a)(2)(i). Furthermore, Petitioner failed to exercise her option to supplement the GPA requirement by submitting a praxis score of passing plus ten percent. N.J.A.C. 6A:9B-8.2(c). In light of all these facts, despite a showing of unfortunate miscommunications between Petitioner and the NJDOE, the record does not show that Respondent carried out its decision in any way to violate the "arbitrary and capricious" standard. The Board followed codified standards to reach its decision.

Petitioner may have a claim for equitable fraud. In general, equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." Jewish Center of Sussex Cty v. Whale, 86 N.J. 619, 624 (1981). Additionally, "[e]ven an innocent misrepresentation can constitute equitable fraud justifying rescission." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 635 (1995).

In the present case, Petitioner has offered evidence that supports the three elements of equitable fraud. A misrepresentation was made on the NJDOE website stating that the required cumulative grade point average for candidates graduating prior to 2004 was "at least 2.50." Petitioner provided email correspondence from individuals at the NJDOE that a GPA of 2.50 satisfies an eligibility requirement. Finally, Petitioner relied on those representations to her detriment by incurring the cost of the online teaching program, and ultimately being denied the NJ certificate.

## CONCLUSION

Although Petitioner may have a separate claim for equitable fraud, the Board of Examiners did not err in its decision to deny her application for a Certificate of Eligibility with Advanced Standing in the State of New Jersey. Although the guidelines may have been listed and dictated in a "haphazard fashion," N.J.A.C. 6A:9B-4.12(c)(1) clearly states that the Board of Examiners shall not waive on GPA requirements for certification.

For the foregoing reasons I **CONCLUDE** that Petition did not meet her burden of proof that Respondent's decision to decision to deny her application was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

## ORDER

It is hereby **ORDERED** that Respondent's Motion to Dismiss is **GRANTED** and Petitioner's request for relief is hereby **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

September 27, 2016
DATE

**LELAND S. McGEE**, ALJ

Date Received at Agency: September 27, 2016

Date Mailed to Parties: SEP 28 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

393-16

393-16SEC

AGENCY DKT. NO. 272-10/16

| | | |
|---|---|---|
| IN THE MATTER OF RONALD MURPHY, | : | |
| BEVERLY CITY BOARD OF EDUCATION | : | COMMISSIONER OF EDUCATION |
| BURLINGTON COUNTY. | : | DECISION |
| | : | |

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely file his Personal/Relative and Financial Disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its July 26, 2016 Order to Show Cause, but prior to the Commission's August 23, 2016 meeting; the Commission, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

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

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/10/16

Date of Mailing: 11/14/16

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

396-16

*In the Matter of Tenure Hearing of*

**Robert Klein,**
**School District of the Township of Howell,**
**Monmouth County, New Jersey**

Agency Docket No.227-8/16

**Opinion and Award**

**Tia Schneider Denenberg**, *Arbitrator*

**APPEARANCES**

FOR THE PETITIONER:

Jan L. Wouters, *Bathgate, Wegener & Wolf, P.C.*

FOR THE RESPONDENT:

James J. Uliano, *Chamlin Rosen Uliano & Witherington*

**BACKGROUND**

This dispute concerns a charge of unbecoming conduct, dated July 6, 2016.[1] It was brought against tenured teacher Robert Klein under Section 25 of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3. The charge[2] reads as follows:

> I, Joseph Isola, of full age and capacity, having been duly sworn, depose and say as follows:
>
> 1. I am the Superintendent of Schools of the Howell Township Board of Education, which has administrative offices at 200 Squankum/Yellowbrook Road, Howell, New Jersey, 07731. I am fully

[1] For ease of reference, the creation date of each document has been cited, rather than the date of the Department of Education stamp. In this matter there is no allegation of failure to comply with time limits.

[2] The paragraph numbering system, in which No . 2 is repeated, appears in the original document.

familiar with the facts and circumstances surrounding this matter and have personally reviewed the evidence in support of the accompanying charges against Robert Klein, a tenured teacher employed by the Howell Township Board of Education ("HTBOE").

2. Robert Klein is a physical education and health teacher at Middle School South. He has been employed by the HTBOE since January 5, 1998.

2. I hereby file tenure charges against Robert Klein for conduct unbecoming a teacher in accordance with N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1 et

3. The Charges stated herein are based upon my personal knowledge, information and belief derived from personnel and other files and records maintained by the HTBOE, and information imparted to me and staff members by internet websites, social media sources and news organizations.

**CHARGE: CONDUCT UNBECOMING A TEACHER**

While attending the 2015 New Jersey Education Association Conference in Atlantic City in November 2015, Robert Klein invited undercover journalists up to his room at the Borgata Hotel and was filmed (a) offering cocaine to the undercover journalists, (b) describing how he keeps cocaine in his home, (c) describing how he avoids being caught with drugs and (d) describing how his job as a teacher, which requires him to work with the local police department and tutor students on the dangers of drugs, taught him how to avoid getting caught with drugs. In the 8.38 minute video, Mr. Klein is filmed making the following statements:

"If you want blow you can have a bump. You can have whatever you want"

"Dude, if you want some I'll give you a taste, don't be embarrassed:"

"Have some."

"You come to my home at night, you come to my room now. I have booze, I have water, I have blow at the house, whatever it is, whatever anybody wants, I have it there, " "and I don't mind having it here"

"Yes I'm a good host and I have this s*** at my house when you come. "

"Like I work with the police in the school district with the drug dogs and they teach us, and they teach our kids how the drug dogs sniff out drugs"

"We're not putting drugs in my car. Blow — different. You put it in your pocket, it's nothing."

"Blow, people mix it with different things so it has different scents."

On or about June 15, 2016 the video of Mr. Klein speaking about his drug use was posted on multiple news and social media sites worldwide on the internet. The following is list of some of the many websites where the video and/or print news stories about the video may be found:

www.dailymail.com.uk
www.projectveritas.com
www.YouTube.corn
http://dailycallernewsfoundation.org
www.njschoolchoice.com
www.app.com
www.nbcnewyork.corn
www.abcnewyork.corn
http://newyork.cbslocal.corn

Each of these sites is accessible by student and parents and in the case of YouTube.com was viewed more than 13,000 times.

In addition to the posting of the video on numerous internet sites, the video was the subject of several news articles, such as the article posted on the website of the Daily Mail under the headline "Middle School health teacher caught on hidden camera offering cocaine to undercover reporters and boasting his job had taught him how to avoid getting caught".

Teachers serve as role models for their students. Mr. Klein's statements and admissions concerning his drug use and its involvement with his duties as a health teacher in the school district falls well below the "role model" status expected of teachers. The statements and admissions by Mr. Klein violate Board Policy 3150 "Discipline" and Board Policy 3281 "Inappropriate Staff Conduct" and constitute conduct unbecoming a teacher.

[Joint Exhibit 1]

The charge was accompanied by a statement of evidence, dated the same day:

I, Joseph Isola, of full age and capacity, having been duly sworn, depose and say as follows:

1. I am the Superintendent of Schools of the Howell Township Board of Education ("HTBOE"), which has administrative offices at 200 Squankum/Yellowbrook Road, Howell, New Jersey, 07731. I am fully familiar with the facts and circumstances surrounding this matter and have personally reviewed the evidence in support of the accompanying charges against Robert Klein, a tenured teacher employed by the HTBOE. The evidence herein is based upon my personal knowledge, information and belief derived from personnel and other files and records maintained by the HTBOE, and information imparted to me and staff members.

2. On or about June 15, 2015 a video was posted online to numerous websites worldwide in which, Robert Klein, while attending the 2015 New Education Association Conference in Atlantic City, New Jersey in November 2015, invited undercover journalists up to his room at the Borgata Hotel and was filmed (a) offering cocaine to the undercover journalists, (b) describing how he keeps cocaine in his home, (c) describing how he avoids being caught with drugs and (d) describing how his job as a teacher, which requires him to work with the local police department and tutor students on the dangers of drugs, taught him how to avoid getting caught with drugs as evidenced by the attachments hereto. The following are the Exhibits to be relied upon to support the charges.

Exhibit A: Video of Robert Klein taken by undercover journalists
Exhibit B: Partial list of websites where the video was posted

* * *

EXHIBIT A
Video of Robert Klein can be viewed here https://wwvv.youtube.com/watch?v-VMpBc2XYDQQ

EXHIBIT B

List of websites where video of Robert Klein was posted:
www.dailymail.com.uk
www.projectveritas.com
www.YouTube.com
http://dailycallernewsfoundation.org
www.njschoolchoice.com
www.app.com
www.nbcnewyork.corn
www.abcnewyork.com
http://newyork.cbslocal.com

[Joint Exhibit 3]

The charges, statement of evidence, and exhibits were served on the teacher and his attorney on July 7, 2016. The teacher was advised of "his right to submit a written statement of position and evidence within 15 days."

On August 24, 2016, the board of education determined in closed executive session "that there was probable cause to credit the evidence" against the teacher. The teacher was notified of the district's intent to a certify tenure charges with the Commissioner of Education. The charge and supporting material were filed with the Commissioner on August 26 [Joint Exhibit 3].

On September 22, 2016, the parties were notified by the Director of the Bureau of Controversies and Disputes that

> following receipt of respondent's answer on September 12, 2016, the...charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges brought pursuant to N.J.S.A. 18A:6-16—which are not dismissed as the result of a motion—under the preponderance of the evidence standard.
>
> Accordingly, on this date, the charges are being referred to Arbitrator Tia Schneider Denenberg pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26* and *P.L. 2015, c. 109.*

The arbitrator conducted a conference call with the parties on September 16, 2016, to discuss scheduling and other preliminary matters. Hearings were scheduled for November 10 and November 11, 2016. On October 12, the arbitrator was granted an extension by the Director of the Bureau of Controversies and Disputes until December 27 to conduct the hearing.

On November 1, during another conference call, the parties informed the arbitrator that they had reached a settlement. It was agreed to conduct a hearing on November 11, 2016, with the arbitrator presiding by speaker phone. The sole witness was the respondent, who testified under oath. The record was transcribed.

In order to ensure that the teacher understood and agreed with the terms of the settlement, he was questioned on the record by his counsel:

Q. Mr. Klein, I have in front of you? Something that we've identified as Exhibit 5, it is a Stipulation of Settlement. Have you had an opportunity to review this document?
A. Yes.
Q. You understand what we are doing here today?
A. Yes.
Q. So, the purpose of today is that you have had an opportunity to review the Stipulation of Settlement, we have gone over it together and it is something that you are willing to do to resolve this case, correct?
A. Yes.
Q. Now, you are aware that, under the law, to discharge you from the employment the District has an affirmative duty to prove their case. Are you aware of that?
A. Yes.
Q. And you are aware that you had an opportunity to answer the charges, present witnesses and, ultimately, the arbitrator would render a written decision regarding this matter?
A. Yes.
Q. And you are willing to give up your right to that for the settlement that we have today?
A. Yes.
Q. As a result of that settlement, you will be resigning your position as a tenured teaching employee of the District?
A. That's correct.
Q. As a result of that, you are going to be paid, approximately, $15,000, or as you heard earlier, one-and-a-half months via pay period?
A. That's correct.
Q. No one has made any promises to you outside this document regarding this settlement?
A. No.
Q. Nobody is forcing you to do this?
A. No.
Q. You have had ample time to review it with me, and you don't have any further questions of myself or the Arbitrator?

A. Yes, I've had ample time and I have no further questions.
Q. You understand, as a result of this, the District will be withdrawing the current tenured charge?
A. Yes.
Q. The stipulation of dismissal will be filed with the Commissioner of Education?
A. Yes.
Q. And the State of New Jersey, Department of Education?
A. Yes.
Q. And you understand that they are going to notify the Board of Examiners that you are resigning a tenured teaching position?
A. Yes.
Q. You have been represented by myself, have I represented you fairly?
A. Yes.
Q. Do you have any questions for anyone?
A. No.

MR. ULIANO: I have nothing further.
MR. WOUTERS: I have no questions of Mr. Klein.
MS. SCHNEIDER-DENENBERG: I guess the only question I had was the sixth Cardonick factor seems to go a little bit further, "If the charged party is a teaching staff member, assuring the teaching staff member has been advised the Commissioner's duty to [refer tenure] determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate." In this case, because he is resigning, how does that affect that factor?
MR. ULIANO: We just covered that in the settlement.
MR. WOUTERS: Actually, the law is a little confusing....There is actually an administrative code regulation, that absolutely requires the Chief School Administrator to forward this [i]nformation to the State Examiners, whenever a tenured employee is either terminated or resigns as a result of tenure charges. That requirement has been included within the Stipulation of Settlement.
MS. SCHNEIDER-DENENBERG: Right.
MR. WOUTERS: I think Mr. Klein acknowledges that. So, it is what it is.
MR. ULIANO: I have one further question for Mr. Klein.
MS. SCHNEIDER-DENENBERG: Okay.
BY MR. ULIANO:
Q. Mr. Klein, you have agreed to settle this case, but you have made no admissions regarding the truth or [veracity] of any of the charges that you have been filed against you, correct?
A. That is correct.
MR. WOUTERS: The Board acknowledges that Mr. Klein has refuted[3] the charges that were filed against him.

[Tr., pp. 14-19]

[3] The arbitrator understands "refuted" in this context to mean disputed, not disproved.

The Stipulation of Settlement[4] provides:

The Howell Township Board of Education ("District") has pursuant to N.J.S.A. 18A:6-11 heretofore filed tenure charges for unbecoming conduct against Robert Klein ("Klein"), a tenured teacher employed by the District. Klein has responded to the charges and refuted same. After reviewing their respective positions with their counsel, the parties have determined that it will be in the best interest of each party for Klein to resign as a tenured teaching employee and the District to withdraw the tenure charges under the following terms and conditions:

1. The District will withdraw the tenure charges filed against Klein.

2. Klein by this Stipulation of Settlement resigns his position as a tenured teaching employee of the District. The resignation to be effective on a date to be determined.

3. Klein is currently on leave without pay. Upon the approval of this Stipulation of Settlement in accordance with N.J.C.A. 6A:3-5.6, the District will change Klein's status to be on leave with pay for three (3) pay periods during which Klein will receive gross salary in the amount of $15,000. Payments will be made to Klein, net of all appropriate deductions according to the District's current payroll practices. The details of the gross amounts and deductions are set forth in the payroll abstracts attached hereto and made a part of as Exhibit A.

4. Payroll payments to Klein detailed in paragraph 3 above shall commence the first pay period following the District's receipt of written approval of this Stipulation of Settlement by the Commissioner of Education.

5. This Stipulation of Dismissal shall be filed with the Commissioner of Education,

6. State of New Jersey Department of Education.

7. Klein acknowledges that pursuant to N.J.A.C.6A:9-17.4, the chief school administrator of the District shall notify the Board of Examiners that Klein, a tenured teaching staff member who was charged with unbecoming [conduct] has resigned his position.

8. District and Klein represent and warrant that they have the authority to enter into this Stipulation of Settlement and that they have complied with all legal requirements to exercise that authority.

[Joint Exhibit 5]

[4] The paragraph numbering system appears in the original document.

DISCUSSION

The sole question is whether the settlement meets the *Cardonick* standards. Statutory language in N.J.A.C. 6A:3-5.6(a) provides as follows:

> Any proposed...settlement, whether submitted to the Commissioner or to the arbitrator, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;
>
> 4. Indication the charged party entered into the agreement with full understanding of his or her rights;
>
> 5. A showing the agreement is in the public interest; and
>
> 6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

As analyzed in detail below, the settlement agreement satisfies each of the *Cardonick* standards:

No. 1–When the settlement was reached, the arbitration file included the charge and supporting documentation.

No. 2–The circumstances were favorable for a settlement, inasmuch as it brought a degree of certainty about the outcome that benefitted both parties. The district could ensure that the teacher would leave its employ, while the teacher received payment for three pay periods without admitting guilt. The cost of pursuing a full tenure hearing would undoubtedly exceed the cost of the settlement.

No. 3–The consent of both the charged and charging parties was confirmed by both parties on the hearing record.

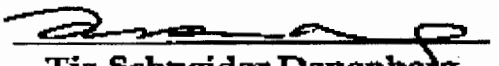
No. 4–There is ample evidence that the charged party entered into the agreement with full understanding of his rights, since the teacher was questioned on the record about his knowledge of those rights and what he was surrendering. He was examined by his attorney, and the transcript demonstrates that he was well aware of the costs and benefits of accepting the agreement.

No. 5–Among the statute's objectives is the expeditious resolution of tenure disputes. A settlement advances that purpose, shortening the time needed to achieve an outcome. In the arbitration process a settlement is typically welcomed and considered superior to an imposed decision, because the parties play an active role in fashioning the terms.

No. 6–Under the terms of the settlement, the teacher was advised that the Commissioner may forward the tenure charge to the State Board of Examiners, which will review it [Tr., pp. 16-18], an action that could impact his certification. The settlement also provides that the district will notify the Board of Examiners that he has resigned his position.

Since the *Cardonick* standards have been satisfied, the arbitrator approves the settlement.

For the reasons discussed above, and after considering all arguments and the entire record, the arbitrator concludes that the just, practical, and proper outcome of the tenure dispute is to give effect to the Stipulation of Settlement, as the terms have been explicated under oath in the stenographic transcript of the hearing on November 11, 2016.



**Tia Schneider Denenberg**
***Arbitrator***

**Dated:** November 13, 2016

*In the Matter of the Tenure Hearing of*

**Robert Klein,**
**School District of the Township of Howell,**
**Monmouth County, New Jersey**

Agency Docket No.227-8/16

## Award of Arbitrator

*The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, as amended by P.L. 2015, c. 109, to hear and decide the above-captioned matter, rules as follows:*

The tenure charges against teacher Robert Klein shall be resolved according to the terms of the Stipulation of Settlement entered into by the parties, as recorded in the hearing transcript of November 11, 2016. The terms include resignation of the teacher from his tenured position in the district and payment to him by the district of $15,000.

**Tia Schneider Denenberg**
*Arbitrator*

**Dated:** November 13, 2016

*State of New York*
*County of Columbia*

*On this 13th day of November, 2016, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.*

**Kristy Lee Brailey**
*Notary Public State of New York*
*No. 01BR6326865*
*Qualified in Columbia County*
*Commission Expires June 29, 2019*

394-16LM

394-16


CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

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

KIMBERLEY HARRINGTON
*Acting Commissioner*


November 10, 2016

Darren J. Del Sardo, Esq.
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Lawrenceville, New Jersey 08648

Re: *T.H., on behalf of minor children, T.H., H.H. and J.H. v. New Jersey State Interscholastic Athletic Association, Dkt. No. 292-11/16.*

*S.A., on behalf of minor child, N.A. v. New Jersey State Interscholastic Athletic Association, Dkt. No. 291-11/16.*

Dear Counsel:

I have reviewed the materials filed by all of the parties in connection with the motion for emergent relief filed by the petitioners in the above-captioned matters. The petitioners[1] are seeking a stay of the New Jersey State Athletic Association's decision excluding the Wayne Hills football team from the 2016 Football State Championships due to the playing of ineligible players during the 2016 football season. After reviewing certain documents on November 7, 2016, the NJSIAA's Executive Director declared that two student athletes were ineligible to play football because they did not establish a bona fide change of residence. As a result, the NJSIAA determined that all 2016 season games in which these student athletes played that resulted in wins for Wayne Hills shall be forfeited.

[1] The matter of *T.H., on behalf of minor children, T.H., H.H. and J.H. v. New Jersey State Interscholastic Athletic Association*, Dkt. No. 292-11/16, was filed by the parent of the student athletes that were deemed to be ineligible to play for the Wayne Hills football team. The matter of *S.A., on behalf of minor child, N.A. v. New Jersey State Interscholastic Athletic Association*, Dkt. No. 291-11/16, was filed by the parent of another player on the Wayne Hills football team.

Upon review of the submissions, I find that the NJSIAA's decision to declare the two student athletes ineligible for failure to establish a bona fide residence was procedurally flawed, as the students were not afforded any due process[2]; further, there is not sufficient credible evidence in the record to serve as a basis for the decision reached by the NJSIAA. Although representatives from the NJSIAA and the Wayne Hills School District held a meeting on November 8, 2016 to discuss potential residency concerns, neither the student athletes nor their parents were given an opportunity to provide evidence of their residency status. In fact, the student athletes were not provided with any notice of the meeting, nor were they informed that the NJSIAA was reviewing their residency status. Instead, the student athletes became aware of the NJSIAA's determination via a press release. Until the student athletes are afforded due process, I cannot determine whether the NJSIAA applied its rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2)

Accordingly the NJSIAA is temporarily enjoined from declaring that T.H., H.H. or J.H. are ineligible to participate in football at Wayne Hills. The disqualification of the Wayne Hills football team from the 2016 Football State Championships and the forfeiture of any wins by the Wayne Hills football team for 2016 is hereby stayed pending further proceedings before the NJSIAA whereby the student athletes are given an opportunity to present evidence concerning their residency status.

IT IS SO ORDERED.[3]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library
Isabel Machado, Esq.

KH/MKD/JKH

VIA FACSIMILIE

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[2] Although under Article I of the NJSIAA Bylaws, the Association Executive Director has been granted the authority to impose appropriate penalties pending a full blown hearing pursuant to Article XIII, due process, at a minimum, still requires notice to those affected and an opportunity to be heard.

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

395-16

AGENCY DKT. NO. 271-10/16

| | | |
|---|---|---|
| IN THE MATTER OF NICAURY MILLER, | : | |
| THE GRAY CHARTER SCHOOL, | : | COMMISSIONER OF EDUCATION |
| ESSEX COUNTY. | : | DECISION |
| | : | |

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission determined that the respondent violated the School Ethics Act by filing disclosure statements that were identified as incomplete, and by failing to correct or re-submit those statements in accordance with *N.J.A.C.* 6A:28-3.4. The Commission recommended a sanction of suspension for 30 days or until the respondent corrects and submits her disclosure statements. If the respondent fails to file her disclosure statements at the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Alternatively, if the requisite disclosure statements are filed within the 30 days, the Commission recommends a penalty of reprimand. Respondent did not file exceptions, nor has she submitted proof that she has corrected and re-filed her disclosure statements. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official and is hereby ordered to correct and re-file her disclosure statements within 30 days from the date of this decision. If the respondent

files the disclosure statements within 30 days she shall be reprimanded as a school official found to have violated the School Ethics Act. Alternatively, if the respondent does not file the disclosure statements within 30 days from the date of this decision, the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/14/16
Date of Mailing: 11/14/16

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

391-16

OAL DKT. NO. EDU 06707-16
AGENCY DKT. NO. 103-4/16

| | | |
|---|---|---|
| A.D., ON BEHALF OF MINOR CHILDREN, P.D. AND A.D., | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, | : | |
| RESPONDENT. | : | |

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

Upon review, the Commissioner observes that the Superintendent and Board Secretary of the Morris School District Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent or Board Secretary to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent or Board Secretary to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Additionally, the Commissioner notes that the settlement makes reference to a payment intended to be made on September 15, 2016. The parties are reminded that a settlement

of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/14/16

Date of Mailing: 11/14/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 06707-16
AGENCY DKT. NO. 667-11/10

**A.D. ON BEHALF OF MINOR CHILDREN P.D. AND A.D.,**
Petitioner,
v.
**MORRIS SCHOOL DISTRICT BOARD OF EDUCATION, MORRIS COUNTY,**
Respondent.

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**A.D.,** petitioner, pro se

**Marie-Laurence Fabian,** Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: September 22, 2016 Decided: September 23, 206

BEFORE **MICHAEL ANTONIEWICZ,** ALJ:

On or about April 7, 2016, petitioner A.D. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Morris School District (the Board). The Department of Education transmitted this matter

to the Office of Administrative Law (OAL), where it was filed on May 4, 2016, for determination as a contested case. After numerous discussions between the parties, an amicable resolution was reached. Under letter dated September 19, 2016, counsel for the Board submitted the attached Settlement Agreement indicating the terms of agreement between the parties.

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

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

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

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

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

September 23, 2016
DATE

**MICHAEL ANTONIEWICZ**, ALJ

Date Received at Agency: 9-27-16

Date Mailed to Parties: SEP 27 2016
jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

# SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") made by and between

Morris School District Board of Education
(Hereinafter referred to as "Morris")

AND

A.D. o/b/o P.D. & A.D.
(Hereinafter referred to as "A.D.")

## WITNESSETH:

**WHEREAS**, Morris is duly organized as a public school district under the laws of the State of New Jersey; and

**WHEREAS**, A.D. was found by Morris to have enrolled his sons in Morris School District Public Schools, despite not being domiciled in the Morris School District; and

**WHEREAS**, A.D. appealed that decision to the Commissioner of Education in a matter bearing Agency Reference Number 103-4/16 and OAL Docket Number EDU 06707-2016N; and

**WHEREAS**, a hearing was commenced before the Office of Administrative Law on August 29, 2016 during which A.D. provided documentation supporting domicile in the Morristown for the first time; and

**WHEREAS**, in order to avoid the time and expense of continuing the litigation, the parties agreed to enter into a settlement agreement;

**NOW, THEREFORE**, in consideration of the mutual covenants and promises hereinafter set forth, the parties desire to enter into the within Settlement Agreement (the "Agreement") as follows:

1. **Payment:** On or before September 15, 2016, A.D. shall pay the sum of three thousand dollars ($3,000.00) to Morris.

2. **Withdrawal and Release.** A.D. agrees to withdraw his claims against Morris and Morris releases its claims for tuition for the 2015-2016 school year. Morris acknowledges that A.D. has provided documentation supporting his sons' eligibility for enrollment in the Morris School District at this time. A.D. herein releases and gives up any and all civil and administrative claims and rights he may have against Morris for any damages or injuries, including any civil claim for compensatory damages, punitive damages, or any damages or injuries to A.D. arising out of the residency/domicile or education of the minor children A.D. and P.D. during the time period they were attending school in the Morris School District, whether known or unknown, that have taken place through the date of this Agreement.

3. **Non-Admission of Liability**. Nothing contained in this Agreement is intended, nor shall be construed: (i) to waive or release any future claim arising after the date this Agreement is signed by both parties; or (ii) to limit either party's right to enforce the terms of this Agreement. Each party acknowledges and agrees that this Agreement is a compromise of disputed claims and neither this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by either party of any kind with respect to any fact, liability, or fault.

4. **Severability.** Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

5. **Authorization.** Each individual signing this Agreement warrants and represents that he or she has the full authority and is duly authorized and empowered to execute this Agreement on behalf of the party for which he or she signs.

6. **Jurisdiction.** This Agreement shall be governed by the laws of New Jersey, and the Superior Court of New Jersey, Morris County, shall have jurisdiction over, and be the proper venue for, any disputes arising out of this Agreement.

7. **Construction.** The parties have participated fully in the review of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

8. **Successors.** This Agreement shall inure to the benefit of the parties hereto, and their respective officers, directors, employees, attorneys, heirs, executors, administrators, successors and assigns.

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

Morris School District Board of Education

By: Mackey Pendergrast,
Superintendent

Dated: 9/1/2016

A.D.
Date:

Anthony LoFranco,
Business Administrator/Board Secretary

Dated: 9/1/2016

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

A.D.
Date: 5-14-2016

Morris School District Board of Education

By: Mackey Pendergrast,
Superintendent

Dated: 9/1/2016

Anthony LoFranco,
Business Administrator/Board Secretary

Dated: 9/1/2016

397-16

| | | |
|---|---|---|
| D.D.K., ON BEHALF OF MINOR CHILD, D.K., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY, AND BARBARA SARGENT, | : | DECISION |
| RESPONDENTS. | : | |

## SYNOPSIS

*Pro se* petitioner challenged the determination of the Board that his son, D.K., was not the subject of acts of harassment, intimidation or bullying (HIB) by several students in violation of the New Jersey Anti-Bullying Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. This case stems from two separate incidents of alleged HIB against D.K. in May of 2014, when D.K. was in seventh grade. D.K. is now in high school and did not attend or testify at the hearing in this matter. Petitioner D.D.K. testified on his son's behalf. He alleged that the HIB investigation was not properly conducted, and sought an order reversing the "no HIB" determination. The Board asserted that the petitioner failed to show that D.K. was mistreated by the other students based on his race, gender or other distinguishing characteristic; further, petitioner failed to prove that the conduct substantially disrupted or interfered with the orderly operations of the school.

The ALJ found, *inter alia*, that: the Commissioner will not overturn a decision of a local board unless the action is determined to be arbitrary, capricious or unreasonable; petitioner bears the burden of proof to show that the investigation of the alleged incidents of HIB was conducted improperly; the first incident – in which students on the school bus referred to D.K. as a "know it all" – did not rise to the level of HIB, as the investigation found that this was a conflict between students regarding their comparative abilities in math, and was not motivated by an actual or perceived characteristic; D.D.K.'s assertions that D.K. had been called a "smarty pants" and a "dumb ass Asian" on the bus were not substantiated at the hearing; the second incident – in which a student "joked" in homeroom with D.K., who was wearing a yellow shirt, by saying "you're already yellow, you're Asian" – was judged in the investigative report to be motivated by D.K's race and color; however, while this substantiated statement had the effect of insulting or demeaning D.K., his response was to say "fortunately, this was not problematic for my learning experience, but it ticked me off at the time"; therefore, this incident did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students. The ALJ concluded that the petitioner did not meet his burden of proof that the Board acted in an arbitrary manner in finding that D.K. was not the target of HIB as defined in the Act. Accordingly, the petition was dismissed.

Upon review, the Commissioner agreed that the school bus incident did not rise to the level of HIB. With respect to the second incident, the Commissioner observed that the Board's HIB report specifically found that comments made to D.K.: could reasonably be perceived as motivated by D.K.'s race; happened on school property; and had the effect of being insulting or demeaning to D.K. However, the Commissioner was constrained to agree with the ALJ that the petitioner failed to meet his burden of demonstrating that these incidents substantially disrupted or interfered with the orderly operation of the school or the rights of other students. Accordingly, the Commissioner adopted the Initial Decision, as modified, as the final decision in this matter.

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

November 16, 2016

OAL DKT. NO. EDU 07682-15
AGENCY DKT. NO. 86-4/15

| | | |
|---|---|---|
| D.D.K., ON BEHALF OF MINOR CHILD, D.K., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY, AND BARBARA SARGENT, | : | DECISION |
| RESPONDENTS. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

This case involves a challenge by petitioner to the Board's determination that his son was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner alleges that in the first incident, on May 20, 2014, his son was called a "know it all" on the school bus. (Initial Decision at 2) He alleges that another student bumped D.K. with his school bag and said, "I hope you get brain damage." *Ibid.* In the second incident – on May 21, 2014, in homeroom – petitioner alleges that a student made comments regarding D.K.'s Korean descent, asking him why he was not wearing yellow for spirit day because "you're already yellow . . . you're Asian." *Id.* at 3. Petitioner alleges that the same student also referred to D.K. as a "dumb ass Asian." *Id.* at 2-3.

The Board determined that the incidents did not amount to HIB. According to the report, the school bus incident was not reasonably perceived as being motivated either by an actual or perceived characteristic, and instead was a conflict between students. (Exhibit J-2) With respect to the second incident, the report indicated that although there was evidence that the comments could reasonably be perceived as being motivated by D.K.'s race and color, and had the effect of being insulting or demeaning to D.K., it did not substantially disrupt or interfere with the orderly operations of the school or the rights of

other students. (Exhibit J-1) The Administrative Law Judge (ALJ) found that the Board's decision in finding no HIB was not arbitrary, capricious, or unreasonable because "it has not been established that the alleged aggressors' actions were motivated either by any actual or perceived characteristic . . . or by any other distinguishing characteristic." (Initial Decision at 10)

Upon a comprehensive review of the record, the Commissioner notes at the outset that petitioner – who did not witness either incident – did not propound discovery despite multiple opportunities to do so, nor did petitioner call any witnesses besides himself at the hearing. It is clear that petitioner had the burden to prove by a preponderance of the evidence that the Board acted in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. *See T.B.M on behalf of M.M. v. Moorestown Board of Education*, OAL Dkt. No. EDU 12780-07, decided February 6, 2008 (citing Thomas v. Morris Township Board of Education, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966)), *adopted* Commissioner Decision No. 157-14, April 7, 2008. The Commissioner agrees with the ALJ that petitioner did not meet his burden.

Specifically, the Commissioner is in accord with the ALJ's determination that the Board's finding of no HIB with respect to the school bus incident was not arbitrary, capricious or unreasonable. With respect to the second incident, the Commissioner agrees with the ALJ's finding that the Board was not arbitrary, capricious or unreasonable, but disagrees with the ALJ as to the reasoning. The elements of HIB are set forth at *N.J.S.A.* 18A:37-14:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the

> student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Here, the alleged aggressor admitted to asking D.K. why he was not wearing yellow for spirit day because "you're always yellow." (Exhibit J-1) The HIB report specifically found that "[t]here is evidence that Alleged Aggressor's comments could reasonably be perceived as being motivated by D.K.'s race and color." *Ibid.* Accordingly, the Commissioner disagrees with the ALJ that such comments were not motivated by any actual or perceived characteristic, as the report found otherwise. The report also found two additional elements of the HIB test were met because (1) the incident happened on school property; and (2) had the effect of being insulting or demeaning to D.K.

However, the report determined that the incident did not amount to HIB because the comments did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In support of this finding, the report noted that D.K. stated in his interview that "fortunately, this was not problematic for my learning experience, but it ticked me off at the time." (Exhibit J-1) The student witness observed the alleged aggressor make an "embarrassed laugh" to himself when he realized what he had said had come out wrong, but did not hear anyone else laugh and did not think D.K. was upset as a result of the comment. *Ibid.* The teachers did not hear any of the alleged comments.

Previously, conduct has been determined to substantially disrupt the orderly operation of the school when students are so upset or embarrassed that they are "not fully available for learning." *G.H. and E.H. on behalf of K.H. v. Board of Education of the Borough of Franklin Lakes, Bergen County*, OAL Dkt. No. EDU 13204-13, decided February 24, 2014, *adopted* Commissioner Decision No. 157-14, April 10, 2014. Additionally, when other students are "so affected" by behavior that they report it, the orderly operation of the school may be substantially disrupted. *T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education*, OAL Dkt. No. EDU 10208-13, decided September 25, 2014, *adopted*

Commissioner Decision No. 450-14, November 10, 2014. Given that D.K. indicated that the comments were not problematic for his learning experience and other students did not appear to be affected by them – combined with a lack of any other evidence to the contrary – the Commissioner is constrained to agree that petitioner failed to meet his burden of demonstrating that the comments substantially disrupted or interfered with the orderly operation of the school or the rights of other students. As such, petitioner has not demonstrated that the Board was arbitrary, capricious, and unreasonable in finding no HIB.

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/16/16

Date of Mailing: 11/16/16

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

# State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 07682-15

AGENCY DKT. NO. 84-4/15

**D.D.K. ON BEHALF OF D.K.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY AND BARBARA SARGENT,**

Respondents.

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**D.D.K.**, petitioner, pro se

**John Comegno**, Esq., for respondents (Comegno Law Group, attorneys)

Record Closed: August 22, 2016 Decided: October 6, 2016

BEFORE **DEAN J. BUONO**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the father of D.K., alleges that his son was subject to acts of harassment, intimidation or bullying (HIB) by several students in violation of the New Jersey Anti-Bullying Law, N.J.S.A. 18A:37-13 et seq. The Board of Education of the Township of Readington (District or Board) conducted an investigation and determined

that the student's conduct did not constitute HIB. Petitioner seeks an order reversing the Board's determination.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 7, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on June 20, 2016, and the record was kept open for each of the parties to submit closing summations. Petitioner failed to submit a written summation. On August 22, 2016 respondents submitted a written summation and the record was closed.

## FACTUAL DISCUSSION

**D.D.K.** is the father of D.K. and testified on behalf of D.K. D.K. graduated from the District in May 2015, and is now in high school. It is presumed that D.K. wants to put this whole issue behind him and does not wish to relive the events that occurred in 2014. As a result, D.K. was not present and did not give testimony at this hearing. D.D.K. asserted that the District mishandled the HIB investigation, did not properly interview all of the witnesses and covered up the aggressors' actions to protect them. The Board did not conduct a thorough enough investigation, and should have permitted the parents to obtain all of the angles of video from the bus surveillance system. D.D.K. is seeking a finding that the students violated the District's HIB policy and an apology from the District.

D.D.K. described two separate incidents of alleged HIB involving D.K.. The first incident was on May 20, 2014, while D.K. was on the school bus. At the time, D.K. was twelve years old and was in seventh grade. D.K. was assisting a fifth grader and the aggressor said "why you got to be a know it all, I hope you get brain damage". Thereafter he bumped into D.K. with a school bag.

D.D.K. also testified that there were comments made by the aggressors that D.K was a "smarty pants" and a "dumb ass Asian". Those comments were particularly harassing and disturbing to D.K.. "Smarty pants if looked up in the urban dictionary is a derogatory term for an Asian. I looked it up last night." This tribunal requested that that

information be provided to the court, however, D.K. could not reproduce or substantiate his allegation.

The second incident occurred in homeroom on May 21, 2014, which was Spirit Day at the school. According to D.D.K., a student "joked" to D.K. who was wearing a yellow shirt and said "you're already yellow, you're Asian." The same student referred to D.K. as a "dumb ass." The incident was investigated by the District who found that the incident did not meet the criteria in the HIB definition. D.D.K pointed out the investigation in this case was flawed. According to the Report for Harassment, Intimidation, and Bullying, the following conclusion were made: "Although there was evidence that the alleged aggressor's comments could reasonably be perceived as being motivated by D.K.'s race and color; and at least one of the incidents, the homeroom incident, was confirmed as having occurred on school property." D.K. made it clear, in the interview process that "fortunately, this was not problematic for my learning experience, but it ticked me off at the time." Therefore, while the substantiated statement in homeroom, whether intentional or unintentional, had the effect of being insulting or demeaning to D.K., it did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students, as per D.K.'s own statement. (J-1 Tab 11). This is proof that the investigation was severely lacking and D.K. is owed and apology.

Although D.K. is now in high school he still feels like a victim. D.D.K. recalled that he grew up in the 1970's and experienced a high degree of harassment because of his Korean descent.

On cross-examination, it was conceded that D.K. never missed a day of school, his 7$^{th}$ grade grades were A or A+ average, he never went to the doctor or counselor for care as a result of the alleged HIB in five years in Readington school district, and he was a great success story of the Readington school system. The District investigated each incident and had suggestions for follow-up including but not limited to:

- Consideration should be given to having Alleged Aggressor formally apologize to D.K., as Alleged Aggressor did acknowledge making the statement accidentally.

- The school counselor should meet with Alleged Aggressor and complete an individualized lesson that reviews issues of diversity and character education.

- Should inappropriate/accidental commenting become a pattern with Alleged Aggressor in the future, then disciplinary action would be recommended.

- Counselor should check with D.K. to insure that the commenting has stopped and review strategies and actions he could take if future events like this occur.

- At the next Safety Committee Meeting, increased awareness of HIB issues, as it relates to specifically to minorities will be discussed.

**Dr. Barbara Sargent** testified for the respondent. She is the Superintendent of District for the last five years. She oversees 1600 Kindergarden through Eighth Grade students and has thirty years in education. She has a B.A. from Rutgers University, a Masters from Rider University in Reading and Language Arts as well as a Ph.D. from Seton Hall University. Aside from multiple teaching certifications, Dr. Sargent began the HIB program in Readington five years ago.

Mrs. Fieri is the HIB specialist at Readington Middle School. She received training on reporting and investigation of incidents. Mrs. Fieri is licensed social worker and works well with the students. As to both of the incidents involving D.K., her investigation was thorough and the reports comprehensive. The findings for both incidents was that there was no HIB.

In the first incident, D.K. reported that, while riding home on the bus on May 20, 2014, he felt like he was "ganged up on" by some of his peers. He was upset by this, indicating that he felt all alone without anyone to come to his defense. D.K. relayed that while on the bus engaging in an "encouraging conversation with a 6$^{th}$ grader about what it was like to be in 7$^{th}$ grade," his conversation was disrupted by an alleged aggressor who told him to stop "acting like you know everything." The alleged aggressor then

commented to everyone who was sitting nearby, "I bet everyone on this bus doesn't like you because you act like you know it all." Of all the students on the bus within earshot, the only student to allegedly acknowledge the alleged aggressor was another alleged aggressor.

This other alleged aggressor joined the conversation at that point and told D.K. that they hoped that he would "fail the math test tomorrow"... and that they hoped his "brain would get damaged." D.K. was confused by the comments but retaliated by reminding the person and those within earshot that he does well in math and had gotten straight "A's since entering Middle School." He shared that he did hear them talking about the upcoming math test and couldn't understand what they were all worried about, because he "took that test this morning and it was easy."

Several student witnesses painted a different picture. One witness indicated that D.K. likes to lecture the other 7th graders on the bus whenever he rides, which is not that frequently. According to this witness, when D.K. does ride the bus, he usually tries to inquire about other's grades on the math quizzes, in an effort to "make us all feel dumb." The witness pointed out that they are not in that level of math and on the day in question, even when asked to stop talking about math by the two alleged aggressors, D.K. did not stop. They did tell him to "stop acting like a know it all."

Another student witness shared that the people on the bus feel that D.K. can be annoying because he thinks he is smart and uses big words when he talks. He likes to brag about his grades, and on this day, the alleged aggressors were reacting to his math comments by telling him that he "acts like he knows it all" and were asking him to stop.

That incident did not meet the criteria in the HIB definition. This incident is not reasonably perceived as being motivated either by an actual or perceived characteristic. Based on investigative findings, this was a conflict between students regarding their comparative math abilities. Consequently, there was no discipline because nothing was done wrong and D.K. was not a victim of HIB.

The second incident likewise did not meet the criteria in the HIB definition. There is evidence that alleged aggressor's comments could reasonably be perceived as being motivated by D.K.'s race and color; and at least one of the incidents, the homeroom incident, was confirmed as having occurred on school property. However, D.K. made it clear, in the interview process that "fortunately, this was not problematic for my learning experience, but it ticked me off at the time." Therefore, while the substantiated statement in homeroom, whether intentional or unintentional, had the effect of being insulting or demeaning to D.K., it did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students, as per D.K.'s own statement. Nevertheless, the district made suggestions for follow-up:

- Consideration should be given to having Alleged Aggressor formally apologize to D.K., as Alleged Aggressor did acknowledge making the statement accidentally.
- The school counselor should meet with Alleged Aggressor and complete an individualized lesson that reviews issues of diversity and character education.
- Should inappropriate/accidental commenting become a pattern with Alleged Aggressor in the future, then disciplinary action would be recommended.
- Counselor should check with D.K. to insure that the commenting has stopped and review strategies and actions he could take if future events like this occur.
- At the next Safety Committee Meeting, increased awareness of HIB issues, as it relates to specifically to minorities will be discussed.

## FINDINGS OF FACTS

Having carefully considered the relevant evidence, including the testimony, and observed the demeanor of the witnesses, I **FIND** the following **FACTS**:

D.D.K., complained to the District regarding two instances of alleged HIB. HIB specialist Mrs. Fieri received HIB Complaints from the school principal and she conducted an investigation and interviewed D.K., the alleged aggressors and witnesses.

After concluding the investigations, Mrs. Fieri felt that the incidents did not meet the criteria in the HIB definition. This incident is not reasonably perceived as being

motivated either by an actual or perceived characteristic and it did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students.

D.K. graduated from the District in May 2015.

## LEGAL ANALYSIS AND CONCLUSIONS

Petitioner challenges the determination of the Board that the conduct of several students towards D.K. did not constitute harassment, intimidation or bullying (HIB).

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

> (b) has the effect of insulting or demeaning any student or group of students; or
>
> (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The District's HIB Policy, "Prohibiting Harassment, Intimidation and Bullying," essentially mirrors the New Jersey law. Additionally, the policy also sets forth a detailed process by which complaints are investigated to determine whether an action meets the definition of HIB as set forth in the policy and Act.

Petitioner alleges that the HIB investigation was conducted improperly. He asserts that Mrs. Fieri failed to interview witnesses and properly investigate two separate instances of harassment and demeaning contact with D.K. Petitioner urges this tribunal to conclude that the HIB investigation was conducted improperly and therefore the determination should be reversed.

The Board argues that incidents of HIB must be based on a distinguishing characteristic and substantially disrupt or interfere with the orderly operation of the school or the rights of students. Further, the incident must have physically or emotionally harmed the student, insulted or demeaned the student, or created a hostile educational environment for the student. The Board asserts that petitioner has failed to show that D.K. was mistreated by the students based on his race, gender or any other characteristic. Moreover, petitioner has not shown that D.K. was insulted or demeaned, or that he was physically or emotionally harmed.

The Board urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that the student's conduct did not constitute HIB.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008)

(citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board's decision that a student committed an act of HIB. The Administrative Law Judge (ALJ) found that the board's actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the board's actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious or unreasonable.

Here, petitioner filed a complaint and school personnel responded to D.K.'s HIB complaint. The District investigated the HIB complaint in a timely manner in accordance with the statute, and once the investigation was conducted all timelines in the Anti-Bullying Bill of Rights were followed. Petitioner asserts that the initial investigation omitted interviews of key witnesses. He points to inconsistencies in the reports and testimony. However, those assertions are unfounded.

Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

I have carefully reviewed the record. Petitioner has presented no credible evidence that the Board acted in an arbitrary manner. I am mindful of D.D.K.'s strong desire to protect his son from harm. Indeed, a parent's most basic instinct is to protect their children. However, petitioner provided no testimony from D.K. or any other eyewitness to refute the testimony of the respondent's witnesses. I am more persuaded by the evidence presented by the respondent than by that presented by petitioner. Furthermore, it has not been established that the alleged aggressors' actions were motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.

Based on the whole of the credible evidence presented, I **CONCLUDE** that petitioner has not met his burden of proof that the Board acted in an arbitrary manner in concluding that the students conduct did not constitute harassment, intimidation or bullying under the Act.

## ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 6, 2016
DATE

**DEAN J. BUONO**, ALJ

Date Received at Agency: 10/6/16

Date Mailed to Parties: 10/6/16

vj

## APPENDIX

## WITNESSES

**For petitioner:**

D.D.K.

**For respondent:**

Dr. Barbara Sargent

## EXHIBITS

Jointly submitted

| | |
|---|---|
| J-1 Tab 11 | Anti-Bullying Specialist Investigation Report, date of alleged incident May 21, 2014 |
| J-2 Tab 9 | Anti-Bullying Specialist Investigation Report, date of alleged incident May 20, 2014 |
| J-3 Tab 10 | Response to Investigation to parents, dated May 30, 2014 |
| J-4 Tab 12 | Letter to parents on conclusion of investigation, dated May 30, 2014 |
| J-5 Tab 13 | Email to Ms. Moffat, dated June 10, 2014 |
| J-6 Tab 14 | Email regarding Appeal hearing, dated June 11, 2014 |
| J-7 Tab 15 | Email to Ms. Sargent, dated June 20, 2014, regarding appeal hearing |
| J-8 Tab 16 | Response to J-7 |
| J-9 Tab 17 | Letter from Ms. Sargent, dated July 1, 2014 |
| J-10 Tab 18 | Email to Ms. Sargent, dated July 11, 2014 regarding request for records under OPRA and Common Law |
| J-11 Tab 19 | Letter from Steffi-Jo DeCasas, dated July 17, 2014, regarding Open Public Records Act |
| J-12 Tab 20 | Letter from Ms. Sargent, dated January 22, 2015, regarding decision of Superintendent being upheld |

400-16

400-16SEC

AGENCY DKT. NO. 274-10/16

| | | |
|---|---|---|
| IN THE MATTER OF ALEX JANKLOWICZ, | : | |
| LAKEWOOD TOWNSHIP BOARD OF | : | COMMISSIONER OF EDUCATION |
| EDUCATION, OCEAN COUNTY. | : | DECISION |
| | : | |

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely file his Personal/Relative and Financial Disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its July 26, 2016 Order to Show Cause, but prior to the Commission's August 23, 2016 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/15/16
Date of Mailing: 11/16/16

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

407-16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF LAUREN KRESLOFF, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE TOWNSHIP OF MOUNT LAUREL, | : | DECISION |
| BURLINGTON COUNTY. | : | |

## SYNOPSIS

Petitioning Board certified tenure charges of abandonment, conduct unbecoming, and incapacity against respondent – a tenured social worker under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 11/22/16

AGENCY DKT NO. 264-9/16

| | | |
|---|---|---|
| IN THE MATTER OF THE TENURE HEARING | : | |
| OF LAUREN KRESLOFF, SCHOOL DISTRICT | : | COMMISSIONER OF EDUCATION |
| OF THE TOWNSHIP OF MOUNT LAUREL, | : | DECISION |
| BURLINGTON COUNTY. | : | |

For the Petitioner, Andrew W. Li, Esq.
No appearance by or on behalf of Respondent, Lauren Kresloff

This matter was opened before the Commissioner of Education on September 29, 2016 through tenure charges of abandonment, conduct unbecoming, and incapacity certified by George Rafferty, Superintendent of the School District of the Township of Mount Laurel, together with supporting evidence against respondent Lauren Kresloff, a tenured social worker in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address – via regular and certified mail – on September 28, 2016.

On September 30, 2016, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in a pattern of chronic and excessive absenteeism beginning in January 2016, when respondent was absent from work for approximately

two days per week and failed to contact the District to report her absences. On April 28, 2016, respondent underwent testing for drugs and alcohol, which indicated the presence of then-unspecified drugs in respondent's system. Following an administrative leave in which respondent advised that she would seek treatment, respondent failed to contact the District – despite receiving numerous notifications by District employees – to make arrangements to return for the 2016-17 school year and schedule a physical examination. To date, respondent has not contacted the district, nor has respondent demonstrated that she has undergone medical treatment or a fitness for duty examination.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of abandonment of her teaching position, conduct unbecoming a school employee, and incapacity to perform her job functions have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16

Date of Mailing: 11/22/16

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

406-16

OAL DKT. NO. EDU 07541-16
AGENCY DKT. NO. 117-4/16

| | | |
|---|---|---|
| A.G., ON BEHALF OF MINOR CHILD, M.G., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, AND THOMAS FICARRA, SUPERINTENDENT, | : | DECISION |
| RESPONDENT. | : | |

The record, proposed settlement agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the Business Administrator/Board Secretary of the Hamilton Township Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Business Administrator/Board Secretary to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution approving the settlement agreement and designating the Business Administrator/Board Secretary to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties are unwilling

or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16

Date of Mailing: 11/22/16

**State of New Jersey**
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 07541-16

AGENCY DKT. NO. 117-4/16

**A.G. ON BEHALF OF MINOR**
**CHILD M.G.,**

Petitioner,

v.

**BOARD OF EDUCATION OF HAMILTON,**
**MERCER COUNTY AND THOMAS FICARRA,**
**SUPERINTENDENT,**

Respondents.

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**A.G.,** petitioner, pro se

**Patrick F. Carrigg,** Esq., for respondents (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorney)

Record Closed: October 6, 2016 Decided: October 13, 2016

BEFORE **JOSEPH A. ASCIONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 20, 2016, 2016, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have executed a Settlement Agreement and General Release of Claims, which is attached hereto as J-1.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 13, 2016
DATE

Joseph A. Ascione
**JOSEPH A. ASCIONE**, ALJ

Date Received at Agency: 10/14/16

Date Mailed to Parties: 10/14/16

/lam

## LIST OF EXHIBITS

J-1 Settlement Agreement and General Release of Claims

J-1

**SETTLEMENT AGREEMENT AND GENERAL RELEASE OF CLAIMS**

The SETTLEMENT AGREEMENT AND GENERAL RELEASE OF CLAIMS ("**Agreement**") is being entered into among and between **A.G. o/b/o M.G.** (or "**Releasor**") and HAMILTON TOWNSHIP BOARD OF EDUCATION ("**HAMILTON**") shall be referred to as "**Releasee.**" **A.G. o/b/o M.G.** and HAMILTON shall be collectively referred to herein as the "**Parties.**"

**WHEREAS, Releasor** is the parent of a 7th grade student, M.G., enrolled in Crockett Middle School;

**WHEREAS,** Releasor filed an appeal of the Board's Decision dated January 28, 2016 affirming a finding of a violation of the HIB Policy to the Commissioner of Education Docket No.: 117-4/16 (the "**Action**");

**WHEREAS,** the Parties wish to resolve Releasor's appeal and any and all claims and\or causes of action that Releasor had or may have had, including without limitation those pled in the Action; and

**WHEREAS,** the meaning, effect and terms of the Agreement have been fully explained to Releasor, who understands that the Agreement settles, bars, and waives any and all claims that she could possibly have against Releasees as of the date of the Agreement.

**NOW, THEREFORE,** in consideration of the mutual promises, covenants, agreements and representations contained herein, and intending to be legally bound hereby, the Parties agree as follows:

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2016 OCT -6 P 12:01
STATE OF NEW JERSEY
OFFICE OF THE COMMISSIONER

1. No Admission of Wrongdoing. **Releasor** acknowledges and agrees that the consideration by Releasees to her as described below, her acceptance of such consideration, and the Parties' execution of the Agreement and making promises and representations as set forth herein, are the result of compromise, and that the Agreement shall never be considered at any time or for any purpose as an admission by Releasees of any liability, wrongdoing or unlawful conduct of any kind with respect to **Releasor** or any other person. Indeed, Releasees expressly deny that they violated any contract, rule, law or regulation related to the underlying matter.

2. Consideration. In consideration for **Releasor** signing the Agreement, not revoking it, and fully complying with the terms, conditions and promises made herein, Releasee agrees that the HIB decision and the investigatory documents related thereto shall not become part of M.G.'s permanent student record, shall not be passed from his current school to his next school whether in or outside the Hamilton Township School District, Mercer County, and that said records shall only be maintained consistent with Hamilton's obligations under any law or applicable statute for the retention of records. The records shall not be produced to any requesting individual or entity other than M.G.'s parents or guardians or as required by any statute or law. All physical and electronic copies of the HIB decision and investigatory documents will be destroyed upon M.G.'s leaving of Crockett Middle School by way of transfer out of the school, transfer out of the Hamilton Township School District, or promotion to high school. Notice of destruction shall be given to the parents of M.G. by way of certified mail.

3. General Release of Claims. In consideration for Releasees promises and representations made herein, Releasor, individually and on behalf of her heirs, representatives, immediate family members (including but not limited to her spouse and children), agents, successors and assigns, hereby releases Releasees, their parents, board members, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (collectively, the "**Released Parties**"), release from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Releasor now has, claims to have, owns, holds or which Releasors at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of the Agreement, to the fullest extent allowed by law. The release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from the release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, the release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of

privacy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law.

4. Inquiry. Hamilton agrees, through its Administration, to respond to inquiries for M.G.'s HIB file by providing all such information as it may be legally required to provide to any governmental agencies or pursuant to Court Order. Otherwise, Hamilton shall not produce said documents to any individual or entity and shall classify same as a confidential student record. Hamilton shall not produce said file to any other school within or outside the Hamilton Township School District, Mercer County, prior to, at the time of, or after M.G. leaves Crockett Middle School.

5. Confidentiality. The Parties mutually agree that the existence of the Agreement, and the terms hereof, are to be held confidential, and agree not to disclose it to anyone except for their attorneys, members of their immediate family, and any person required by law or order of court to receive such information. To the extent the Parties reference the Agreement in discussions with persons not permitted to receive information about the Agreement, they shall inform such persons that the claims "have been discontinued" or "have been closed." Hamilton shall not disseminate or produce copies of the Agreement except pursuant to Court Order or a lawful request under the Open Public Records Act.

6. Non-Disparagement. The parties agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties.

7. Additional Covenants and Acknowledgments. Releasor further understands and agrees that:

(a) By signing the Agreement she is voluntarily making a full and final compromise and settlement of any and all claims, disputed or otherwise, arising out the Action, and that the Agreement will preclude any further or additional claims arising out of the Action;

(b) She has the right to consult any attorney prior to signing the Agreement and has been encouraged to do so by Releasees;

(c) The Agreement is contractual, is not a mere recital, shall be given full force and effect, and shall be binding upon her, her heirs, executors, successors, administrators and assigns.

8. Disputes. The validity, performance, construction, and effect of the Agreement shall be governed by the substantive laws of the United States and the State of New Jersey. The New Jersey Superior Court shall retain jurisdiction to implement and enforce the Agreement and its terms.

9. Severability. The invalidity or unenforceability of any provision of the Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

10. Counterparts; Exchange by Electronic Means. The Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. The Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

RELEASOR ACKNOWLEDGES THAT SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

RELEASOR AGREES THAT SHE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT SHE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THE AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

RELEASOR FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THE AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THE AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT SHE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THE AGREEMENT.

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties agree to the terms of the Agreement.

**RELEASOR**

A Gina Checchio

Dated: 10/4/16

**HAMILTON TOWNSHIP BOARD OF EDUCATION**

By: Katherine Attwood

NAME: Katherine Attwood

TITLE: Business Administrator / Board Secretary

Dated: 9/30/16

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the HIB settlement agreement for A.G. o/b/o M.G., with approval effective September 29, 2016.

404-16

OAL DKT. NO. EDU 00085-16
AGENCY DKT. NO. 352-11/15

| | | |
|---|---|---|
| DAVID PERRY, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record, proposed settlement agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the President of the Hamilton Township Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution approving the settlement agreement and designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED. *Kimberley Harrington*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16
Date of Mailing: 11/22/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 00085-16

AGENCY DKT. NO. 352-11/15

**DAVID PERRY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,**

Respondent.

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**Sanford R. Oxfeld**, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

**Patrick F. Carrigg**, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, attorneys)

Record Closed: October 5, 2016 Decided: October 13, 2016

# Hamilton Township Board of Education

vr_emp1.050515
09/29/2016

## Employee Demographics

***** **PERRY, DAVID R**

Primary Job Code\Title: 501 Teacher BA
UPC Code(s): HTEA.PRES.01

Address:
260 MAKEFIELD ROAD
YARDLEY PA 19067-

Gender: Male
Race: WH
Married: No
Notes:

Emerg Info 1:
Emerg Info 2;

DOB: 10/16/1959
Phone: (609)658-6666
2nd Phone: ( ) -
Degree: B
Pension Code: TPAF

Loc: 000
Dept:
Work Extn:
Sub?: No
Date Hired: 09/01/1987
Anniversary Date: 07/01/1987
Date Terminated: / /

Issue 1095-C?: Yes

Seniority: 30.00
Tenure?: Yes
Tenure Date: 09/01/1990
Pension #: 0375396

| Experience | |
|---|---|
| Public | 0 |
| District | 29 |
| Military | 0 |
| Other | 0 |

Please see attached Settlement. David Perry is to be paid $9,394. Settlement is on the September Board.

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STATE OF NEW JERSEY
OFFICE OF ATTORNEY GEN

Jackie B Lawson 9/29/16

## Agenda Item Details

| | |
|---|---|
| Meeting | Sep 29, 2016 - Regular Session Meeting |
| Category | H. Personnel - Review Reports and Discussions (R/C) |
| Subject | 16. Settlement Agreement and General Release (R/C) |
| Access | Public |
| Type | Action, Roll Call Vote Required |
| Recommended Action | Upon recommendation of the Interim Superintendent that the Board of Education approves the Settlement Agreement and General Release as per the attached. |

## Public Content

## Administrative Content

16Per16 Agreement for 9-29-16 Board - DP.pdf (2,681 KB)

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STATE OF NEW JERSEY
ADJUTANT LAW

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STATE OF NEW JERSEY

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "**Agreement**", "**Settlement**" and/or "**Release**") is being entered into among and between DR. DAVID PERRY (hereinafter "**Dr. Perry**" or "**Releasor**") and HAMILTON TOWNSHIP BOARD OF EDUCATION shall hereinafter collectively be referred to as the "**Releasees**". Dr. Perry and Releasees shall hereinafter collectively be referred to as the "**Parties**".

**WHEREAS,** Dr. Perry was previously employed by HAMILTON TOWNSHIP BOARD OF EDUCATION in the position of Varsity Boys' Basketball Coach at Steinert High School, (hereinafter "**Employment Contract**"); and

**WHEREAS,** HAMILTON TOWNSHIP BOARD OF EDUCATION, did not renew Dr. Perry in the position of Head Coach of the Varsity Boys' Basketball at Steinert High School for the 2015-16 school year (hereinafter "**Action**"); and

**WHEREAS,** Dr. Perry initiated litigation against HAMILTON TOWNSHIP BOARD OF EDUCATION, alleging that the non-renewal of his employment as Head Coach of the Varsity Boys' Basketball Position was in violation of the Open Public Meetings Act and was done for arbitrary and capricious reasons; and

**WHEREAS,** the Parties wish to resolve the litigation initiated by Dr. Perry in the interest of the public without the need for further litigation, and all of Dr. Perry's claims and potential claims against Releasees, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

**WHEREAS,** the meaning, effect and terms of this Agreement have been fully explained to Dr. Perry, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

**NOW, THEREFORE,** in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

1. Settlement and General Release of Dr. Perry's Claims. In consideration for Releasees promises and representations made herein, Dr. Perry, individually and on behalf of his heirs, representatives, immediate family members (including, but not limited to, his spouse and children), agents, successors and assigns, hereby releases Releasees, board members of the HAMILTON TOWNSHIP BOARD OF EDUCATION, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (hereinafter collectively referred to as "**Released Parties**"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Dr. Perry now has, claims to have, owns, holds or which Dr. Perry at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of this Agreement, to the fullest extent allowed by law. This release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights

Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, this Release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, conspiracy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with HAMILTON TOWNSHIP BOARD OF EDUCATION or the non-renewal of that employment relationship in the position of Head Coach of Varsity Boys' Basketball at Steinert High School. Dr. Perry represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against Releasees that relate to the matters stated above.

2. Payment. Releasees, or their agent, shall remit a check to Dr. Perry, or his attorney, in the amount of one year's coaching stipend for the position of Head Coach of Varsity Boys' Basketball as set forth in the Collective Bargaining Agreement between the Hamilton Township Education Association and Hamilton Township Board of Education as applicable to the 2015-16 school year in full payment for this Release, inclusive of attorney's fees. The settlement proceeds are for pensionable income. The settlement amount shall be reduced by all lawful deductions.

3. No Admissions. The Parties agree that this Settlement, including the Releasees approval of same, does not constitute an admission of liability or wrongdoing by either party.

4. Liens. It is further understood that as a condition of this Settlement, all claims and/or liens, past, current and/or future arising out of this Settlement or asserted against the proceeds of this Settlement are to be satisfied by Releasor and/or his attorneys, including but not limited to any Child Support Judgment liens, Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including, but not limited to, claims based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and/or attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor and his attorney(s) agree to pay all costs, interest and attorney's fees relative to any such lien.

5. Confidentiality. This Agreement shall be treated as confidential and shall not be disclosed to anyone other than the Parties, their accountants and their counsel. Upon any inquiry into the status of this case, all Parties to this Agreement shall state, "The Matter has resolved." To the extent that the Board must comply with a lawful request for a copy of this Release, the Parties agree that the Board's disclosure of this Release shall not violate this Agreement.

6. Public Interest Served. The within Settlement will serve the public interest, eliminating additional litigation costs.

7. No Other Legal Action by Dr. Perry. Dr. Perry confirms that he does not have any charge, complaint or action pending in any forum or form against any of the Released Parties as of the date hereof. Further, Dr. Perry covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Releasees, including members HAMILTON TOWNSHIP BOARD OF EDUCATION's board of trustees, for any actions that could or did arise or accrue prior to and including the date of this Agreement. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Dr. Perry from instituting legal action for the sole purpose of enforcing Releasees' obligations to him under this Agreement. Dr. Perry understands that, by signing this Agreement, he waives any rights he may have to recover money or other relief in any lawsuit or proceeding he brings, or that is brought on his behalf, by any agency or third party against any of the Releasees based on events arising out of or relating to his employment with HAMILTON TOWNSHIP BOARD OF EDUCATION through the date of this Agreement. Except where otherwise permitted under this paragraph, Dr. Perry agrees that any action he may file against any of the Released Parties based on events that transpired on or before the effective date hereof shall be dismissed with prejudice upon presentation of this Agreement.

8. Assent to Terms. The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and volition.

9. Non-Disparagement. Dr. Perry and his immediate family agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties and\or the Board Members of the Released Parties relative to this Agreement or related to the Board Members' votes upon the Superintendent's recommendation to appoint him to the Head Coach of Varsity Boys' Basketball occurring on August 26, 2015. The Board, including the Board Members and the central administration, agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties and\or the Board Members of the Released Parties relative to this Agreement or related to the Board Members' votes upon the Superintendent's recommendation to appoint him to the Head Coach of Varsity Boys' Basketball occurring on August 26, 2015.

10. Entire Agreement. This Agreement sets forth the entire agreement between Dr. Perry and Releasees. Dr. Perry acknowledges and agrees that Releasees have not made any promises to him other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. Because counsel for Dr. Perry had a full opportunity to review this Agreement with him before he signed it, the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

11. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the State of New Jersey. The Superior Court of New Jersey, Mercer County, shall have jurisdiction to implement and enforce this Agreement and its terms.

12. Severability. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

13. Counterparts; Exchange by Electronic Means. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

DR. PERRY ACKNOWLEDGES THAT HE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

DR. PERRY AGREES THAT HE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT HE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THIS AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

**[THIS SPACE INTENTIONALLY LEFT BLANK]**

DR. PERRY FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THIS AGREEMENT.

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties agree to the terms of this Agreement.

**DR. DAVID PERRY**

Dr. David R. Perry

Dated: Sept 2016

**WITNESS -**

Doris A. Ware

Dated: 9/2016

**HAMILTON TOWNSHIP BOARD OF EDUCATION**

NAME: President
TITLE:

Dated: 9/27/16

405-16

| | | |
|---|---|---|
| G.J., on behalf of minor child, S.J., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

SYNOPSIS

*Pro se* petitioner challenged the determination of the respondent Board that his son, S.J., was not the subject of acts of harassment, intimidation or bullying (HIB), in violation of the New Jersey Anti-Bullying Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. Petitioner alleged that his son had been harassed and bullied as a tenth grader by way of a series of internet postings which targeted S.J. The Board and the Ocean County Prosecutor's office conducted an investigation of the postings, but were unable to identify any of the responsible parties. S.J.'s parents were advised by letter in April 2015 of the results of the HIB investigation, and the Board's conclusion that the investigation had not sustained any findings of HIB. Subsequent to an unsuccessful appeal before the Board in November 2015, the petitioner filed the instant matter, which also sought an order compelling the Board to conduct further investigation into the continued harassment of S.F. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Commissioner will not overturn a decision of a local board unless the action is determined to be arbitrary, capricious or unreasonable; petitioner bears the burden of proof to show that the Board failed to comply with the requirements of the Act; in the instant matter, S.J. was the subject of numerous inappropriate internet communications, the content of which constituted harassment and/or bullying; the Board timely conducted an investigation of the internet postings, including interviews with nine students as well as S.J. and his father; the Board's technology team was unable to identify any parties responsible for the harassing posts; the County prosecutor's office was brought in to conduct their own investigation; again, the responsible parties could not be identified; *N.J.S.A.* 18A:37-13 *et seq* lays out a board of education's obligations in responding to an HIB complaint; here, undisputed facts indicate that the Board complied with all substantive and procedural requirements of the Act; after both investigations failed to identify the individuals responsible for the internet postings, the Board prepared an HIB report and met with S.J. and his parents to discuss the investigation. The ALJ concluded that the Board followed all hearing and appeal protocols in this matter; accordingly, the petitioner failed to carry his burden to demonstrate that the Board failed to comply with the provisions of the HIB law. The ALJ granted summary decision to the Board, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter for the reasons expressed therein, and the petition of appeal was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 11/22/16

OAL DKT. NO. EDU 04045-16
AGENCY DKT. NO. 44-2/16

| | | |
|---|---|---|
| G.J., on behalf of minor child, S.J., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's decision in connection with S.J. was not arbitrary, capricious or unreasonable, and the Board is entitled to summary decision. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16
Date of Mailing: 11/22/16

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 04045-16
AGENCY DKT. NO. 44-2/16

**G.J., ON BEHALF OF MINOR CHILD, S.J.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,**
Respondent.

---

**G.J.**, petitioner, pro se

**Jack Butler**, Esq., for respondent (Stein & Supsie, attorneys)

Record Closed: September 27, 2016 Decided: October 19, 2016

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 15, 2016, petitioner G.J. on behalf of his son, S.J. filed a Petition of Appeal with the Commissioner of Education (Commissioner) seeking to have the decision of the respondent Board of Education of the Township of Plumsted (Board) finding of no HIB under the Anti-Bullying Bill of Rights Act reversed. The matter was

transmitted to the Office of Administrative Law as a contested matter on March 15, 2016. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 14F-1 to -13. Petitioner also seeks an order compelling the Board to conduct further investigation of the continued harassment of S.J. The Board filed a Motion for Summary Decision on September 15, 2016. The petitioner filed a response on September 27, 2016. For the reasons discussed below, and finding no material facts in dispute, the Board's Motion to Dismiss is **GRANTED** and the matter is, therefore, **DISMISSED**.

## FACTUAL DISCUSSION AND FINDINGS OF FACT

Petitioner alleges that his son, S.J., a tenth grade student at the time, was being harassed and bullied. A series of internet postings which targeted S.J. were posted in January 2015. The Board and the County Prosecutor's office conducted an investigation but were unable to identify any of the responsible parties. The anti-bullying coordinator at the school met with G.J. in February 2015. The Board advised S.J.'s parents of the results of their HIB investigation by letter dated April 15, 2015. The Board concluded that their investigation did not sustain any findings of HIB. After an unsuccessful appeal in person to the Board on November 18, 2015, the within appeal was filed.

The following facts are undisputed and I **FIND** as **FACT**:

1. S.J. is an eleventh grade student at Plumsted High School. S.J. was a tenth grader when the HIB complaint was filed.

2. In January 2015, S.J. was the subject of numerous inappropriate internet communications which constituted harassment and/or bullying.

3. The internet postings consisted of photographs or pictures with overlaid text which contained inappropriate messaged about S.J. There were numerous postings, all directed at S.J.

4. The Board conducted an investigation of the postings. The investigation included interviews with nine students, and interviews with S.J. and his father, G.J.

5. Extensive efforts were made by the Board's technology team to ascertain who the creators of the inappropriate internet postings were. They were unable to identify the responsible parties.

6. In addition to the Board's technology team, the Board contacted the County prosecutor's office, who conducted their own investigation. They were also unable to identify any responsible parties.

7. On February 19, 2015, the Board determined that they had insufficient evidence to attribute a violation of the HIB policy to any individuals.

8. The parents of S.J. were notified of the results of the investigation by letter dated April 20, 2015.

9. On October 14, 2015, the petitioner appeared at the board of education meeting and made a statement regarding the alleged bullying and the investigation by the Board.

10. On November 9, 2015, the Board met with G.J. and his son to further discuss the matter. At that time, G.J. formally requested an appeal of the findings.

11. An appeal hearing was conducted before the Board on November 18, 2015. At the hearing, the Board reiterated that there was insufficient information to identify a responsible party and therefore, a HIB action could not be instituted. A copy of the HIB report was provided to G.J.

12. The Board advised G.J. that if additional information came to light which could identify the individuals responsible for the postings the investigation would be reopened.

13. G.J. filed an appeal seeking to have the finding of the Board of no HIB action reversed and a further investigation conducted.

## LEGAL ANAYLSIS AND CONCLUSION

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c), which provides in part that the judgment or order sought shall be rendered if the pleadings, depositions, answer to interrogatories and admissions on file. Together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citations omitted).

The burden of proving unreasonableness for actions that is within the management's prerogative for a local board of education is on petitioner. G.M. v. Roselle Park Borough Bd. of Educ., 95 N.J.A.R.2d (EDU) 107, 109. Local board action will not be "usurped or assumed by the Commissioner of Education absent a definitive

showing of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. Local boards of education have reasonable discretion for various managerial matters. Boult and Harris v. Bd. of Educ. of Passaic, 1939-49 S.L.D. 7, 13, affirmed, State Board of Education 15, affirmed, 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1947).

The Anti-Bullying Act was enacted to "strengthen the standards and procedures for preventing, reporting, investigation and responding to incidents of harassment, intimidation and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). The Act defines "harassment, intimidation or bullying" (HIB) as:

> Any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> (a) A reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> (b) Has the effect of insulting or demeaning any student or group of students; or
>
> (c) Creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

In addition the above definition of HIB, the Act provides for a specific procedure for investigating and reporting allegations of HIB events. When information identifying

an incident of HIB is reported to the school principal, "the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist." N.J.S.A. 18A:37-15(b)(6)(a). The investigation must be completed within "ten school days from the date of the written report of the" HIB incident. Ibid. Thereafter, a parent or guardian may request a hearing before a school board. N.J.S.A. 18A:37-15(b)(6)(d). Among the obligations of a board of education is to respond to a complaint of HIB, and to issue a written decision affirming, rejecting, or modifying a superintendent's decision which the parents/guardians have ninety days to appeal to the Commissioner of Education. N.J.S.A. 18A:37-15(b)(6).

In this case, the Burden is on the petitioner to demonstrate that the Board failed to comply with the foregoing provision of the HIB law. However, the undisputed facts indicate that the Board complied with the entire substantive and procedural requirement of the Act. The Board immediately instituted an investigation into the matter which was reported by G.J. on behalf of his son, S.J. The Board interviewed nine separate witnesses as well and G.J. and his parents. The Board engaged the technology department to try to ascertain who was responsible for the postings. When the Board was unable to ascertain who was responsible, they contacted the prosecutor's office to see if they had some technology that was more advanced to try to identify who had made the postings. After the prosecutor's office was unable to identify who was responsible for the postings, the Board prepared a HIB report dated February 11, 2015. The Board also met with S.J. and his parents to discuss the investigation and the issues that they were facing in terms of identifying the individuals responsible for the postings. All hearing and appeal protocols were followed.

Accordingly, I **CONCLUDE** that the petitioner's appeal of the finding of no HIB is hereby **DISMISSED** and the request for an additional investigation is hereby **DENIED.**

## ORDER

It is hereby **ORDERED** that the Board's Motion to Dismiss is supported by the facts and the supporting law and is, therefore, **GRANTED** and the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 19, 2016
DATE

Sarah G. Crowley
**SARAH G. CROWLEY**, ALJ

Date Received at Agency: October 19, 2016 (emailed)

Date Mailed to Parties: October 19, 2016 (emailed)

SGC/mel

408-16

408-16

OAL DKT. NO. EDU 10477-14
AGENCY DKT. NO. 180-7/14

| | | |
|---|---|---|
| J.R. AND K.R., ON BEHALF OF MINOR CHILDREN, T.R., C.R., AND A.R., | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY | : | |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, it is noted that the settlement makes reference to monthly payments intended to start on November 1, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16

Date of Mailing: 11/22/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 10477-14
AGENCY DKT. NO. 180-7/14

**J.R. AND K.R. O/B/O OF T.R., C.R. AND A.R.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY,**
Respondent.

---

**William T. Smith**, Esq., for petitioners (Smith, Crotty, Meyer & Bruins, attorneys)

**Vittorio S. LaPira**, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: October 18, 2016 Decided: October 18, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

On August 15, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearings on September 22, 28 and 29, 2016, but the dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release indicating the

terms of settlement was forwarded to the undersigned October 18, 2016 and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 18, 2016
DATE

**LELAND S. McGEE**, ALJ

Date Received at Agency: 10-20-16

Date Mailed to Parties: OCT 20 2016

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

**FOGARTY & HARA, ESQS.**
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent,
*Cresskill Board of Education*
Our File No.: 123

2014 OCT 18 P 12:01

| | | |
|---|---|---|
| **J.R. and K.R. o/b/o T.R., C.R., and A.R.,** | : | Before the Commissioner of Education of the State of New Jersey |
| Petitioners, | : | **Agency Ref. No.:** 180-7/14 |
| v. | : | **OAL Docket No.:** EDU 10477-2014N |
| **CRESSKILL BOARD OF EDUCATION** | : | |
| Respondent. | : | **Settlement Agreement and Release** |

**THIS SETTLEMENT AGREEMENT AND RELEASE** ("Agreement") is made between the Cresskill Board of Education, which has offices located at One Lincoln Drive, Cresskill, NJ 07626 ("the Board") and J.R. and K.R. ("Parents") on behalf of their children, T.R. C.R. and A.R. ("the Students"), whose address is 81 Heatherhill Road, Cresskill, NJ 07626 (hereinafter referred to as the "Parties").

**WHEREAS**, the Board operates a Kindergarten through Twelfth grade school district ("the District") serving the Borough of Cresskill; and

**WHEREAS**, the T.R., C.R., and A.R. attended school in the District beginning in the 2013-2014 school year, and during the year, a question arose as to their eligibility to attend school in the District on a tuition-free basis; and

**WHEREAS**, after an investigation, and after giving the Parents an opportunity to appear before the Board on June 2, 2014, the Board

shall be released from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings, which have been brought or could have been brought, relating to the payment of tuition pertaining to the Students' attendance at school in the District during the 2013-2014 school year, including, but not limited to, those included in the Parents' appeal and the Board's counterclaim for tuition (OAL Docket No.: EDU 10477-2014N, Agency Ref. No.: 180-7-14).

**4. Dismissal of Complaint.** In consideration of this Agreement, the parties hereby agree to voluntarily dismiss their claims against each other with prejudice.

**5. Entire Agreement.** This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The parties acknowledge and agree that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

**6. Savings Clause.** The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

**7. No Admission.** This Agreement is the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose, including, but not limited to, an admission that the Students did not reside within the Borough of Cresskill during the 2013-14 school year.

**8. Confidentiality.** The terms of this Agreement shall remain strictly confidential, and shall not be divulged to any third party in any manner (including, but not limited to, through social media), except: (a) to the Parties' attorneys/advocate; or (b) if disclosure is required by law. In

**14. Ratification.** This Agreement is subject to ratification by the Board, and is without prejudice to any party if the terms are not agreed upon.

**15. Section Headings.** Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

**16. Counterparts.** This Agreement may be executed in any number of counterparts, which, taken together, shall constitute but one instrument. It is not necessary that all parties sign all or any one of the counterparts, but each party must sign at least one counterpart for the Agreement to be effective.

**IN WITNESS WHEREOF**, the parties have hereunto set their hands and seal the year and date set forth below.

**WITNESS:**

Antoinette Kelly

Mrs. Antoinette Kelly
Board Secretary/Bus. Adm.

Dated: 9/27/16

**CRESSKILL BOARD OF EDUCATION**

By: Denise Villani

Ms. Denise Villani
Board President

Dated: 9-27-16

**WITNESS:**

_____

Dated:

By:_____
J.R. o/b/o T.R., C.R., and A.R.

Dated:

**WITNESS:**

_____

**Dated:**

By:_____
K.R. o/b/o T.R., C.R., and A.R.

Dated:

**14. Ratification.** This Agreement is subject to ratification by the Board, and is without prejudice to any party if the terms are not agreed upon.

**15. Section Headings.** Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

**16. Counterparts.** This Agreement may be executed in any number of counterparts, which, taken together, shall constitute but one instrument. It is not necessary that all parties sign all or any one of the counterparts, but each party must sign at least one counterpart for the Agreement to be effective.

**IN WITNESS WHEREOF**, the parties have hereunto set their hands and seal the year and date set forth below.

**WITNESS:**

_____
Mrs. Antoinette Kelly
Board Secretary/Bus. Adm.

Dated:

**CRESSKILL BOARD OF EDUCATION**

By:_____
Ms. Denise Villani
Board President

Dated:

**WITNESS:**

Bonnie Chahalis
BONNIE CHAHALIS

Dated: 10/11/16

By:_____
J.R. o/b/o T.R., C.R., and A.R.

Dated: 10/11/16

**WITNESS:**

Bonnie Chahalis
BONNIE CHAHALIS

**Dated:** 10/11/16

By:_____
K.R. o/b/o T.R., C.R., and A.R.

Dated: 10/11/16

**BOARD OF EDUCATION REGULAR MEETING, SEPTEMBER 26, 2016**

On a motion by Stephen Moldt, seconded by Rosanne Rabinowitz and carried, the Board approved the following Educational Planning item:

**Resolved,** that the Board of Education, upon recommendation of the Superintendent, approve the attached settlement agreement and release. (Attachment F-6)

| | |
|---|---|
| **AYES:** | Denise Villani, Stephen Moldt, Mary Klein, Rosanne Rabinowitz, Cindy Wolfer, Michael DePalo |
| **NAYS:** | None |
| **ABSTAINED:** | None |
| **ABSENT:** | Caryn Aronson, Sally Cummings, John Park |

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF CRESSKILL IN THE COUNTY OF BERGEN, NEW JERSEY, AT A MEETING HELD ON SEPTEMBER 26, 2016.

Respectfully submitted,

Antoinette Kelly

Antoinette Kelly, CPA
Business Administrator/
Board Secretary

409-16

OAL DKT. NO. EDU 15414-15
AGENCY DKT. NO. 240-9/15

| | | |
|---|---|---|
| BLESSING CHIMEZIE, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED. Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 11/22/16

Date of Mailing: 11/22/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SETTLEMENT**
OAL DKT. NO. EDU 15414-15
AGENCY DOCKET NO. 240-9/15

**BLESSING CHIMEZIE,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,**

Respondents.

---

**Philip Feintuch**, Esq. appearing on behalf of petitioner (Feintuch, Porwich & Feintuch, attorneys)

**Cherie L. Adams**, Esq., for respondent (Adams Gutierrez & Lattiboudere, LLC)

Record Closed: October 24, 2016 Decided: October 24, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 15, 2015, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted during which time the parties agreed to a hearing date. The hearing date was cancelled due to settlement discussions. On October 24, 2016 respondent's counsel submitted the fully

executed settlement agreement, via electronic mail. The original agreement was received on October 26, 2016. A copy of the signed Settlement Agreement and Board Resolution, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10-24-16
DATE

**KIMBERLY A. MOSS**, ALJ

Date Received at Agency: 10-27-16

Date Mailed to Parties: OCT 27 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AG&L Adams Gutierrez & Lattiboudere, LLC

The Legal Center
1037 Raymond Blvd., Suite 900
Newark, NJ 07102
Phone: 973-735-2742 - Fax: 973-735-2743
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October 24, 2016

**VIA FACSIMILE AND REGULAR MAIL**
Honorable Kimberly Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

***RE: Blessing Chimezie v. Board of Education of the City of Jersey City***
***Agency Reference No.: 240-9/15; OAL Docket No.: EDU 15414-2015 N***

Dear Judge Moss:

As you know, this firm represents the Respondent, Jersey City Public Schools ("District"), in the above referenced matter. Enclosed please find the fully executed settlement agreement.

In light of the approved settlement agreement, we respectfully request that Your Honor issue a decision approving the settlement.

Thank you for Your Honor's attention in this matter.

Respectfully submitted,

Cherie Adams

CHERIE L. ADAMS

CLA/jd
Enc.
cc: Hope Blackburn, Esq., General Counsel (via e-mail)
Philip Feintuch, Esq. (via e-mail)

**ADAMS GUTIERREZ & LATTIBOUDERE, LLC**
The Legal Center
1037 Raymond Blvd, Suite 900
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Attorneys for Respondent,
Jersey City Public Schools

| | |
|---|---|
| BLESSING CHIMEZIE,<br><br>Petitioner,<br><br>v.<br><br>BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,<br><br>Respondent. | OFFICE OF ADMINISTRATIVE LAW<br>AGENCY REFERENCE NO.: 240-9/15<br>OAL DOCKET NO.: EDU 15414-2015 N<br><br>**STIPULATION OF SETTLEMENT** |

The Jersey City Public Schools (the "District"), who principal office is located at 346 Claremont Street, Jersey City, New Jersey 07305, and its successors, assignees, officers, employees, agents and representatives (collectively, "District"), and Blessing Chimezie ("Petitioner"), residing at 31 Roselyn Place, Vauxhall, NJ 07088 have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Petitioner is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the Parties intend to adopt, by way of compromise and accord, an amicable resolution of the Petition of Appeal; and

**NOW THEREFORE,** in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties mutually agree as follows:

1. Upon final approval of the signed Stipulation of Settlement by the Judge, the Petitioner shall and hereby does withdraw the instant Petition of Appeal.
2. The District shall restore Petitioner's increment prospectively, thereby placing Petitioner on her proper step for the 2016-2017 school year as if her increment for the 2015-2016 school year had not been withheld.
3. Petitioner understands and agrees that she will not be reimbursed for the salary that she did not receive in the 2015-2016 school year as a result of the increment withholding.
4. This agreement shall not constitute a precedent in any matters involving other District employees.
5. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.
6. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

7. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

8. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

9. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

10. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

11. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

12. The parties agree that the terms of the settlement agreement are subject to approval by the Superintendent of Schools of the Jersey City Public Schools pursuant to authority given to her by the Jersey City Board of Education.

13. Additionally, this Stipulation is subject to final approval by the Judge pursuant to N.J.A.C. 1:1-19.1, and will become effective only upon approval by the Judge.

Counsel for the Parties shall jointly request the Judge's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Petition of Appeal.

Dated: 9/21/16

Blessing Chimezie
BLESSING CHIMEZIE

JERSEY CITY PUBLIC SCHOOLS

Dated: 9/30/2016

DR. MARCIA LYLES
SUPERINTENDENT OF SCHOOLS

410-16L

410-16

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

KIMBERLEY HARRINGTON
*Acting Commissioner*

November 22, 2016

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Re: *P.C. and S.C., on behalf of minor child, A.C. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, OAL Dkt. No. EDU 11497-14, Agency Dkt. No. 13-1/14.*

Dear Counsel:

I have considered the papers filed in connection with the Board's request for interlocutory review of the November 4, 2016 Order of the Honorable Elia A. Pelios, ALJ, granting the petitioners' request to amend their petition in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.[1]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

KH/MKD/JKH

c: Honorable Elia A. Pelios, ALJ
County Superintendent
State Law Library

**Via Facsimile & Regular Mail**

[1] Appeals of Commissioner decisions may be filed with the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

414-16LM

414-16

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
*Acting Commissioner*

December 2, 2016

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Re: *J.J., on behalf of minor child, M.J. v. New Jersey State Interscholastic Athletic Association, Dkt. No. 303-12/16.*

Dear Counsel:

I have reviewed the materials filed in connection with the motion for emergent relief filed by the petitioner in the above-captioned matter. The petitioner is appealing the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) affirming the decision of the Eligibility Appeals Committee (EAC), which found that M.J. transferred from Shawnee High School to Timber Creek Regional High School (Timber Creek) for athletic advantage, and ruled that M.J. is ineligible to participate in football for the 2016 season.

Pursuant to *N.J.A.C.* 6A:3-7.4 and *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. The Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Executive Committee and the EAC, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Generally, when a student-athlete transfers from one school to another without a bona fide change of residence by the student's parent or guardian, there is a 30-day period of ineligibility in any sport in which the student has previously participated. Article V, Section 4 (K)(2) (a) of the NJSIAA Bylaws, Rules and Regulations. New Jersey high schools have agreed that students should not transfer from one school to another for reasons of athletic advantage. Pursuant to Article V, Section 4 (K)(5),

> Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Appeals Committee and may subject the school and the athlete to disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to:
>
> a. Seeking a superior athletic team;
> b. Seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;
> c. Seeking a team consistent with the student's athletic abilities;
> d. Seeking a means to nullify punitive action by the previous school; or
> e. Seeking to be coached by the coach at the new school.

Therefore, if it is determined that the athlete transferred to another school for an athletic advantage, the athlete is subject to an extended period of ineligibility beyond 30 days.

In this case, after hearing testimony from an investigator from the Camden County's Prosecutor's Office,[1] as well as from M.J. and his parents, the EAC found that the explanations for transferring other than for athletic advantage were inadequate.[2] The petitioner maintains that his son's transfer was based on financial reasons; however, there is evidence in the

[1] There was an independent investigation being conducted by the Camden County Prosecutor's Office as to students transferring to Timber Creek who may not have actually resided in the school district.

[2] The Black Horse Pike Regional School District concurs with the EAC's decision that M.J. transferred to the district for athletic advantage.

record to support the EAC's finding that M.J. transferred for athletic advantage. In its decision, the EAC cited excerpts from an interview between the investigator and the petitioner whereby he indicated that his son was playing football "where he wants to play" and that he was arranging to give his son what "my son wanted to do and what I wanted him to do." During the interview, the petitioner also stated that his son was happy to play football at Timber Creek because the school has one of the best quarterbacks in the State.[3] Additionally, despite the petitioner's argument to the contrary, there is no evidence in the record indicating that the NJSIAA applied its rules differently to the other student athletes that transferred to Timber Creek. Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden, and – considering the record of this matter in light of the prescribed standard of review – the Commissioner finds that the petitioner has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for emergent relief and an Order permitting M.J. to participate in the Timber Creek football program is hereby DENIED. [4]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

VIA FAX AND REGULAR MAIL

[3] In his emergent application the petitioner does not deny the details of the conversation that he had with the investigator; rather, he argues that the recorded audio tape should not have been permitted to be introduced at the hearing before the EAC because he did not consent to being recorded. Note, however, that New Jersey is a one-party state – i.e., only one party to a conversation needs to know that the conversation is being recorded. *N.J.S.A.* 2A:156A-4(b).

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

413-16

LORENZO RICHARDSON,

PETITIONER,

V.

VIDYA GANGADIN, BOARD OF EDUCATION: PRESIDENT; AND RAMON RIVERA, BOARD ATTORNEY,

RESPONDENTS.

AND

JERSEY CITY EDUCATION ASSOCIATION, on behalf of its members, RONALD GRECO, Jr., MONIQUE ANDREWS AND ELLEN ZADROGA,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND MARCIA LYLES, SUPERINTENDENT,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

These consolidated petitions sought various forms of relief in regard to the renewal or nonrenewal of the contract of the Superintendent of the Jersey City Public Schools, Dr. Marcia Lyles. The matter involves a determination as to whether the Superintendent's contract was renewed by operation of law in accordance with *N.J.S.A.* 18A:17-20.1. The Jersey City Education Association filed a motion for summary decision on the second petition, while motions to dismiss were filed by respondents in both consolidated matters.

The ALJ found, *inter alia,* that: these consolidated cases raised the question as to whether the parties may alter the provisions of *N.J.S.A.* 18A:17-20.1 by contract; Dr. Lyles' contract expired on June 30, 2016 and, in accordance with *N.J.S.A.* 18A:17-20.1, the Board had up until March 2, 2016 to inform her as to the nonrenewal of her contract; however, the terms of Lyle's contract altered the date for the Board to advise her of impending renewal or nonrenewal to December 31, 2015; the effect of this contract provision was to give the outgoing Board the authority to make the determination of renewal or nonrenewal of the Superintendent's contract prior to the successor Board taking office; further, Lyle's contract concerning renewal or nonrenewal – which stated that "failure to notify the Superintendent by December 31, 2015 of an intention to renew will mean that an offer of renewal is not being made" – was contrary to the requirements of *N.J.S.A.* 18A:17-20.1, which provides that the superintendent is deemed reappointed for another term unless the board provides her with timely written notice that she will not be renewed. The ALJ determined that the Board failed to provide Dr. Lyles with written notice that she was not being renewed; accordingly, her contract was renewed by operation of law on March 2, 2016. The ALJ recommended that the within petitions be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 12/01/16

OAL DKT. NOS. EDU 3062-16, EDU 5307-16 (CONSOLIDATED)
AGENCY DKT. NOS. 62-2/16, 85-3/16

LORENZO RICHARDSON,

PETITIONER,

V.

VIDYA GANGADIN, BOARD OF EDUCATION PRESIDENT; AND RAMON RIVERA, BOARD ATTORNEY,

RESPONDENTS.

AND

JERSEY CITY EDUCATION ASSOCIATION, on behalf of its members, RONALD GRECO, Jr., MONIQUE ANDREWS AND ELLEN ZADROGA,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND MARCIA LYLES, SUPERINTENDENT,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners, Lorenzo Richardson and the Jersey City Education Association (JCEA), and the respective reply exceptions filed by the respondents: the Jersey City Board of Education; Dr. Marcia Lyles and Vidya Gangadin; and Ramon Rivera.

This matter involves a determination as to whether the contract of Dr. Lyles, Superintendent of the Jersey City Public Schools, was renewed by operation of law in accordance with *N.J.S.A.* 18A:17-20.1. Pursuant to *N.J.S.A.* 18A:17-20.1:

> At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either:
>
> a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or
>
> b. **the board notifies the superintendent in writing that he will not be reappointed at the end of the current term**, in which event his employment shall cease at the expiration of that term, provided that such notification shall be given prior to the expiration of the first or any subsequent contract by a length of time equal to 30 days for each year in the term of the current contract. (Emphasis added)

The Administrative Law Judge determined that the Board failed to provide the Superintendent with written notice that she was not being renewed and, as a result her, contract was renewed by operation of law. In reaching this conclusion, the ALJ found that the non-renewal provision in the Superintendent's contract was contrary to the mandatory written notice requirement in *N.J.S.A.* 18A:17-20.1, and therefore void. As a result, the ALJ recommended that the petitions of appeal be dismissed.

In his exceptions, Mr. Richardson maintains that the ALJ improperly dismissed his petition of appeal. Mr. Richardson argues that the failure of Vidya Gangadin, Board President, to follow the appropriate procedures that would have enabled the Board to make a decision to renew or non-renew the Superintendent's contract was unethical and a manipulation of the law. The Initial Decision should have left it up to the majority of the full Board to decide whether to renew the contract of the Superintendent, not an individual Board member or the Board attorney. In the alternative, Mr. Richardson contends that a full hearing is necessary so all of the facts can come out and a fully informed decision can be made in this matter.

The JCEA and its named members also take exception to the ALJ's finding that their petition of appeal should likewise be dismissed. The JCEA argues that the ALJ erroneously found that the non-renewal provision in the Superintendent's contract was invalid. The JCEA contends that the statutory written notice of non-renewal referenced in *N.J.S.A.* 18A:17-20.1 was provided to the Superintendent by virtue of a contract provision negotiated by her with the Board. According to the Superintendent's contract, the Board agreed "that by December 15, 2015 it shall notify the Superintendent in writing whether it desires to renew this Agreement for an additional period of time, and of the terms and conditions proposed for that period. Failure to notify the Superintendent by that date of an intention to renew will mean that an offer of renewal is not being made." The JCEA argues that the contract provision is in writing and it constitutes written notice of non-renewal if the required affirmation expression of a desire to renew is not present. The Board did not notify the Superintendent prior to December 31, 2015 that it had a desire to renew her contract.

The JCEA also argues that the ALJ incorrectly found that the non-renewal provision in the contract improperly alters the statute. The use of the written contract notice provision, which is triggered by a failure to state a desire to renew, is not inherently illegal and does not violate any term of *N.J.S.A.* 18A:17-20.1. The JCEA emphasizes that nothing in the statute specifies what form the written notice of non-renewal must take and the Commissioner has held that the failure to adopt a resolution to renew a superintendent's contract is, in and of itself, a sufficient basis to give statutory notice of non-renewal. *See*, *Jose Negron v. Board of Educ. of the Borough of South Plainfield, Middlesex County*, Commissioner Decision No. 137-11, decided March 28, 2011, Aff'd Superior Court App. Div. (December 3, 2012). Moreover, there is nothing in the statute or elsewhere that prevents the exercise of discretion by a board of education to give

more notice of potential non-renewal to the superintendent. The JCEA also notes that there could be no finding of automatic renewal of the Superintendent's contract prior to December 31, 2015 because it would be a violation of common law in that it would have been binding on a future Board which was to take office in January 2016 – well before the expiration of the Superintendent's existing contract. Finally, the JCEA states that the ALJ improperly inferred facts not in the record concerning the intentions of the Board members.

In reply, the respondents argue that the ALJ correctly dismissed the petitions of appeal because, by operation of law, the Superintendent's contract was renewed pursuant to *N.J.S.A.* 18A:17-20.1.[1] The respondents assert that the petitioners' exceptions are based almost entirely on a regurgitation of their previous arguments. Additionally, the JCEA illogically relied upon *Negron*, *supra*, for the erroneous proposition that the Board's inaction is a sufficient basis to give statutory notice of non-renewal of the Superintendent's contract. In this case, it has been admitted that there was no notice whatsoever provided to the Superintendent of the non-renewal of her contract within the statutory time frame. In contrast, in *Negron*, *supra*, there was no question that after the board failed to adopt the resolution for renewal, the superintendent had received written notice of non-renewal within the statutorily-prescribed time period. *Negron*, *supra* at 3.

The respondents also contend that the ALJ properly held that the language in *N.J.S.A.* 18A:17-20.1 is mandatory in nature, and that the contract provision at issue impermissibly altered the Board's obligation to provide written notice of non-renewal under *N.J.S.A.* 18A:17-20.1. The ALJ's finding was not based upon any provision in the contract lengthening the time within which the Board was required to provide written notice; rather, the language in the contract states the opposite, and reverses the Board's mandatory obligation under

[1] Separate reply exceptions were submitted by the Board; Dr. Marcie Lyles and Vidya Gangadin; and Ramon Rivera. All of the reply exceptions contained the same general arguments.

the statute. Thus, there was no error in the Initial Decision finding that the entirety of the contract provision which excused the Board from providing any notice whatsoever, by the deadline of December 31, 2015, was contrary to the mandatory terms of the statute and therefore void.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's determination that Superintendent Lyles's contract was renewed by operation of law under *N.J.S.A.* 18A:17-20.1 because the Board did not provide her with written notice that she was not being renewed by the statutory deadline. The Commissioner is also in accord with the ALJ's finding that the nonrenewal provision contained in the Superintendent's contract cannot be used as a substitute for the written notice that is required by *N.J.S.A.* 18A:17-20.1.

*N.J.S.A.* 18A:17-20.1 establishes a mechanism whereby a superintendent is reappointed by operation of statute for another contracted term of the same duration when the Board neither reappoints – by contract – to a new term, nor provides written notice of the board's intent not to reappoint by the applicable deadlines. In this case, the Board was required to provide written notice of nonrenewal to the Superintendent by March 2, 2016 and it is undisputed that the Board did not provide such written notice.[2] Despite the JCEA's argument to the contrary, the non-renewal provision contained in the Superintendent's contract did not constitute the required written notice of non-renewal mandated by *N.J.S.A.* 18A:17-20.1.[3] Under the contract provision relied on by the JCEA, the Board's failure to notify the Superintendent by December 31, 2015 of an intention to renew her contract means that an offer of renewal is not being made. That provision is inconsistent with *N.J.S.A.* 18A:17-20.1, which requires an affirmative obligation by the Board

[2] *N.J.S.A.* 18A:17-20.1 requires written notice "shall be given prior to the expiration of the first or any subsequent contract by a length of time equal to 30 days for each year in the term of the current contract." In this case it is undisputed that the notice was required to be provided to the Superintendent by March 2, 2016.

[3] The Commissioner also finds that the contents of the Board's agenda on January 21, 2016 and February 18, 2016 did not satisfy the notice requirement.

to provide the Superintendent with written notice of nonrenewal prior to March 2, 2016. The parties were not permitted to agree to a contractual provision that effectively negated the statutory requirement of written notice by including a provision in the Superintendent's contract that was inconsistent with the type of notice mandated by *N.J.S.A.* 18A:17-20.1. *See*, *Rita Spiewak, et al. v. Board of Educ. of Rutherford, et al.*, 90 *N.J.* 63, 76 (1982) ("It is now well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute.")

Accordingly, the Superintendent was reappointed by operation of law for another contracted term of the same duration as the previous contract.[4] The Initial Decision of the OAL is adopted as the final decision in this matter and the petitions of appeal are hereby dismissed.

IT IS SO ORDERED.[5]

Kimberley S. Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/01/16

Date of Mailing: 12/02/16

[4] Since the Superintendent's contract automatically renewed by operation of law on March 2, 2016, the question of whether the board could have authorized employment action prior to December 31, 2015, which action would begin during the tenure of a new board, need not be reached.

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**LORENZO RICHARDSON,**

Petitioner,

v.

**VIDYA GANGADIN, CITY OF JERSEY CITY BOARD OF EDUCATION PRESIDENT, AND RAMON RIVERA, BOARD ATTORNEY,**

Respondents.

OAL DKT. NO. EDU 03062-16
AGENCY DKT. NO. 62-2/16

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**JERSEY CITY EDUCATION ASSOCIATION, RONALD F. GRECO, JR., MONIQUE K. ANDREWS AND ELLEN ZADROGA,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY OF JERSEY CITY AND DR. MARCIA V. LYLES, SUPERINTENDENT OF THE JERSEY CITY PUBLIC SCHOOLS,**

Respondents.

OAL DKT. NO. EDU 05307-16
AGENCY DKT. NO. 85-3/16

**(CONSOLIDATED)**

---

**Lorenzo Richardson**, pro se

**Stephen J. Edelstein**, Esq., and **Kyle J. Trent**, Esq., for Vidya Gangadin and Dr. Marcia V. Lyles (Schwartz Simon Edelstein & Celso, attorneys)

**Christina M. Michelson Abreu**, Esq., for Ramon Rivera (Scarinci Hollenbeck, attorneys)

**Louis P. Bucceri**, Esq., for the Jersey City Education Association, Ronald F. Greco, Jr., Monique K. Andrews and Ellen Zadroga (Bucceri and Pincus, attorneys)

**Perry L. Lattibourdere**, Esq., for the Board of Educaiton of the City of Jersey City (Adams Gutierrez and Lattiboudere, attorneys)

Record Closed: October 19, 2016 Decided: October 19, 2016

BEFORE **RICHARD McGILL**, ALJ:

This consolidated proceeding involves two petitions seeking various forms of relief in regard to the renewal or nonrenewal of the contract of the Superintendent of the Jersey City Public Schools. In one petition, Lorenzo Richardson, who is a member of the Jersey City Board of Education ("Board"), argues primarily that the Board should be required to vote on the renewal of the contract. Respondents Vidya Gangadin and Ramon Rivera maintain that the case is moot and that the petition is without merit as a matter of law.

In the other petition, the Jersey City Education Association ("JCEA") and three individuals contend that the Superintendent's contract was not renewed by the Board or by operation of law. Respondents Dr. Marcia V. Lyles and the Board maintain that these petitioners lack standing and that the Superintendent's contract was renewed by operation of law and seek dismissal of the petition.

## PROCEDURAL HISTORY

Richardson filed his petition with the Department of Education on March 1, 2016, pursuant to the authority of the Commissioner of Education under N.J.S.A. 18A:6-9 to hear and determine controversies and disputes arising under the school laws. Along with the petition, Richardson filed a motion for emergent relief. The matter was transmitted to the Office of Administrative Law for determination as a contested case.

On March 7, 2016, Gangadin filed a motion to dismiss and opposition to petitioner's request for emergent relief. An oral argument in regard to the motion for emergent relief was conducted on March 8, 2016, at the Office of Administrative Law in Newark, New Jersey. The undersigned's Order dated March 9, 2016, denying the request for emergent relief, was adopted by the Commissioner in a Decision on Application for Emergent Relief dated April 6, 2016.

Rivera joined in Gangadin's motion to dismiss, and Richardson submitted papers in opposition. Both respondents filed replies to Richardson's opposition papers.

On March 14, 2016, JCEA and the three individuals filed a petition of appeal with the Commissioner of Education challenging the view that Dr. Lyles' contract was renewed by the Board or by operation of law. On April 4, 2016, Dr. Lyles filed a motion to dismiss in lieu of answer pursuant to N.J.A.C. 6A:3-1.5(g). The Board filed a similar motion on the same date.

On April 7, 2016, JCEA's petition was transmitted to the Office of Administrative Law for determination as a contested case. On May 5, 2016, JCEA filed a motion for summary decision and a brief in support thereof and in opposition to the motion to dismiss. On May 16, 2016, the undersigned moved sua sponte to consolidate the two matters. An Order consolidating the two matters was issued on June 3, 2016.

By letter dated July 6, 2016, the undersigned advised the parties that the motions to dismiss would be considered first and set a schedule for additional submissions and that JCEA's motion for summary decision would be held in abeyance. In accordance with the schedule, the Board and Dr. Lyles submitted separate replies to JCEA's opposition to their motions to dismiss.

The two petitions in this matter are similar, but they are sufficiently different that it is more appropriate to consider them separately. The motion to dismiss Richardson's petition will be considered first.

## PETITION OF LORENZO RICHARDSON

Richardson's petition is not set forth in separate counts, but there are in effect two main contentions. The first contention is that the failure to vote on Dr. Lyles' new contract violated N.J.S.A. 18A:17-15, which relates to appointments of superintendents. The second contention is that Dr. Lyles' contract was nonrenewed pursuant to N.J.S.A. 18A:17-20.1, which concerns reappointments of superintendents.

The petition states that it seeks to summon a special meeting of the Board to convene and vote on the renewal of the Superintendent's contract before March 1, 2016, in accordance with a Resolution, which provides in pertinent part as follows: "THEREFORE BE IT RESOLVED that the Jersey City Board of Education hereby approves the renewal of the Superintendent's employment contract for a term to be decided before the end of the current contract."

Respondent Gangadin's motion to dismiss in regard to this matter is based primarily on mootness. Respondent Rivera adds failure to state a claim upon which relief can be granted. For purposes of the latter type of motion, all facts alleged in the complaint and all legitimate inferences therefrom are deemed admitted. Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

The essential factual allegations as set forth in the petition are as follows: Vidya Gangadin is the president of the Board, Richardson and Gerald Lyons are members of the Board, and Ramon Rivera is the Board attorney. Dr. Marcia V. Lyles has been the Superintendent since August 2012, and her contract was due to expire on June 30, 2016. A provision of Dr. Lyles' contract states as follows:

> 11. RENEWAL OR NON-RENEWAL
>
> The parties agree that prior to October 31, 2015, the Superintendent shall notify the Board of her desire to extend her employment on the terms offered or upon other terms upon which the parties may agree. The Board agrees that by December 31, 2015 it shall notify the Superintendent in writing whether it desires to renew this Agreement for an additional period of time, and of the terms and conditions proposed for that period. Failure to notify the Superintendent by that date of an intention to renew will mean that an offer of renewal is not being made.

At a caucus meeting on December 15, 2015, Lyons and Richardson demanded that the Superintendent's contract be placed on the agenda for a Board meeting scheduled for December 17, 2015. With three of the nine members not voting due to conflicts and Lyons and himself opposed, Richardson anticipated that the resolution to renew would fail to receive the five-vote majority of the entire membership needed for approval. Contrary to the request of Richardson and Lyons, the resolution as prepared for the December 17 Board meeting said "not renew" as opposed to "renewal." This resolution was also likely to fail to receive five votes and in effect be reason for renewal.

Richardson does not mention the December 17, 2015 meeting itself, but Gangadin's certification indicates that Richardson and Lyons were not present for that meeting. With only four non-conflicted Board members present for the meeting, Gangadin pulled the resolution from the Board's agenda. As a result, there was no vote on any resolution in regard to the Superintendent's contract.

On December 31, 2015 and thereafter, Board attorney Rivera advised the Board that the Superintendent's contract was automatically renewed because the Board failed to notify her of nonrenewal by the December 31, 2015 deadline in her contract.

Lyons attempted to add his resolution to the agenda for the Board meeting on January 21, 2016, but was unsuccessful. Richardson made another request to Gangadin to place a resolution concerning the Superintendent's contract on the agenda for the February 18, 2016 Board meeting. The resolution was not placed on the agenda. Richardson made a motion during that meeting to place the resolution on the agenda. Lyons was willing to second the motion, but due to difficulties with his connection from a remote location, he was unable to do so. As a result, the resolution was not placed on the agenda and was not considered at the Board meeting on February 18, 2016.

There were three opportunities, i.e., the Board meetings in December 2015 and January and February 2016, to vote on the Superintendent's contract. Nonetheless, the Board members were not given the opportunity to vote on the contract.

Richardson relies on N.J.S.A. 18A:17-15, which provides that a board of education may by contract appoint a superintendent of schools "by the recorded roll call vote of the full membership of the board." Based upon this statute, petitioner argues that the president of board must schedule, and that there must be, a vote of the members of the board on the Superintendent's contract. Richardson also cites N.J.S.A. 18A:17-20.1, which provides as follows:

> At the conclusion of the term of the initial contract or of any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different term which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. the board notifies the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the

> expiration of that term, provided that such notification shall be given prior to the expiration of the first or any subsequent contract by a length of time equal to 30 days for each year in the term of the current contract.

The difficulty with Richardson's first argument is that N.J.S.A. 18A:17-15 uses the word "may" and is therefore permissive by its terms. Nonetheless, in the case of an original appointment, there does not appear to be any alternative to an appointment pursuant to N.J.S.A. 18A:17-15. A reappointment differs in that N.J.S.A. 18A:17-20.1 provides that a superintendent may be deemed reappointed under certain circumstances. In effect, a superintendent can be deemed reappointed by operation of law.

As a general principle of statutory construction, a specific provision controls over a general one. Williams v. Am. Auto Logistics, 226 N.J. 117, 126 (2016). This case involves a reappointment of a school superintendent. Because N.J.S.A. 18A:17-20.1 specifically relates to reappointments, it is the applicable statute in this case. It follows that N.J.S.A. 18A:17-15 does not mandate a vote under the circumstances of this case.

Gangadin and Rivera further argue that the issue is moot because the last date for a vote would have been March 2, 2016, which is 120 days prior to the expiration of the contract of Dr. Lyles in accordance with N.J.S.A. 18A:17-20.1. A case is moot when the decision sought will have no practical effect on the controversy. Greenfield v. New Jersey Dep't of Corrections, 382 N.J. Super. 254, 257-58 (App. Div. 2006). Here, the deadline of March 2, 2016, for a vote in regard to the renewal of Dr. Lyles' contract is now in the past, and a timely vote is not possible. It follows that Richardson's request that the Commissioner allow a vote on a resolution concerning Dr. Lyles' contract is now moot.

Richardson also relies on N.J.S.A. 18A:17-20.1. In the petition, Richardson requested recognition of December 31, 2015, as the contract notification deadline and a determination that Dr. Lyles' contract was not renewed in accordance with its terms because the Board did not give notice of its intention to renew the contract by that date.

The main difficulty with this request is that the relief would adversely affect the Board and Dr. Lyles. It is noteworthy that JCEA seeks substantially the same relief against the Board and Dr. Lyles. While Gangadin and Rivera are the proper respondents in regard to the question of a vote, the same cannot be said for this type of relief. Because the requested relief cannot be granted in a petition naming Gangadin and Rivera and not the Board and Dr. Lyles as respondents, this portion of the petition must be dismissed. Under the circumstances, I **CONCLUDE** that Richardson's petition must be dismissed in its entirety with prejudice.

## PETITION OF JCEA

The petition of JCEA, Ronald F. Greco, Jr., Monique K. Andrews and Ellen Zadroga (collectively "JCEA") is set forth in four counts. Count I requests a determination that Dr. Lyles' contract was not authorized for renewal by December 31, 2015, and that the terms of her contract stand as written notice to her of her nonrenewal, barring the application of N.J.S.A. 18A:17-20.1 to create an automatic renewal of her contract. Count I seeks to enjoin the Board from continuing the employment contract of Dr. Lyles as Superintendent after June 30, 2016, unless the Board votes on a resolution to extend her contract by a majority vote of its full membership. In the event that the matter is not resolved by June 30, 2016, JCEA seeks an order requiring the immediate termination of the employment contract of Dr. Lyles as Superintendent of Schools.

Set forth in the alternative to Count I, Count II requests a determination that if any notice of contract renewal was issued by an agent of the Board to Dr. Lyles before or after December 31, 2015, it was null and void as outside the authority of the issuing party due to a lack of Board action or authorization. JCEA again seeks the same relief as set forth in Count I.

Set forth in the alternative to Counts I and II, Count III alleges that an election of Board members was held in November 2015 and that the Board's organizational

meeting with the newly elected board members took place on January 5, 2016. JCEA further alleges that allowing the lame duck Board sitting in December 2015 to automatically renew Dr. Lyles' contract, which was not due to renew until June 30, 2016, after the new board took office in January 2016, constitutes a violation of the common law prohibition barring a sitting board from binding a successor board to a contract which will begin during the new Board's term. As a result, alteration of the timelines specified in N.J.S.A. 18A:17-20.1 to set December 31, 2015, as the deadline for automatic renewal would be contrary to the intent of that statute and create a violation of the prohibition barring a sitting board from binding a successor board. JCEA again seeks the same relief as set forth in Count I.

Set forth in the alternative to Counts I, II and III, Count IV alleges that the requested relief must be granted based upon events that have transpired since the Board's reorganization meeting on January 5, 2016. JCEA alleges that on two occasions, January 21, 2016, and February 18, 2016, motions to add renewal of the Superintendent's contract to the agenda were rejected or failed to come to a vote. In each case, Dr. Lyles was present at the meeting and observed the Board's failure to agree to even vote on the renewal of her contract. According to JCEA, each of these instances constituted clear and adequate notice prior to March 2, 2016, such that Dr. Lyles' contract was not subject to automatic renewal under N.J.S.A. 18A:17-20.1. Based upon the allegations in Count IV, JCEA requests the same relief as in Counts I, II and III.

As respondents in this matter, the Board and Dr. Lyles have filed motions to dismiss JCEA's petition. First, respondents maintain that JCEA lacks standing to challenge the Board's conduct as it relates to the continued employment of Dr. Lyles as Superintendent of Schools. Second, respondents maintain that JCEA's challenge is moot. Third, respondents contend that Dr. Lyles' contract has automatically renewed by operation of law. The Board also maintains that the petition should be dismissed because the District should not be required to provide separate defenses to the same claim.

Standing will be considered first. In Count I of its petition, JCEA set forth the facts in regard to itself and the three individual petitioners as follows:

1. Petitioner Ronald F. Greco Jr. is a citizen and taxpayer of the City of Jersey City and the President of the Jersey City Education Association ('the Association'). The Association is the majority representative for grievances and collective negotiations for non-supervisory and non-administrative certificated and certain non-certificated employees of the Jersey City Public School District.

2. Petitioner Monique K. Andrews is a citizen and taxpayer of the City of Jersey City whose children attend the Jersey City public schools.

3. Petitioner Ellen Zadroga is a citizen and taxpayer of the City of Jersey City.

Standing is a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal. In re Six Month Extension of N.J.A.C. 5:91, 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). New Jersey cases have historically taken a liberal approach to the issue of standing. Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 101 (1971). Wide recognition has been given to suits by associations. Id., at 109. To have standing, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision. In re Camden County, 170 N.J. 439, 449 (2002). When a case presents a question of substantial public interest, any slight additional private interest harmonizing with the public interest is sufficient to give standing. Falcone v. De Furia, 103 N.J. 219, 226 (1986).

Here, Greco, Zadroga and Andrews are residents of Jersey City and taxpayers. These individuals have a legitimate interest in the orderly, efficient and legally sound administration of the Jersey City public schools. Andrews has a child who attends the Jersey City public schools as well as a niece and a nephew. Greco is an employee of the Jersey City School District and the Association President. The Association

represents its members who are likely to be impacted by determinations made by the Superintendent. Zadroga has two children who are employed by the Board and two grandchildren who are students in the District. Finally, the appointment of the superintendent has a substantial impact on the public interest as the position of superintendent affects the quality of the public schools and their administration. It follows that JCEA has standing to bring the petition in this matter.

The Board and Dr. Lyles maintain that JCEA's petition should be dismissed as the claims are moot since Dr. Lyles maintains a statutory right to employment because her contract was already renewed by operation of law. Further, JCEA's alternative contentions are irrelevant and meritless.

The law in regard to mootness is set forth above. The motions to dismiss on the basis of mootness prematurely assume that Dr. Lyles' contract has been renewed by operation of law. This assumption is unwarranted without full consideration of the issue on its merits. It follows that the motions to dismiss on the basis of mootness are without independent merit.

Pursuant to N.J.A.C. 6A:3-1.10, a petition may be dismissed on the grounds that petitioner has advanced no cause of action even if petitioner's factual assertions are accepted as true. This rule is analogous to a motion to dismiss for failure to state a claim upon which relief can be granted under R. 4:6-2. With this type of motion, all alleged facts and legitimate inferences that may be drawn therefrom are deemed admitted. Rieder v. Dep't of Transp., 221 N.J. Super. at 552.

Counts I, II and III relate to Dr. Lyles contract and specifically the section, which is set forth above, pertaining to renewal or nonrenewal. In Count I, JCEA maintains in essence that the Board did not vote to renew Dr. Lyles' contract and that in accordance with the terms thereof the failure to notify the Superintendent by December 31, 2015, means that an offer of renewal is not being made. Since the litigation has not been

resolved by June 30, 2016, JCEA seeks the immediate termination of Dr. Lyles as the Superintendent of Schools.

In Count III, JCEA maintains that allowing the lame duck Board sitting in December 2015 to renew Dr. Lyles' contract, which remained in effect until June 30, 2016, which is after the new board took office in January 2016, would constitute a violation of the common law prohibition barring a prior board from binding a successor board to a contract which will begin during the new board's term. Further, the alteration of the timelines specified in N.J.S.A. 18A:17-20.1 to set December 31, 2015, as the deadline for automatic contract renewal would be contrary to the intent of the statute. JCEA seeks the same relief as in Count I.

JCEA's position raises two concerns as to the validity of the section of Dr. Lyles' contract pertaining to renewal or nonrenewal. The first concern is that this section violates the prohibition barring a sitting board from binding a successor board. The second concern is that the section is inconsistent with N.J.S.A. 18A:17-20.1.

The common law rule is that "an official empowered to appoint a public officer may not forestall the rights and obligations of his successor by making an appointment where the term of the appointee will not take effect until after the expiration of the term of the appointing officer." Georgia v. Suruda, 154 N.J. Super. 439, 448 (Law. Div. 1977). This principle was applied in Gonzalez v. Bd. of Educ. of the Elizabeth Sch. Dist., 325 N.J. Super. 244 (App. Div. 1999), where a board of education gave its superintendent notice one year before the expiration of his term, as was required by N.J.S.A. 18A:17-20.1 at the time, that his contract would not be renewed. Thereafter, on February 8, 1995, the board of education appointed a new superintendent for a term of three years beginning on July 1, 1996, when the prior superintendent's term expired. After the annual school board election on May 1, 1996, the newly constituted board reappointed the former superintendent to that position and returned the individual appointed by the old board to his prior position as assistant superintendent. On appeal by the individual appointed superintendent on February 8, 1995, the court determined

that N.J.S.A. 18A:17-20.1 did not empower the old board to appoint a new superintendent at the time that it gave notice of nonrenewal to the prior superintendent. The principle barring an outgoing board from binding its successor applied in this situation, and the appointment of the new superintendent on February 8, 1995, was void ab initio.

Here, Dr. Lyles' contract expired on June 30, 2016, and in accordance with N.J.S.A. 18A:17-20.1, the Board had until March 2, 2016, to inform her as to nonrenewal of her contract. According to the terms of Dr. Lyles' contract, the date for the Board to advise her as to renewal or nonrenewal was extended to December 31, 2015. While a board of education may give notice at any time prior to the expiration of the minimum period for notice required by N.J.S.A. 18A:17-20.1, the effect of the contract provision was to give the old board the authority to make the determination as to renewal or nonrenewal of the Superintendent's contract for term to begin after the new board takes office. This result is fundamentally inconsistent with the principle that an outgoing board cannot bind its successor by making an appointment which does not take effect until after the expiration of the term of the appointing officer. It follows that the section of Dr. Lyles' contract concerning renewal or nonrenewal is not valid.

The second concern is whether the section of Dr. Lyles' contract concerning renewal or nonrenewal is consistent with N.J.S.A. 18A:17-20.1, which provides in pertinent part that the superintendent is deemed reappointed for another term, unless the board provides him with timely written notice that he will not be renewed. Reversing the consequences of lack of notification, the contract provides that "[F]"ailure to notify the Superintendent by [December 31, 2015] of an intention to renew will mean that an offer of renewal is not being made."

The question is whether the parties may alter the provisions of the statute by contract. In some instances, the provisions of a statute may not be altered by contract. In Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 66 (1982), the Court stated as follows:

> [P]ublic employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute. "If the legislature establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted." [Id., at 76 (citation omitted)]

In Spiewak, the Court determined that this principle applies to tenure rights. In contrast, where a statute by its terms provides for discretion, the parties may agree to contract provisions within the range thereof. Wright v. Bd. of Educ. of the City of East Orange, 99 N.J. 112, 119 (1985).

N.J.S.A. 18A:17-20.1 states in part that the superintendent "shall" be deemed reappointed. This language is mandatory in nature, but the term "shall" is modified by the word "unless" which applies in two situations. One is not relevant to this case, and the second relates to a situation where the board provides timely notice in writing that the superintendent will not be reappointed at the end of the current term. The provision as to notice allows some discretion in that a board could provide a longer period for notice provided that it did not violate some other provision of law such as the rule barring a sitting board from binding a successor board as to an appointment which takes effect during the term of the latter. Nonetheless, the discretion does not extend to reversing the statutes central purpose which was to provide that in the absence of timely written notice, the superintendent is deemed reappointed for another contract term. It follows that the section of Dr. Lyles' contract related to renewal and nonrenewal is invalid because it conflicts with a mandatory provision of N.J.S.A. 18A:17-20.1.

These principles can now be applied to Counts I, II and III. With respect to Count I, JCEA maintains that the Board did not give Dr. Lyles notice of its intention to renew the contract by December 31, 2015, and therefore, the terms of Dr. Lyles' contract give her written notice of her nonrenewal, barring the application of N.J.S.A. 18A:17-20.1 to renew her contract automatically. The difficulty with JCEA's argument is that the section of Dr. Lyles' contract concerning renewal or nonrenewal is invalid and has no effect. It follows that Count I of JCEA's petition must be dismissed.

Count II is set forth in the alternative to Count I and states in part "If any notice of contract renewal was issued by an agent of the board to Dr. Lyles before or after December 31, 2015, petitioners submit it is null and void as outside the authority of the issuing party due to lack of board action or authorization . . . ." It is noteworthy that Count II does not actually allege additional facts and that there is no indication in the other papers that any such notice was ever issued to Dr. Lyles. It follows that Count II does not state any cause of action and should be dismissed.

Count III is set forth in the alternative to Counts I and II and states in essence that allowing the lame duck Board sitting in December 2015 to automatically renew the contract of Dr. Lyles would constitute a violation of the common law principle barring a prior board from binding a successor board to a contract which will begin during the new board's term. JCEA's assertion that the section of Dr. Lyles' contract pertaining to renewal or nonrenewal violates the above-mentioned common law principle has been accepted as correct. Nonetheless, that assertion does not lead to the conclusion that the requested relief should be granted. Rather, the present situation is governed by N.J.S.A. 18A:17-20.1 without regard to the contract provision. Because Count III does not warrant any relief, it should be dismissed.

In Count IV, JCEA alleges that events in January and February 2016 constitute clear and adequate notice to Dr. Lyles that the Board did not intend to renew her contract. According to JCEA, Dr. Lyles was present at Board meetings on January 21, 2016, and February 18, 2016, where motions to add renewal of her contract to the agenda were rejected or did not come to vote.

The question is whether it can legitimately be inferred from the meetings in January and February 2016 that the Board did not intended to renew Dr. Lyles' contract. A key consideration with respect to this question is that at the meeting on December 17, 2015, its attorney had advised the Board that the notice of nonrenewal had to be given to the Superintendent by December 31, 2015, or her contract would be

renewed under State law. In view of this advice, the only reasonable inference is that the Board did not address Dr. Lyles' contract during the meetings in January and February 2016, because members believed that the contract was already renewed. It is not a legitimate inference that the Board did not address the matter during its meetings in January and February 2016 because members had the intention to advise Dr. Lyles of nonrenewal of her contract. Additionally, the Board never gave Dr. Lyles notification that her contract would not be renewed. It follows that Count IV must be dismissed.

The purpose of N.J.S.A. 18A:17-20.1 is to give superintendents a measure of job security. Gonzalez v. Bd. of Educ. of the Elizabeth Sch. Dist., 325 N.J. Super. at 254. This case presents a good example of a situation where a superintendent should not lose her employment because two members oppose her and the board of education cannot make a decision requiring a majority its full membership as the result of conflicts. It follows that JCEA's petition should be dismissed in its entirety with prejudice.

Based upon the above, I **CONCLUDE** that both petitions in this matter should be dismissed. Accordingly, it is **ORDERED** that:

1. Richardson's petition be dismissed in its entirety with prejudice.
2. JCEA's petition be dismissed in its entirety with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 19, 2016
DATE

**RICHARD McGILL**, ALJ

Date Received at Agency: Oct. 19, 2016

Date Mailed to Parties: OCT 20 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

415-16

IN THE MATTER OF THE TENURE CHARGES REGARDING

JAMES DIXON

DOCKET NO. 256-9/16

AND

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

THE SCHOOL DISTRICT OF THE TOWNSHIP
OF RANDOLPH, MORRIS COUNTY
NEW JERSEY

AWARD APPROVING
SETTLEMENT AGREEMENT

FOR THE DISTRICT:

MARC H. ZITOMER, ESQ.
SCHENCK PRICE SMITH & KING, LLP
220 PARK AVENUE
P. O. BOX 991
FLORHAM PARK, NEW JERSEY 07932

FOR MR. DIXON:

GREGORY T. SYREK, ESQ.
BUCCERI & PINCUS, ESQS.
300 BROADACRES DRIVE, SUITE 210
BLOOMFIELD, NEW JERSEY 07003-3153

The School District of the Township of Randolph, Morris County ("District" or "Employer") initiated, and the State District Superintendent certified to the Commissioner of Education, tenure charges seeking the termination of employment of James Dixon ("Respondent" or "Mr. Dixon"), who is employed as a tenured Teacher within the District. By letter dated October 11, 2016, the Commissioner of Education referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. Preliminary conferences were conducted with counsel, and a pre-hearing schedule and an initial hearing date of November 17, 2016, were established. Prior to the date set for the hearing, however, counsel jointly requested, and the Arbitrator approved, a postponement of the hearing in light of the development of proposed settlement terms that were accepted by both parties. Thereafter, a Settlement and Release, bearing an effective date of November 8, 2016, executed by Mr. Dixon and Al Matos, President of the Randolph Board of Education, was conveyed to the Arbitrator.

The Arbitrator has reviewed the charges, the answer, and the proposed terms of the parties' jointly submitted Settlement Agreement & Release. She finds same to be fair, appropriate, and proper. The Arbitrator approves same and incorporates it herein as her Award in this matter.

Dated: November 29, 2016

Jacquelin F. Drucker, Esq.
Arbitrator

Attachment, Incorporated by Reference: Settlement Agreement & Release dated and effective November 8, 2016

State of New York )
) SS:
County of New York )

On this 29th day of November, 2016, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6018984
Qualified in New York County
Commission Expires February 1, 2019

# SETTLEMENT AGREEMENT & RELEASE

This Agreement and Release ("the Agreement") is entered into and effective this 8 day of NOV., 2016 ("the Effective Date"), by and between James Dixon and the Randolph Township Board of Education ("Board").

**WHEREAS**, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

**WHEREAS**, Mr. Dixon is employed by the Board as a tenured teacher; and

**WHEREAS**, the parties desire to resolve and settle all employment issues between them pursuant to the terms and conditions set forth in this Agreement;

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Consideration.

   a. The Board will pay Mr. Dixon a lump sum payment of $30,000.00. He shall be responsible for all taxes and withholdings.

   b. The Board will withdraw the pending Tenure Charges which it certified against Mr. Dixon, docketed as 256-9-16.

   c. The parties acknowledge that Mr. Dixon is not entitled to any further consideration, compensation, emoluments of employment or fringe benefits of any kind.

   d. Mr. Dixon acknowledges that all of the aforesaid constitutes good and valuable consideration.

2. **Resignation.** Mr. Dixon will submit an irrevocable letter of resignation, effective November 1, 2016. Mr. Dixon agrees not to seek future employment with the Board.

3. **Release.** In exchange for the above consideration, Mr. Dixon, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims, rights, demands, judgments, suits, causes of action or liabilities (hereinafter "claims") whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, its Superintendent of Schools, agents, employees, attorneys, and their successors, heirs and assigns (hereinafter collectively referred to as "the Board"), including, but not limited to any claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, Title IX,



J.D. Initials JD
BOE Pres. Initials

the Americans with Disabilities Act, the Age Discrimination in Employment Act, The Old Workers Benefit Protection Act, as amended, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, New Jersey Title 18A, 6& 6A, any collective negotiations agreement, any common law claim and any other claims for harassment, sexual harassment, hostile work environment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim which arises directly or indirectly or in any way out of Mr. Dixon's employment relationship with the Board. Mr. Dixon and his Association also agree with withdraw, with prejudice, the Arbitration pending before PERC, docketed as AR-2017-142. Specifically, exempted from the release are any claims for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA") and workers compensation claims.

4. **Assent to Terms.** Mr. Dixon hereby acknowledges that he signed this Settlement & Release with a full understanding of his rights and that he was fully informed of the implications of this agreement by his counsel, Gregory Syrek, Esq. He also signs this Settlement & Release without duress and of his own free will and volition and acknowledges that he was given the opportunity to fully consider this Settlement & Release for twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Board Counsel, Marc H. Zitomer, Esq., 220 Park Avenue, Florham Park, New Jersey 07932.

5. **References.** Upon direct inquiry by any future employers, the Superintendent or his designee will provide the dates of Mr. Dixon's employment with the Board, the position he held in the District, and his salary. No further information will be provided. All calls from prospective employers will be directed to the Superintendent or her designee who will only provide the above information.

6. **No Admissions.** This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery, nor performance of this Agreement, nor Mr. Dixon's resignation, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by either party to this agreement, and the parties further agree that neither this Agreement and Release nor Mr. Dixon's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

7. **Confidentiality.** Mr. Dixon and the Board understand and agree that this Agreement, its terms, and the matters discussed in negotiating its terms are confidential, to the extent permitted



J.D. Initials _____
BOE Pres. Initials _____

by law. Neither party may directly or indirectly, divulge, discuss, publicize, disclose or in any way communicate the fact of this Agreement or the terms of this Agreement, the discussion or circumstances surrounding the negotiation or execution of this Agreement or the facts and circumstances leading to Mr. Dixon 's resignation in the District to anyone without the express written authorization by an authorized representatives of the other party. However, the District has the right and will truthfully respond to any inquiry regarding Mr. Dixon from the State or Federal Government or its agencies or instrumentalities, including Unemployment, or otherwise compelled to do so pursuant to law. Moreover, Mr. Dixon understands that this settlement will be provided to the Commissioner of Education for final approval. All of the the foregoing confidentiality obligations shall not apply to disclosure by Mr. Dixon to his immediate family, union, legal representatives and/or tax advisors, provided Mr. Dixon first instructs them, and secures their agreement, to keep all such information in strict confidence.

8. **Authority.** This Agreement is subject to Board approval and that of the Commissioner of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

9. **State Board of Examiners Reporting Requirement**

Mr. Dixon's understands that the Commissioner of Education may refer this matter to the N.J. State Board of Examiners which may suspend or revoke his certificate.

10. **Satisfaction of *In re Cardonick*, 1990 S.L.D. 842 (1990)**

The parties agree that this matter satisfies the six (6) criteria for settlement set forth in *In re Cardonick*, 1990 S.L.D. 842, 846 (1990) and delineated in N.J.A.C. 6A:3-5.6.

i. Documentation as to the nature of the charges - See, Exhibit A for a copy of the tenure charges

ii. Circumstances justifying settlement – Mr. Dixon has tendered his resignation from the District effective November 1, 2016 making the tenure charges moot.

iii. Consent of both the charged and charging parties - The agreement has been executed by both parties.

iv. Charged party entered into this agreement with a full understanding of his rights - See Paragraph 4, supra.

v. Agreement in the public interest – This agreement is in the public interest because Mr. Dixon has resigned from the District, making the matter moot. Moreover, even though there is a separation payment, the settlement will save the District a significant amount of administrative time and expense for the hearing. Finally, the charges are for inefficiency, not unbecoming conduct.



J.D. Initials JRD
BOE Pres. Initials

vi. Referral to State Board of Examiners – See Paragraph 9, supra.

**11. Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

**12. Amendment; Severability; No Waiver.** This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

**13. Personal Belongings.** Upon his execution of this Agreement, the District will schedule an appointment with Mr. Dixon's counsel for him to retrieve his personal belongings at a mutually convenient date and time before or after school hours.

**14. District Property.** At the time Mr. Dixon retrieves his personal belongings he shall immediately be responsible for returning all District property in his possession to the District including, but not limited to computers, computer files, keys, books, flash drives, curriculum and student records.

**15. Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

**16. Construction.** The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.



J.D. Initials JRD
BOE Pres. Initials

17. **Law Governing.** This Agreement is governed by the laws of New Jersey.

**IN WITNESS WHEREOF**, the parties have executed this agreement consisting of five (5) pages as of the effective date.

JAMES ~~DIXON~~

Dated: 11/7/16

Witness:

Dated: 11/7/16

RANDOLPH BOARD OF EDUCATION

By: ALMATOS, BD. PRES.

Dated: 11/8/16

Witness

Dated: 11/8/16



J.D. Initials _____

BOE Pres. Initials _____

416-16

| | | |
|---|---|---|
| J.L., on behalf of minor child, A.L., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioner challenged the determination of the respondent Board that his daughter, A.L., engaged in harassment, intimidation and bullying (HIB) pursuant to New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board alleged that A.L., who was seven years old during the period pertinent to this matter, was one of several girls who bullied a classmate on the school bus because of her speech disability. Petitioner sought an order reversing the Board's determination that A.L. committed an HIB offense, and removing any reference to the alleged incident from A.L.'s school records. Petitioner maintained that the Board violated the Act's mandatory procedural requirement and that A.L.'s conduct did not rise to the level of HIB under the statute. The Board argued that it conducted an adequate investigation and that its determination was not arbitrary or capricious. The petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: summary decision is appropriate, as there are no material facts at issue in this case; petitioner herein asserted that the Board committed four procedural errors: 1) failed to issue a written decision as required in the Act, 2) failed to review the investigation report prior to affirming the HIB charge against A.L., 3) failed to provide the required information about the HIB investigation to petitioner in writing, and 4) incorrectly advised petitioner that there was a ten-day limitation on requesting an "appeal" before the Board, and that such request must be made in writing; the respondent Board's argument that its decision to affirm the superintendent's recommendation of HIB was memorialized in writing – in both a letter from the school principal to petitioner and in the minutes of its March 24, 2015 Board meeting – is without merit, as these documents cannot be construed as the written decision required under the Act; the Board's use of the HIB Committee to fulfill its responsibility of reviewing the investigation report was permissible under the Act; the principal's letter to petitioner did not provide information about the nature of the HIB investigation or about the discipline imposed and, accordingly, did not meet the Act's requirement to provide petitioner with this information in writing; and the Board incorrectly advised A.L.'s parents of their rights under the statute by representing that there was a ten-day limitation on requesting a hearing. The ALJ concluded that the Board did not comply with the procedural safeguards provided under the Act, and the determination of an HIB violation under these circumstances was arbitrary and capricious. Accordingly, the ALJ ordered that the HIB determination be reversed and any reference to HIB be deleted from A.L.'s school record.

Upon review, the Commissioner, *inter alia*, concurred that there were procedural errors made in this case, but found that the ALJ erred in ordering the reversal of the HIB finding and the removal of reference to HIB from A.L.'s record. Accordingly, the Commissioner ordered the Board to conduct a hearing and issue a proper written decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 12/09/16

OAL DKT. NO. EDU 11604-15
AGENCY DKT. NO. 167-7/15

| | | |
|---|---|---|
| J.L., on behalf of minor child, A.L., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the parties. In this matter, petitioner alleges that the Board's determination that A.L. violated its harassment, intimidation and bullying ("HIB") policy is arbitrary and capricious because the Board failed to comply with the procedural safeguards under the Anti-Bullying Bill of Rights Act ("the Act"). Petitioner also argues that A.L.'s conduct did not rise to the level of HIB under the statute, and seeks removal of any reference to the alleged incident from A.L.'s school records. Respondent contends that the Board did not violate the procedural requirements under the Act, and that it conducted a proper investigation.

The ALJ found that the Board made three of the four procedural errors alleged by petitioner. The ALJ concluded: the Board did not issue a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e); the Board did not provide the parents with written information about the HIB investigation pursuant to *N.J.S.A.* 18A:37-15(b)(6)(d); the Board incorrectly advised the parents of their rights under the statute when it notified the parents of a 10-day timeframe within which to request a hearing; and the Board's utilization of a committee to

review the HIB matter and subsequently report to the Board was a procedurally acceptable practice. Although the ALJ did not make a determination as to whether A.L.'s actions constituted a violation of the HIB policy, the Initial Decision recommended that the HIB determination against A.L. be reversed and any reference to HIB be deleted from A.L.'s school records because the Board failed to comply with the procedural safeguards under the Act.

Respondent takes exception to the ALJ's conclusion that the Board violated procedural requirements of the statute because it did not issue a written decision, did not provide the parents with written information about the HIB investigation, and incorrectly advised the parents of their rights under the statute. The Board further argues that the ALJ erred in concluding that the only remedy in this matter is to reverse the decision and remove any reference to same in A.L.'s file. Respondent submits that "remand" of the matter to the Board for a hearing on the substantive HIB issues is the appropriate remedy. Petitioner has filed a reply to respondent's exceptions, arguing that the ALJ correctly found that the Respondent violated the procedural requirements of the Act, and the only appropriate remedy in this case is reversal of the HIB finding.

Upon a comprehensive review of the record, the Commissioner agrees in part and disagrees in part with the ALJ's determination. Specifically, the Commissioner agrees that the Board's utilization of an HIB committee to review the matter and report to the Board was an appropriate practice. The Commissioner further agrees that the Board failed to properly comply with the procedural requirements set forth in *N.J.S.A.* 18A:37-15(b)(6); however, the Commissioner finds that such noncompliance did not deprive petitioner or A.L. of their due process rights under the Act. The Commissioner disagrees with the ALJ's conclusion that the Board erroneously advised the parents of a timeframe within which to request a hearing. The Commissioner finds that although there is no time limit set forth in the statute, it was necessary

for the Board to establish a deadline, as will be discussed below. Furthermore, the fact that the Board continued to provide the parents with opportunities for a hearing beyond the 10-day deadline mitigates any adverse consequence of "misinformation." Lastly, the Commissioner finds that the appropriate remedy is to order the Board to conduct a hearing and to issue a proper decision.

*N.J.S.A.* 18A:37-15(b)(6)(d) provides in relevant part, "parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation . . . this information shall be provided in writing within 5 school days after the results of the investigation are reported to the board." Additionally, *N.J.S.A.* 18A:37-15(b)(6)(e) provides, "at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." Here, respondent argues that the Board minutes and Principal Kerr's March 25, 2015 letter – which followed the HIB Committee's review of the matter on March 19, 2015 – and a reporting of the matter to the full Board's review on March 24, 2015, satisfy the requirements under *N.J.S.A.* 18A:37-15(b)(6)(e). Respondent also argues that phone calls and correspondence between the parents and the District, as well as the March 25, 2015 letter, meet the requirements of *N.J.S.A.* 18A:37-15(b)(6)(d). Petitioner argues that the March 25, 2015 letter did not fully inform the parents of the nature of the investigation or the decision imposed, as required under *N.J.S.A.* 18A:37-15(b)(6)(d), and that the same letter did not satisfy the Board's responsibility to issue a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e).

The Commissioner finds that neither the Board minutes nor the March 25, 2016 letter constitute a written decision by the Board in accordance with *N.J.S.A.* 18A:37-15(b)(6)(e). First, under no circumstances can any board minutes be substituted for a requirement of a written decision by a board on an HIB matter. Second, a school principal is not a proper agent to issue a

HIB decision on behalf of the Board. Here, the content of the March 25, 2015 letter also does not *explicitly* set forth the Board's consideration of the matter and its decision to affirm, reject or modify the superintendent's determination.[1] Someone who is authorized to speak on behalf of the board must notify the parents of the Board's decision on the superintendent's determination/recommendation; had that been done, the March 25, 2015 letter would have constituted a Board decision meeting the requirements of *N.J.S.A.* 18A:37-15(b)(6)(e). Absent this criteria, the Board failed to issue a proper written decision.

The Commissioner further finds that the March 25, 2015 letter – which was intended to satisfy the requirements of *N.J.S.A.* 18A:37-15(b)(6)(d) – informed the parents of the nature of the investigation and the finding of HIB, but did not set forth in writing the discipline imposed. Based on the HIB investigation report and correspondence in the record, it is evident that the parents were in frequent communication with the District and were aware of the details (and on notice) of the HIB matter and investigation, as well as the discipline imposed. Therefore, failure to include the discipline imposed in the March 25, 2015 letter is *de minimus*.

With regard to the deadline established by the District in its March 25, 2015 letter, the Commissioner finds that it was necessary for the Board to do the same. *N.J.S.A.* 18A:37-15(b)(6)(c) provides, "the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation. . . ." The parents or guardians need to be notified within five school days after the results of the investigation are reported to the board, and "a parent or guardian may request a hearing before the board after receiving the information." *N.J.S.A.* 18A:37-15(b)(6)(d). Significantly, *N.J.S.A.* 18A:37-15(b)(6)(e) provides, "at the next board of education meeting following receipt of the report, the board shall issue a decision. . . ." The

[1] Although implicit in the letter is the Board's affirmation of the superintendent's determination, that alone does not satisfy the written decision requirement of *N.J.S.A.* 18A:37-15(b)(6)(e).

present language of the statute does not set forth a specific number of days within which a parent should request a hearing, nor does it prohibit a board of education from setting forth a timeline within which to receive requests of a hearing, which has led to considerable disagreement between the parties in the matter. As noted in *N.J.S.A.* 18A:37-15(b)(6)(d), the parents may request a hearing after they receive the investigation information, *e.g*, the superintendent's recommendation: in essence, the parents are appealing the superintendent's decision to the board. Thus, it simply would not make sense for parents to request a hearing *after* the board has considered and affirmed the superintendent's decision at its "next" meeting. Additionally, without any time limit on the parents' option to request a hearing, HIB matters would remain "open" on the district level for an extensive period of time, at the detriment of the students involved. Therefore, a clear reading of the statute suggests that the request for the hearing should be made as soon as possible following the parents' receipt of the investigation information because a board has to render a decision at the "next" board meeting *after* its receipt of the report. As such, it follows that the parents need to request a hearing *before* the "next" board meeting takes place – in the time period between receipt of the investigation information and the next board meeting. This timeframe is logical and practical based on the language of the statute, and therefore a deadline to request a hearing – set forth by a board – would not violate a parent's procedural due process rights under the Act.

In this case, the investigation was completed on or about March 17, 2015; the results were reported to the HIB Committee on March 19, 2015 and to the full Board during its March 24, 2015 meeting. Therefore, the Board should have rendered a decision at its next meeting, on April 14, 2015; [2] this means that the parents needed to request a hearing in advance of the April 14, 2015 meeting. In this situation, the onus is on the school district to provide the

[2] The Bridgewater-Raritan School District's website indicates that the next board meeting for the 2014-2015 school year took place on April 14, 2015.

parents with proper information: the District should have provided the parents with the date of the next Board meeting, and clarified the process for requesting a hearing. The Commissioner does not construe the deadline set forth by the District in this case to be a limit on the parents' rights, in light of the fact that the timeline coincided with the next Board meeting and would allow for both parties to prepare for a hearing. More importantly, through correspondence in May, June, and July, the Board provided petitioner multiple opportunities to appear for a hearing before the Board, which petitioner declined. In other words, petitioner was never denied a hearing before the Board and the record reflects that the petitioner was on notice throughout the duration of the HIB investigation process. Therefore, the Commissioner cannot find a deprivation of due process rights under such circumstances.

Finally, in the Initial Decision, the ALJ relied on *Edward Sadloch, et. al. v. Board of Education of the Township of Cedar Grove, Bergen County*, Commissioner Decision No. 216-15 (June 23, 2015), in determining the possible remedies to the procedural violations by the Board. The ALJ concluded that, like *Sadloch*, the Board failed to follow the procedures under the Act, and the sole remedy under the law is to reverse the HIB determination and to remove any reference of HIB from A.L.'s records. In *Sadloch*, however, the Commissioner was in accord with the ALJ's conclusions and ordered removal of reference to HIB from the records of all the named petitioners because that board failed to comply with basic investigatory procedures under the Act. Additionally, the state of the record in that case was such that a fact finder could not properly determine whether an act of HIB had occurred. Here, the Board gave petitioner notice of the allegations, conducted a thorough investigation and completed a comprehensive investigation report, and also afforded the petitioner with an opportunity to appear before the Board. *See Stephen Gibble v. Board of Education of the Hunterdon Central Regional School District, Hunterdon County*, Commission Decision No. 254-16 (July 13, 2016). Therefore, the

Commissioner finds that the ALJ erred in ordering that the HIB finding be reversed, and that all reference to HIB be removed from the petitioner's file; instead, the proper remedy for the procedural errors set forth herein is to return the matter to the Board to provide the petitioner with a hearing on the HIB allegations. In an HIB appeal where the record is sufficient for a fact finder to determine whether an act of HIB occurred, and where the procedural violations did not deprive the petitioner of their right to notice and a hearing, any other remedy would curtail the legislative intent behind the Act.

Accordingly, the recommended decision of the ALJ is modified as stated herein and the Board is directed to provide the petitioner with a hearing and issue a proper decision.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/09/16

Date of Mailing: 12/09/16

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION GRANTING APPLICATION FOR SUMMARY DECISION**
OAL DKT. NO. EDU 11604-15
AGENCY DKT. NO. 1267-7/15

**J.L. ON BEHALF OF MINOR CHILD, A.L.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,**
Respondent.

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**Randall J. Peach**, Esq., for petitioner (Bruce C. LiCausi, attorney)

**John Geppert, Jr.**, Esq., for respondent (Schwartz, Simon Edelstein & Celso, LLC, attorneys)

Record Closed: September 15, 2016 Decided: October 24, 2016

BEFORE **JOSEPH A. ASCIONE,** ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, J.L., the father of A.L., a seven-year-old during the

period pertinent to this matter, challenges the determination of respondent Bridgewater-Raritan Regional School District Board of Education ("Board" or "District") that his daughter engaged in harassment intimidation bullying (HIB) under N.J.S.A. 18A:37-14 while a student at the Crim Primary School. J.L. petitioned the New Jersey Commissioner of Education seeking an order reversing Respondent's determination that A.L. committed a HIB offense and removing any reference to the alleged incident from A.L.'s school records. Petitioner maintains that that the Board's determination of a violation of HIB policy against A.L. is arbitrary and capricious[1], as a result of A.L.'s young age, and the Board's failure to perform an appropriate review or keep any record of the review process. Respondent argues that it conducted an adequate investigation of A.L.'s actions and the Board's determination is not arbitrary and capricious.

On August 3, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. On July 15, 2016, the petitioner moved for summary judgment (sic), seeking to reverse the HIB determination and removing the determination from A.L.'s school record. Respondent opposed said motion, petitioner received time to submit a reply to respondent's opposition. Petitioner submitted a reply brief on August 11, 2016. The record closed on September 15, 2016 after an initial review of the documents submitted.

## FACTS

On March 4, 2015, Margaret Kerr, Principal of the Board's Crim Primary School, received an email from C.D., father of E.D. Respondent's Brief (RB), 7; Geppert Cert., Exh. B. In this email, C.D. indicated that, for about one month, his daughter had been coming home crying because some girls on the bus were "being very mean to her." Id. C.D. mentioned that his daughter had a problem pronouncing certain words and letters and that the girls on the bus were bullying her because of her speech disability. Id. E.D. named four girls as alleged perpetrators, one of whom was A.L. Id. at 7-8.

[1] Petitioner argues that the review should not be based upon whether the Board's actions were arbitrary or capricious. A determination of the scope of the review is not yet determined. Initial indications and respondent's position are that the scope of the OAL review of the Board's action is subject to a limited arbitrary and capricious analysis.

Principal Kerr referred the HIB report to the Crim School's Anti-Bullying Specialist, Jacquelyn Spagnolo, and an investigation began on March 6, 2015 (after a snow day on March 5, 2015). Id. at 8. On that day, Ms. Spagnolo spoke with E.D. regarding the alleged bullying. Id. During the conversation, E.D. identified A.L. as one of the girls who was making fun of her. Id.; Geppert Cert., Exh. C at BWRL 0059. Later, after indicating that the comments were mostly coming from another student, E.D. stated that A.L. was "not really" saying anything to her. Id.

On that same day, Ms. Spagnolo spoke with E.G., one of the alleged HIB aggressors. Id. E.G. indicated that A.L. was among the group of students who would talk about how "[E.D.] has trouble saying some words." Id.; Geppert Cert., Exh. C at BWRL 0060. Ms. Spagnolo also spoke to A.M., another alleged aggressor, who identified A.L. as one of the students "talking about [E.D.'s] voice because she had a weird accent." Id. at 9; Geppert Cert., Exh. C at BWRL 0061. Additionally, on March 6, 2015, Principal Kerr spoke with R.L., petitioner's wife, about the HIB investigation. Id. R.L. also called the Superintendent's office and spoke with Dr. Hayek's secretary. Id. On March 9, 2015, Ms. Spagnolo spoke with A.L. Id. During that conversation, A.L. stated, "Like [E.D.] has a speech problem and the girls were making fun of her and since they were doing it and I was bored, I did it also, I made fun of her speech." Id.; Geppert Cert., Exh. C at BWRL 0063. On March 11, 2015, Ms. Spagnolo again spoke to R.L., petitioner's wife, about the HIB investigation. Id. The following day, Ms. Spagnolo forwarded a separate voicemail received from R.L. to Principal Kerr's office. Id. at 10.

On March 17, 2015, Ms. Spagnolo completed the HIB Investigation Report and forwarded it to Principal Kerr for review. Id. at 10. The report concluded that A.L.'s conduct constituted HIB based on the distinguishing characteristic of E.D.'s "speech error." Id. The recommended action consisted of: 1) a verbal reprimand; 2) telephoned parents; and 3) changed bus seating. Id.; Geppert Cert., Exh. C at BWRL 0065-66.

On March 18, 2015, petitioner and his wife submitted correspondence to Superintendent Hayek acknowledging that there was an HIB investigation that involved

their daughter. Id. Among other things, the petitioner wrote, "The incident on the bus was an isolated incident; if it was an ongoing problem we should have been notified." Id. at 11; Geppert Cert., Exh. D.

The results of the investigation were set forth in a report, which was received by the Superintendent on March 18, 2015. Petitioner's Brief (PB), 3. The next day, the results of the HIB investigation were considered by the Board's HIB Committee (Committee), which consists of three Board members. Id. at 3, 5-6. The Committee rendered a report, dated March 19, 2015, recommending that the HIB finding involving A.L. be affirmed. Id. at 3-4.

On March 24, 2015, the results of the investigation were unanimously affirmed at a meeting of the full Board. Id. at 4. Petitioner contends that, at this time, the Board members did not possess the actual investigation report. Id. at 5. Rather, they possessed only a summary of the HIB finding, as contained in the HIB Committee report dated March 19, 2015, stating "Target's [name redacted] father reported that aggressors are making fun of target's speech disability." Id.; Doc. 22-24. Respondent asserts that the Board possessed information beyond this summary, including the information obtained by Committee members during the HIB Committee meeting. See RB, 14.

The Board's meeting minutes reflect that a motion was made and seconded to approve a series of action items, including Item E: "Approval of the Superintendent's report of alleged HIB incidents and investigations for March 19, 2015, as well as the recommendation of the Committee to affirm the determinations and actions specified." See RB, 12; Geppert Cert., Exh. F at 0018. The minutes subsequently record the Board's vote on all action items. Id. at 12-13. However, no formal written decision was issued to affirm the HIB finding involving A.L. See PB, at 4-5.

The following day, March 25, 2015, Principal Kerr wrote to petitioner and his wife, informing them that "it was determined that your child did commit an act of harassment, intimidation, or bullying." See PB, 6; Doc. 25. The letter did not provide A.L.'s parents with information about the nature of the investigation or about the discipline, which was imposed for the HIB violation. Id. Respondents note that, prior to this date, petitioner

and his wife had multiple conversations with Principal Kerr regarding the HIB investigation and that they were fully aware of the nature of the investigation and the action taken as a result. See RB, 17-18.

Additionally, Principal Kerr's letter advised A.L.'s parents that "[i]f you do not agree with the [HIB] finding(s), you have a right to appeal this decision by written request to the Superintendent within 10 days of receipt of this letter." See PB, 7; Doc. 25. Respondents point out that the parents of the three other alleged aggressors appeared before the Board at its April 14, 2015 meeting, while A.L.'s parents did not. See RB, 20. According to Respondents, A.L.'s parents never requested a hearing before the Board. Id. at 45.

## LEGAL DISCUSSION

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for deciding motions for summary decision are contained in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there is no "genuine issue" of "material fact." The determination as to whether genuine issues of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" issues of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than

"facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses on the analytical procedure for determining whether a purported issue of material fact is "genuine" or is of an "insubstantial nature." Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary-decision motions. "[T]he essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). In searching the proffered evidence to decide the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontracted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. Id. at 535 (citation omitted).

Petitioner's two main arguments are that respondent violated the Anti-Bullying Bill of Rights Act's mandatory procedural requirements and that, in any event, A.L.'s conduct did not rise to the level of HIB under the statute. See PB, 2. Respondent contends that petitioner is not entitled to prevail as a matter of law on any of his legal arguments, as proper procedures were followed, and that the Board did not act arbitrarily, capriciously, or unreasonably in finding that A.L.'s conduct constituted HIB. See RB, 21, 51.

Whether A.L.'s conduct amounted to HIB is not an appropriate issue to be decided at this time. Rather, the alleged procedural errors and the possible remedies for these procedural errors must be addressed.

Under the New Jersey Anti-Bullying Bill of Rights Act, each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation must be conducted by a school anti-bullying specialist and must be completed no later than ten school days from the date of the written report of the incident. Id.

Within two school days of the completion of the investigation, the results must be reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation, whether the district found evidence of HIB, and whether discipline was imposed. N.J.S.A. 18A:37-15(b)(6)(d). This information must be provided in writing within five school days after the results of the investigation are reported to the board. Id. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Id. Any hearing shall be held in executive session to protect the identity of any students involved. Id. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Id.

The board must issue a decision, in writing, at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Id. The board's decision may be appealed to the Commissioner of Education within ninety days. Id.

Petitioner's main contention is that respondent violated the Anti-Bullying Bill of Rights Act's mandatory procedural requirements. See PB, 7. In essence, petitioner asserts that respondent committed four procedural errors: 1) Respondent failed to issue a written decision; 2) respondent failed to review the investigation report prior to affirming the HIB violation against A.L.; 3) respondent failed to provide the required information about the HIB investigation to petitioner in writing; and 4) respondent incorrectly advised petitioner that there was a ten-day limitation on requesting an "appeal" before the Board and that such a request had to be in writing.

A. Whether the Board issued a written decision

Petitioner first argues that respondent never issued a decision in writing to affirm the HIB violation against A.L. The HIB statute requires that:

> [A]t the next board of education meeting following its receipt of the report, the board shall issue a decision, **in writing**, to affirm, reject, or modify the superintendent's decision. N.J.S.A. 18A:37-15b(6)(e) (emphasis added). Respondent contends that this procedural requirement was met when Principal Kerr wrote a letter to Petitioner and his wife on March 25, 2015, informing them of the Board's determination that E.D. had committed an act of HIB. See RB,13. According to Respondent, "Principal Kerr was an appropriate Board agent to be delegated the responsibility of communicating the Board's decision in writing . . ." Id. at 31. However, this correspondence was not "a decision" issued by "the board," as required by the statute. As discussed further below, Principal Kerr's letter provided no information about the investigation and failed to explain the Board's rationale for its determination.

Additionally, according to respondent, "[t]he Board's decision to affirm the superintendent's recommendation in the A.L. HIB matter was also memorialized in writing by the Board Secretary, Peter Starrs, who kept the minutes of the March 24, 2015 Board meeting reflecting the Board's vote to affirm the HIB determination regarding A.L." See RB, 32. However, a record of a vote is not the same as "a decision." Again, this "writing" falls short of the statute's procedural requirements.

Thus, the Board did not issue "a decision, in writing" as required by the HIB statute. Respondent has failed to meet the procedural requirements of the Act in this respect.

B. Whether the Board reviewed the investigation report prior to affirming the HIB violation

As previously stated, the HIB statute requires that the Board issue a decision "at the next board of education meeting following its receipt of the report[.]" N.J.S.A. 18A:37-15b(6)(e). Petitioner argues that this wording indicates that 1) the Board members must actually receive "the report" before rendering a decision, and 2) the Board members must have reviewed and considered the report prior to deciding whether HIB occurred. See PB, 11-12. Respondent argues that the plain language of the statute suggests, "It is not a physical copy of the report which the Board members must be provided. Instead, the Board members must have been informed about the results of the investigation along with the information regarding the services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." See RB, 28.

On March 19, 2015 the Board's HIB Committee met and discussed the recommendation of the Board's Superintendent. See RB, 13-14. According to respondent, "the Board established a HIB Committee to meet with the Superintendent and receive information about the investigation and make a recommendation regarding all HIB investigations" in order "[t]o ensure adequate attention and full and meaningful review of each HIB determination in the District." Id. at 29-30. The HIB regulations do not specifically allow or prohibit school boards from setting up committees to review HIB investigation reports and make recommendations. Districts are explicitly allowed to use such a system in other contexts. For example, regulations addressing the removal of currently enrolled students state: If district board of education policy allows, a board committee shall conduct hearings required pursuant to this subchapter and then shall make a recommendation to the full board. However, no student shall be removed except by vote of the district board of education taken at a meeting duly convened and conducted pursuant to N.J.S.A. 10:4-6 et seq., the Open Public Meetings Act. N.J.A.C. 6A:22-4.3(e). Thus, in the context of removals, a committee of the board is permitted to

conduct a hearing and make a recommendation to the full board, as long as the full board is responsible for the ultimate vote. Although the HIB statute and regulations are silent regarding the use of such a committee system, this procedure is not unheard of in other areas of school board decision-making and is likely permissible.

C. Whether the Board provided the required information about the HIB investigation to A.L.'s parents in writing

The HIB statute states in relevant part:

> [P]arents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided **in writing** within 5 school days after the results of the investigation are reported to the board. N.J.S.A. 18A:37-15b(6)(d) (emphasis added).

Here, following the Board's meeting on March 24, 2015, Principal Kerr sent a letter to A.L.'s parents dated March 25, 2015. Geppert Cert., Exh. G. In this document, Principal Kerr informed petitioner and his wife that A.L. "did commit an act of harassment, intimidation or bullying." Id. Petitioner argues that the letter did not provide him and his wife with information about the nature of the investigation or about the discipline imposed. See PB, 6. These assertions are not without merit, as the letter contains no such information.

Respondent argues that petitioner and his wife already had all of the necessary information about the investigation because of previous correspondence with Principal Kerr, Anti-Bullying Specialist Spagnolo, and the Superintendent's office. See RB, 17. Even if this is true, the statute clearly states that the information about the investigation must be provided to the child's parents or guardians **in writing** within five school days

after the results of the investigation are reported to the board. N.J.S.A. 18A:37-15b(6)(d). The respondent did not meet this requirement.

D. Whether the Board incorrectly advised A.L.'s parents that there was a ten-day limitation on requesting an "appeal" before the Board and that such a request had to be in writing

Finally, petitioner argues that respondent communicated inaccurate information about the investigation process to petitioner in violation of petitioner's due process rights as guaranteed by the statute. See PB, 15. Pertinently, the statute provides, "A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request." N.J.S.A. 18A:37-15b(6)(d).

In her March 25, 2015 letter to petitioner, Principal Kerr wrote, "If you do not agree with the finding(s), you have a right to appeal this decision by written request to the Superintendent within 10 days of receipt of this letter." Geppert Cert., Exhibit G. Respondent argues that the reason for this deadline is to ensure that the parent "make the request for a hearing prior to the next Board meeting when the Board is statutorily required to issue its decision." See RB, 41. However, this argument is contrary to the Commissioner of Education's guidance on the matter, which explicitly states, "There is no time limit on requesting a hearing; however, parents may want to take action as close to the investigation as possible." Petitioner's Reply Brief, 10-11; Exh. A, Doc. 187. Thus, the Board incorrectly advised A.L.'s parents of their rights under the statute.

In Sadloch, et. al v. Bd. of Educ. of the Twp. of Cedar Grove, OAL Dkt. No. EDU 00619-14, initial decision, (March 26, 2015), adopted Comm'r (June 23, 2015), http://njlaw.rutgers.edu/collections/oal/,http://www.nj.gov/education/legal/commissioner/2015/jun/216-15.pdf a HIB investigation was initiated when a student athlete complained that the school's football coaches were engaging in a pattern of conduct that made the football program uncomfortable for him. Id. at 2. The school board determined that the coaches had violated the HIB policy, and the coaches appealed this finding. Id. at 1, 4. Importantly, the court found that the school board failed to issue a written decision about the HIB and that the board's meeting minutes were insufficient to

qualify as a "written decision by the Board." Id. at 5. Further, the Board's written communications to the parents failed to explain the rationale for the superintendent's findings, and they lacked both a description of the precise conduct at issue and the "distinguishing characteristic" that met the statutory definition of HIB. Id. at 8.

When considering the possible remedies for these procedural violations, the ALJ noted, "In theory, a remand to the Board, or allowing a hearing before me to serve as a substitute for the required local investigatory steps, are possible remedies." Id. at 19. The ALJ reasoned that such remedies would unfairly prejudice the alleged harassers because the events in question had taken place well over a year earlier. Id. The ALJ concluded, "the law permits no other remedy but the removal of any reference to HIB from these coaches' files." Id. The coaches also asserted that their conduct did not rise to HIB as defined by the law. Id. at 18. However, the ALJ noted, "the record created via the Board's internal investigation does not permit me to properly make a determination relative to this critical issue." Id. The Commissioner of Education adopted the reasons expressed in the ALJ's opinion.

Here, like in Sadloch, supra, the Board failed to follow the procedures required by the HIB statute, such as issuing a written decision and providing A.L.'s parents with a written explanation of the nature of the alleged conduct and the rationale for the superintendent's findings.

Respondent's misguided reliance on R.A. v. Bd. Of Educ., Twp. of Hamilton, EDU 10485-15, Initial Decision (May 12, 2016) adopted Comm'r. (June 22, 2016) http://njlaw.rutgers.edu/collections/oal/,http://www.nj.gov/education/legal/commissioner/2016/jun/223-16.pdf provides no support for its position that a decision issued, in that case the Board conducted a hearing, and issued a decision finding no HIB violation, the principal delivered the decision. Here neither the principal nor the Board's attorney can deliver a written decision issued by the Board in compliance with the regulations. Petitioner's counsel promptly questioned the procedural safeguards early on in the process on April 6, 2015. Respondent disregarded the procedural concerns raised at that time, they were in the best position to timely address same.

This tribunal makes no determination regarding whether petitioner's actions constituted an HIB violation as the respondent's violations of procedure makes determination of that issue moot. Note that the allegations are serious. A.L.'s parent(s), if they have not already done so, should discuss the consequences to the mental well-being of a student suffering from a disability, and the cruelty of those who fail to contemplate how one's words can harm.

## CONCLUSION

I **CONCLUDE** the respondent did not comply with the procedural safeguards provided under the New Jersey Anti-Bullying Bill of Rights Act.

I **CONCLUDE** the determination of an HIB violation under these circumstances is arbitrary and capricious.

I **CONCLUDE** that the law permits no other remedy but the reversal of the HIB determination and the removal of any reference to HIB from this student's file. The Anti-Bullying statute is quite specific regarding the sort of investigation required, and it includes tight timelines for completing the steps needed to properly investigate a claim that bullying took place. These timelines are in place for several reasons; first and foremost, to ensure that victim's concerns are promptly addressed, but also because charges of this nature are best explored promptly, when memories are fresh. Here, the events at issue took place well over a year ago. In theory a remand to the Board, or allowing a hearing before me to serve as a substitute for the required local investigatory steps, are possible remedies. I **CONCLUDE** that such remedies would unfairly prejudice this student.

## ORDER

Base on the foregoing, it is **ORDERED** that the HIB determination against A.L. be **REVERSED**, and any reference to HIB be deleted from the school record of A.L.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 24, 2016
DATE

**JOSEPH A. ASCIONE,** ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

## APPENDIX

## LIST OF WITNESSES

**For Petitioner:**

None

**For Respondent:**

None

## LIST OF EXHIBITS

**For Petitioner:**

P-1 Summary Decision Motion and attachments

P-2 Reply Brief

**For Respondent:**

R-1 Opposition to Summary Decision

OAL DKT. NO. EDU 2455-16
AGENCY DKT. NO. 341-11/15

| | | |
|---|---|---|
| LAURAL THURSTON, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/12/16

Date of Mailing: 12/12/16

# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SETTLEMENT**

OAL DKT. NO. EDU 02455-16

AGENCY DKT. NO. 341-11/15

**LAURAL THURSTON,**

Petitioner,

v.

**CITY OF PLAINFIELD BOARD OF EDUCATION,**

**UNION COUNTY,**

Respondent.

---

**Nancy I. Oxfeld,** Esq. for petitioner (Oxfeld Cohen, attorneys)

**Francesco Taddeo**, Esq. for respondent (Law Office of Francesco Taddeo, attorney)

Record Closed: November 2, 2016 Decided: November 2, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 18, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the agreement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 2, 2016
DATE

**DANIELLE PASQUALE**, ALJ

Date Received at Agency: 11-4-16

Mailed to Parties: NOV 3 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

**FRANCESCO TADDEO, LLC**
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Lee C. Honecker, Esq.
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§ Certified by the Supreme Court of NJ as a Civil Trial Attorney

November 2, 2016

EDU 2455-16

**Honorable Danielle Pasquale, A.L.J.**
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

**RE: Laural Thurston v. City of Plainfield BOE, Union County**
**Docket No. 341-11/15**

Dear Judge Pasquale:

As Your Honor is aware, the undersigned represents the Plainfield Board of Education in connection with the above referenced matter.

In that regard, enclosed herein please find an executed Settlement Agreement and Release. Thus, there will be no need for the Hearing to proceed on November 3, 2016.

I thank Your Honor for her courtesies in this matter. Should there be any questions, please do not hesitate to contact me at the above number.

Respectfully yours,

FRANCESCO TADDEO

cc: Sanford Oxfeld, Esq. (via fax only to 973-802-1055)
Plainfield Board of Education

# AGREEMENT AND RELEASE

This Agreement dated Oct 17, 2016 by and between:

CITY OF PLAINFIELD BOARD OF EDUCATION, (hereinafter "BOE")

and

LAUREL THURSTON, an employee of School in the capacity of teaching staff (hereinafter "Thurston"),

By means of the mutual covenants and understandings contained herein state as follows:

1) Thurston was previously injured at the place of employment on or about November 1, 2013, and filed a worker's compensation claim CP-2014.4030 which required absences from her employment with the School. The reasons were medical in nature, and numerous days off were taken by Thurston.

2) The workers compensation case was subsequently resolved on September 17, 2015.

3) Pursuant to NJSA 18A:30-2.1, the days Thurston was absent for related disability are days which she shall receive full pay, without being charged as sick days or without pay.

4) The School has an obligation under contract, rule, regulation, statute or otherwise to provide Thurston with those days and the parties discussed and reviewed the appropriate number of days to return to Thurston following completion of the workers compensation matter.

5) The parties jointly reviewed the schedule of days previously utilized by Thurston and agree that fifteen (15) total days will be returned to Thurston.

6) Thurston shall not receive any additional days, monies, salary or otherwise, from the BOE other than what is specifically referenced herein.

7) This agreement is not assignable to any other person or entity other than those listed herein.

8) This agreement is for a very specific set of factors and cannot be used by either party or any third-party as a means to bind any party to a future course of conduct.

9) This agreement contains the entire understanding of the parties with respect to the subject matter of the agreement, and it supersedes all prior understandings and agreements, whether written or oral, and all prior dealings of the parties with respect to the subject matter hereof.

10) This agreement may be executed in any number of counterparts. It is not necessary that all parties sign all or any one of the counterparts, but each party must sign at least one counterpart for this agreement to be effective.

11) This agreement shall be governed, construed and interpreted in all respects in accordance with the laws of the State of New Jersey.

12) The parties hereto have read the terms of this agreement before signing the same and hereby agree that no statement, remark, agreement, or understanding, oral or written, not contained herein, will be recognized or enforced.

13) This agreement shall not be modified or changed in any fashion except by a writing executed with original signatures by both parties.

The above provisions are hereby consented and acknowledged by:

LAUREL THURSTON

Dated: Oct 17, 2016

PLAINFIELD BOARD OF EDUCATION

Dated: Nov. 11, 2016

418-16

OAL DKT. NO. EDU 16782-16
AGENCY DKT. NO. 284-10/16

| | | |
|---|---|---|
| BUSINESS AND GOVERNMENTAL INSURANCE AGENCY,<br><br>PETITIONER,<br><br>V.<br><br>BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, AND WILLIS OF NEW JERSEY, INC.,<br><br>RESPONDENTS. | : | COMMISSIONER OF EDUCATION<br><br>DECISION ON<br><br>APPLICATION FOR EMERGENT RELIEF |

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Therefore, the Board is directed to rescind the contract with Willis of New Jersey, Inc. and award the contract for insurance brokerage services to one of the four vendors who submitted timely responses to the request for proposals, or reject all of the proposals if one of the criteria set forth in *N.J.S.A.* 18A:18A-22 is satisfied.

Accordingly, the recommended Order of the OAL granting petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/12/16
Date of Mailing: 12/13/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION**
**FOR EMERGENT RELIEF**
OAL DKT. NO. EDU 16782-16
AGENCY DKT. NO. 284-10/16

**BUSINESS AND GOVERNMENTAL INSURANCE AGENCY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, AND WILLIS OF NEW JERSEY, INC.,**

Respondents.

---

**Christopher K. Harriott**, Esq., for petitioner (Florio Kenny Raval, attorneys)

**Paul E. Griggs**, Esq., for the Board of Education of the Township of Union (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

**Robert A. Mintz**, Esq., for Willis of New Jersey, Inc. d/b/a Willis Towers Watson (McCarter & English, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

Business and Governmental Insurance Agency ("petitioner") filed a petition with the Commissioner of Education challenging a determination by the Board of Education of the Township of Union ("respondent") to award a contract for insurance brokerage services to Willis of New Jersey, Inc. d/b/a Willis Towers Watson ("Willis"). In conjunction with the petition, petitioner filed a motion for emergent relief.

Petitioner filed its petition with the Commissioner of Education on October 31, 2016, and the matter was transmitted to the Office of Administrative Law on November 1, 2016, for determination as a contested case. An oral argument in regard to petitioner's motion for emergent relief was conducted on November 21, 2016, at the Office of Administrative Law in Newark, New Jersey.

Petitioner filed its motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In its petition, petitioner alleges that in early 2016 respondent issued a Request for Proposal for Insurance Brokerage Services. In regard to the timing of any proposal, the request states as follows: "Proposal shall be submitted no later than MARCH 15, 2016. . . . Proposals will be opened . . . at 11:00 a.m. on MARCH 15, 2016. Your proposal must be received prior to that date and time." On March 15, 2016, petitioner submitted a fully responsive proposal. In addition, timely proposals were submitted by

three other vendors including Brown & Brown Metro, LLC, Atlantic Associates Insurance Agency, Inc., and Arthur J. Gallagher & Co. Despite the four timely responses, respondent awarded the contract to Willis, which did not submit a proposal until September 2016.

Further, Willis served as a consultant to review insurance options and met with respondent's Finance Committee on several occasions after proposals were received from the other vendors but before the contract was awarded. After discussing insurance options with respondent and reviewing the proposals submitted by petitioner and the other vendors, Willis subsequently submitted its own untimely response to provide insurance brokerage services.

On September 20, 2016, respondent adopted a resolution to accept the proposal of Willis. Prior thereto, respondent did not receive consent to extend the deadline to award the contract beyond the sixty days set forth in N.J.S.A. 18A:18A-36. Further, respondent did not take any action to reject the proposals of petitioner and the other vendors that submitted timely responses.

On October 5, 2016, petitioner which had provided the services in question for twenty-three years received notice from Flagship Dental Plans, a third-party provider of dental benefits to respondent, that petitioner was removed as broker of record for respondent effective October 1, 2016.

As relief, petitioner seeks an Order (1) enjoining respondent from awarding and/or proceeding with any contract in regard to the request for proposal; (2) rescinding any contract already awarded to Willis; and (3) requiring respondent to award the 2016 contract for insurance brokerage services to one of the four vendors that submitted timely responses to the request for proposals.

Respondent disputes petitioner's factual and legal contentions. In regard to the facts, respondent maintains that savings from the contract awarded to Willis would save the school district approximately $130,000 relative to petitioner's proposal. Further,

petitioner participated in the entire process and never objected to the alleged legal deficiencies in awarding the contract to Willis. Petitioner itself submitted a second proposal on July 7, 2016. Petitioner's president made a presentation to respondent on September 13, 2016. Throughout the process, petitioner slept on its rights. Willis was not contractually retained by respondent, and Willis did not prepare specifications. Willis did not review the proposal from other vendors and did not have an unfair advantage.

Willis maintains that it was never retained by respondent in a consulting capacity and at no time reviewed the proposals of the other vendors prior to submitting its own proposal. According to Willis, it was requested by respondent to submit a proposal. Willis and respondent executed and entered into the contract on October 18, 2016. Willis became the broker of record for respondent on September 27, 2016. Since that time, Willis has performed a significant amount of work for respondent.

The first factor is whether petitioner will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Crowe v. DeGioia, 90 N.J. 126, 132-33 (1982). Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

An unsuccessful bidder may attack the award of a contract but may not recover money damages, even if the challenge is successful. Delta Chem. Corp. v. Ocean County Utils. Auth., 250 N.J. Super. 395, 400 (App. Div. 1991). As the incumbent provider of the service in question for twenty-three years, petitioner has suffered real, substantial and immediate harm through the loss of the contract. It follows that petitioner meets the requirement of irreparable harm.

The next requirement is that the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)2. Petitioner's claim is based upon alleged violations of three provisions of the Public Schools Contract Law, N.J.S.A. 18A:18A-1 to -59. Petitioner cites numerous cases under the Local Public Contracts Law, N.J.S.A. 40A:11-1 to -51,

as there are relatively few in regard to the Public Schools Contract Law. Citation to these cases is reasonable in view of the similarity of the statutory provisions and the policies in regard to public bidding. It follows that petitioner satisfies the requirement that the legal right underlying its claim is settled.

The next consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. Emergent relief is not appropriate where material facts are in dispute. Crowe v. DeGioia, 90 N.J. at 133.

Petitioner's first legal theory is that respondent violated N.J.S.A. 18A:18A-36 by failing to award the contract within sixty days. N.J.S.A. 18A:18A-36 provides in pertinent part as follows:

> a. The board of education shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more than 60 days, except that the bids of any bidders who consent thereto may, at the request of the board of education, be held for consideration for such longer period as may be agreed.

It is noteworthy that a similar provision is contained in N.J.S.A. 18A:18A-4.5e, N.J.S.A. 40A:11-4.5 and N.J.S.A. 40A:11-24.

Respondent maintains that petitioner in effect consented to respondent's holding the proposal for consideration for a longer period by its silence throughout the entire process. Respondent's contention raises a question of material fact such that emergent relief cannot be granted on the basis of this legal theory.

Petitioner's second legal theory is that respondent violated N.J.S.A. 18A:18A-22 by failing to properly reject any of the timely filed responses. N.J.S.A. 18A:18A-22 allows a board of education to reject all bids under certain circumstances. Here, respondent accepted the bid of Willis. In view of this circumstance, it cannot be said that respondent rejected all bids. It follows that N.J.S.A. 18A:18A-22 does not appear to be applicable to this case.

Petitioner's third legal theory is that respondent acted arbitrarily, capriciously and unreasonably by awarding the contract to Willis, which did not submit a timely response to the request for proposals, in violation of N.J.S.A. 18A:18A-21(b), which relates to submitting and receiving bids.

The Local Public Contracts Law has been interpreted to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines. L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 356 (1977). Strict compliance is required, and there is no discretion to accept a defective bid. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314 (1994). All bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any contract based thereon. Ibid. It is firmly established that a material condition may not be waived; however, minor or inconsequential discrepancies and technical omissions are subject to waiver. Ibid. The two-pronged test for materiality was stated in Township of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207 (Law Div. 1974) as follows:

> There must, therefore, be applied two criteria in determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity - - first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of the competition. [Id., at 216.]

The purpose of the public bidding laws is to secure for the public the benefits of unfettered competition Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975). Further, the purpose of competitive bidding is not protection of individual interests of bidders but rather the advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis. Township of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. at 215. The statutes promote competition by placing all bidders on equal footing

and guarding against "favortisim, improvidence, extravagance and corruption." Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957).

Bidders must comply with substantive and procedural requirements. Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. at 317. A brief delay relative to a filing deadline is not a material violation of public bidding law particularly where there is no evidence of fraud, favoritism, corruption or improper competitive advantage, e.g., Turner Constr. Co. v. New Jersey Transit Corp., 296 N.J. Super. 530 (App. Div. 1997) (bidder's representatives were in the building before deadline but were sent to the wrong location by a security guard); William M. Young & Co. v. West Orange Redevelopment Agency 125 N.J. Super 440 (App. Div. 1973) (bidder's representative was two minutes late due to inclement weather).

Here, the undisputed facts are that the proposals were due March 15, 2016, and that Willis submitted its proposal in September 2016. The lateness by five to six months is far removed from the periods of a few minutes that were found to be brief delay that was not a violation of the public bidding laws. Moreover, there are indications of collusion and favoritism in that according to Willis, it was asked by respondent to submit a proposal. Further, Willis did so and was awarded the contract. Under the circumstances, petitioner has established a likelihood of prevailing on the merits.

The final requirement is that when the equities and interest of the parties are balanced, petitioner will suffer greater harm than respondents will suffer if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)4. Petitioner maintains that the requested relief will preserve the status quo as it is already the incumbent vendor. Respondent will suffer no harm whatsoever during the interim, because petitioner will continue to provide the service. Further, the public will be harmed if the requested relief is not granted in that a decision to allow respondent to proceed in this fashion will undermine the purpose and spirit of public bidding laws, harm the public's confidence and discourage competition.

Respondent maintains that the relief requested by petitioner exceeds what is necessary to preserve the status quo pending a full hearing on the merits. Moreover, respondent will be placed in a position where it will function without the services of a health insurance broker for a significant amount of time.

Willis contends that contrary to petitioner's claim, the requested relief would do more than preserve the status quo as of the commencement of the proceeding. Rather, the requested relief would alter the status quo in favor of petitioner. Further, Willis has already performed a substantial part of the contract.

Emergent relief is not limited to preservation of the status quo. In regard to the equities, the foremost consideration is that respondent has disregarded a gross deficiency in the proposal of Willis in that it was filed five or six months after the deadline. Moreover, there are indications of collusion and favoritism in that Willis filed its proposal at the urging of respondent and was awarded the contract. As noted above, the conditions and specifications must apply equally to all prospective bidders. The principle was not followed in this case. It follows that petitioner satisfies this requirement.

In order to prevail on a motion for emergent relief, the movant must satisfy all four requirements under N.J.A.C. 6A:3-1.6(b). Here, petitioner meets all four requirements. Under the circumstances, I **CONCLUDE** that petitioner satisfies the applicable standard for emergent relief.

The emergent relief should be granted only to the extent necessary to achieve its purposes. As the contract in question is only for one year, meaningful emergent relief cannot allow respondent and Willis to benefit from an obvious and gross material defect in the proposal. Therefore, I **CONCLUDE** that the contract must be rescinded promptly.

Accordingly, it is **ORDERED** that:

1. The contract between respondent and Willis be rescinded and deemed null and void.
2. Respondent may award the contract for insurance brokerage services to any of the four vendors who submitted timely responses to the request for proposals or reject all of the proposals if the circumstances satisfy the criteria in N.J.S.A. 18A:18A-22.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 29, 2016

DATE

**RICHARD McGILL**, ALJ

ljb

420-16

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

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IN THE MATTER OF THE PROCEEDING BETWEEN:

Gerri A. Chapman, "Respondent" or "Tenured Teacher"

- and -

State-Operated School District of the City of Camden, "Petitioner" or "District"

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Agency Docket No: 248-9/16

# AWARD AND OPINION

Hearings: Oct. 31 and Nov. 1, 2016

Posthearing Briefs: Dec. 5, 2016

Date of Award: Dec. 13, 2016

Arbitrator: Perry A. Zirkel

APPEARANCES:

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**Factual Findings**

On or about Jan. 1, 2001, the District hired Geraldine Chapman as an elementary school teacher.[1] During the next decade, she served as in four elementary schools, attaining tenure during the first part of this period.

Starting in the 2011–12 school year, the District assigned Chapman to teach kindergarten at the Forest Hills Elementary School. She continued at Forest Hills thereafter until the pertinent period. More specifically, in 2014–15, she co-taught a grade 2 inclusion class[2] with special education teacher Laura Colligan,[3] and in 2015–16, she taught a regular grade 2 class on her own.

On June 26, 2013, per a consent order between the Commissioner of Education and the District board of education in March 2016, the District changed to state-operated status.[4] A primary resulting priority was on improving student outcomes.

In the 2013-14 school year, the District initiated its implementation of the Teacher Accountability for the Children of New Jersey (TEACHNJ) Act.[5] With Commissioner approval, the District selected the Danielson framework for the practice part[6] of its evaluation rubric. This framework consists of four domains, each with specified components. The domains are planning

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[1] As a matter of legal style, this decision uses after the first, full reference to each individual solely his or her surname without titles or other prefixes and without any intent of discourteousness. Moreover, where the exhibits are identified as "Petitioner" (for those admitted into evidence from the District) and "Respondent" (for those admitted into evidence from the Tenured Teacher in this case), "Petitioner/Respondent" for duplicates, and "Joint" for those submitted jointly. Additionally, "Tr." refers to specified pages in the first ("-I") or second ("-II") volume of the hearing transcript. Finally, the footnotes use "*infra*" and "*supra*" for cross references to parts of this decision respectively below or above that footnote.

[2] The total number of students in the class was approximately 20, including approximately 5 special education students.

[3] Although her surname subsequently changed upon her marriage, this arbitration decision uses this prior surname from the case exhibits for consistency.

[4] See, e.g., Joint exhibit 1.

[5] For an overview of the provisions of this legislation, which included a pilot implementation date of Jan. 31, 2013, see *infra* notes 44–54 and accompanying text.

[6] See *infra* note 52 and accompanying text.

and practice, classroom environment, instruction and student engagement, and professional responsibilities. The District provided for training for principals concerning implementation of the Danielson framework, including computerized documentation via the Teachscape digital platform, in December 2012 and spring 2013, with the principals providing training to their teachers in September 2013 and periodic follow-up meetings in fall 2013.

For implementation of the student learning[7] part of the evaluation rubric in the affected elementary grades in 2014-15,[8] the District obtained approval for the Northwest Evaluation Association's (NWEA's) Measures of Academic Performance (MAP) assessment for the student learning[9] part of the evaluation rubric, specifically for what New Jersey's relevant legal requirements refer to as "student growth objectives" (SGOs).[10] The MAP assessment includes on-line testing in reading and math in September/October (referred to herein as "pre-"), January (referred to as "winter" or "mid"), and April/May (referred to herein as "post-")[11]; multi-format reporting of the results[12]; and the use of post-test target scores, referred to under the rubric of "RIT," based on the pre-test scores.[13] Prior to the start of the school year, the District's office of evaluation used the NWEA PowerPoint to provide MAP training to the implementing administrators, including the elementary school principals and assistant principals. On a turnkey basis, the principals next provided the training to the teachers in their respective schools.

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[7] *See infra* note 52 and accompanying text.

[8] The District used a different assessment for kindergarten and subsequently instituted an alternative at the high school level, but the MAP assessment applied to the grades that Chapman taught for the two years in question, 2014–15, and 2015–16. Conversely, the District's use of MAP in 2013–14 only applied to grades 6 and above, thus not pertinent to the instant case.

[9] *Id.*

[10] For the specific regulations, see *infra* note 56 and accompanying text.

[11] The reading and math tests are each 52 items on an adaptive basis, i.e., with the difficulty level adjusted of subsequent items adjusted based on the child's performance on the previous items.

[12] The format for the first report is a summary listing the pre-test, RIT, and post-test scores of all of the student's in the teacher's class.

[13] This acronym is derived from the statistical concept of the **R**asch U**nit** scale. See, e.g., https://www.nwea.org/assessments/map/scale-and-norms/

During the mandatory days before classes started in 2014–15, Forest Hills principal Daniel Corvi included training on the Danielson and MAP components for the school's teaching staff. The contractually specified regular faculty meetings[14] also included, along with various other administrative and instructional matters, follow-up training on these components of the mandatory evaluation process. For example, at the follow-up meeting on Oct. 6, 2014, which Chapman attended, he reviewed SGOs via the MAP system, including the access procedures for the summary and other reports at the NWEA dashboard for the MAP assessments.[15] The final, "Updates Reminder" slide of the PowerPoint, which he customized from the turnkey NWEA training material,[16] included the following statement: "SGO Draft Due: Tuesday, October 15th by midnight - based on RIT Projected Score."[17] The same slide also identified "Friday, October 31" as the final deadline.

Shortly before the Oct. 31 deadline, Colligan, on behalf of herself and Chapman, sought assistance from Corvi. He provided her with a sample SGO as an example.[18] With Colligan in the lead, they developed SGOs for math and reading in a tiered format, grouping the students in

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[14] For 2014–15, these after-school faculty meetings were for 45 minutes on approximately a weekly basis, whereas for the following school year, they were changed to 90 minutes each approximately every two weeks.

[15] E.g., Petitioner exhibit 10; Tr.-I at 192.

[16] The incorporated NWEA slides included one that claimed that "SGOs are driven by teachers" rather than being "administrator-driven." Petitioner exhibit 10, at 00816. Another NWEA slide identified as a misconception that "SGOs are a statistically precise measure of growth based on a pre-test/post-test model of performance." *Id.* at 00818. The accompanying slide identifies some of the flaws of a pre-test/post-test model, including problems with the reliability of the results and the impossibility of extrapolating learning "from one data point." *Id.* Instead, the slides claim that the MAP system for SGOs uses multiple measures for the starting point, and the illustrated format is a tiered approach, with 3–4 preparedness groups and with each group having a minimum target score that is "ambitious and achievable." *Id.* at 00821-00822. The accompanying NWEA reference document only provides RIT means, or averages, for the beginning, middle, and end of each grade rather than individually determined RIT scores. *Id.* at 00265. Finally, the "frequently asked questions" sheet is quite clear that the SGO is worth 20% of the summative evaluation, but it is not at all reasonably clear that the target score will be based solely and individually on the child's pre-test score. *Id.* at 00266.

[17] *Id.*

[18] Tr.-I at 376–77; Tr.-II at 447. The example was inferably tiered based on their result upon following its format. *Id.* at 378.

four tiers in successive ranges of MAP pre-test scores.[19] The tiered format was similar to the aforementioned[20] illustrations. However, rather than being based on individual RIT projected scores, per the summary report available for reading and math, respectively, from the NWEA MAP dashboard,[21] the target score for every tier, or group, was one point above the group's designated range.[22] Additionally although incidentally, the number of students in each group was not completely accurate.[23]

On Oct. 31, 2014, Chapman and Colligan submitted their two joint SGOs to Corvi. He signed the SGOs as approved after a quick immediate review.[24]

During the rest of the 2014–15 school year, the three Chapman observations, including posthearing conferences, that Corvi and the assistant principal conducted are not at issue in this case.[25] The Jan. 12, 2015 training session, which both Chapman and Colligan attended, provided a sample SGO form that, although again using a tiered format, referred more specifically to RIT

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[19] Petitioner exhibits 11 and 13/Respondent exhibit 6.

[20] *See supra* notes 16 and 18.

[21] Petitioner exhibit 16. This report includes for each student in the class the pre-test score along with its standard error (e.g., 173 and 3.0 for the first student on the list for math); the projected, or target, RIT score (e.g., 187 for this same student in reading) along with the corresponding growth projection and its standard error (14 and 4.2 for this student); and, after the post-testing, the post-test score and its standard error (173 and 2.9 for this student). The growth projection is based on the national sample of students at the same grade who participated in NWEA's MAP program. See, e.g., Respondent exhibit 33, at 00784.

[22] Petitioner exhibit 11/Respondent exhibit 6. For both reading and math, not only the target but also the range for each group was uniform. For example, for the "medium" group in math, the selected range was 175–184, and the target score was 185. *Id.* at 0045–0046.

[23] For reading, the SGO identified the sizes of the first and third groups as 7 and 5 respectively, whereas the actual number of students in the SGO's specified ranges of pre-test scores was 8 and 6. For math, the SGO identified the sizes of the first and second groups as 9 and 6, whereas the actual sizes were 8 and 7. *Id.*

[24] *Id.*; Tr.-I at 380.

[25] The parties stipulated that each of these observations "substantially complied with evaluation procedures, does not contain any mistakes of fact, and is otherwise arbitrary or capricious." Joint exhibit 12.

projected, or target, scores.[26]

On Saturday, May 2, 2015, Colligan e-mailed the joint SGO results to Corvi, "I just realized that Ms. Chapman and I never handed in our SGO spreadsheet."[27] Early the following week when Colligan was at the principal's office to pick up her mail, Corvi notified her that the results she had submitted were not in compliance with District requirements and had to be revised based on each student's RIT target score in reading and math, respectively, as available on the testing reports accessible via the NWEA dashboard since soon after the MAP pre-testing. Revision of their SGOs based on the individual RIT target scores resulted in much lower overall summative SGO scores.[28] Corvi checked with District central officer administrators, who directed him to use the revised SGOs for the summative evaluation.[29] As a result, based on the revised scores, Corvi conducted a summative conference with Chapman on June 8, 2015, which he had postponed from the originally scheduled date of June 1, 2015 upon her request. The summary report showed the specific scores for the practice part (i.e., for the four Danielson domains and their respective components) and—per the aforementioned revision—for the

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[26] Petitioner exhibit 18. Specifically, for example, the form for reading repeated the following SGO: "At least 70–84% of students in each preparedness group will achieve at least 1 year's growth according to the individual projected MAP Language RIT Scale Norm." *Id.* at 00250–00251. Yet, the use of multiple measures for each preparedness group (here, NJASK and DRA in addition to MAP) is illusory and confusing, because (1) only the MAP score counts for this growth calculation, and (2) the score ranges of the other two measures do not at all necessarily align with the specified range for MAP.

[27] Petitioner exhibit 44/Respondent exhibit 8. Again, their joint report was not carefully accurate. In reading, the group 1 results omitted the data for the student who had a pre-test score of 149 and a post-test score of 131; the group 2 results included a student who should not have been listed due to the absence of any pre-test score; the group 3 results listed post-test scores that were erroneously high for two students (181 and 175 rather than 177 and 172, respectively); and the single student in group 4 identified the post-test score as 201 whereas it was actually 188. The overall summative SGO score in reading should have been 3.55 rather than 3.70. *Id.* In math, the only error, although not materially affecting the summative SGO score, was again in the teachers' direction; their listing of group 2 included a student who did not have a pre-test score but was counted as meeting their target. *Id.*

[28] Petitioner exhibits 12 and 14. The summative scores were 1.00 in reading and 1.00 in math. *Id.* If corrected for the errors attributable to the originally submitted SGOs (*supra* notes 19–23 and accompanying text), which were all in favor of the two teachers, these revised summative scores would remain the same because they were already at the lowest possible level on the four-point scale.

[29] Tr.-II at 226–27.

student learning part (i.e., the SGOs in reading and math) per their prescribed weights.[30] The resulting reported overall rating was Partially Effective.[31] Consequently, he followed up at the same meeting with a corrective action plan (CAP).[32]

In the summer of 2015, the District's turnkey evaluation training for principals included various revisions and refinements, such as adjusted domain weights for the teacher practice part and median student growth percentiles for the student learning part, but no notable clarification regarding the RIT format for SGOs.[33] The follow-up District training for principals in September 2015 noted inconsistencies in implementation of SGO's during the previous year.[34] To improve the process, the training provided additional information about SGOs, including a recommended the simple rather than tiered format (i.e., for the entire class rather than for subgroups of the class) for elementary teachers.[35] Yet, perhaps due to the introduction of an alternative assessment (which was not applicable to teachers on CAPs), this training did not specifically show the otherwise mandated individual RIT projection format.

During the 2015–16 school year, when Chapman had a grade 2 regular class of approximately 14 students, Corvi implemented the CAP,[36] and the District conducted the three requisite observations,[37] along with an additional one on May 25, 2016, at Chapman's request. Christie Whitzell, who was then senior lead teacher at the District's central office, conducted the

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[30] The applicable weights were 20% for student learning and 80% for practice.

[31] Petitioner exhibit 19/Respondent exhibit 9. The overall score was 2.53, and the range for Partially Effective was 1.85 to 2.64. *Id.*

[32] Petitioner exhibit 20.

[33] Petitioner exhibit 54.

[34] Respondent exhibit 33, at 00782. For example, the PowerPoint noted: "Little guidance, clarity, and/or support for teachers across the district in creation, progress monitoring and/or scoring process." *Id.*

[35] *Id.* at 00790.

[36] E.g., Petitioner exhibits 21–22 and 38–40.

[37] E.g., Petitioner exhibits 23–28. Only the fourth observation was at issue; the other three were subject to a stipulation that they met the requisite standards within the arbitration context. *See supra* note 25.

additional observation.[38] In the interim, specifically on Feb. 1, 2016, Chapman and Corvi signed the SGO revision form based on a change in her class size.[39] Chapman's SGO for this school year was in the simple rather than tiered format and based on individual RIT target scores, with the specified ranges for the four rating categories based on a District-wide mandated minimum of 75% rather than 70% for full, as compared with partial, effectiveness.[40]

At the end of the year, Chapman's calculated SGO level was 71% for reading and 71% for math, thus fitting in the Partially Effective range of 60%–74%.[41] The resulting summative evaluation report, which included this SGO result for its designated 20% weighting and the practice domain scores for their designated weights within the remaining 80%, showed an overall score of 2.62, which was in the Partially Effective range (1.85–2.64).[42]

As a result of the two consecutive annual summative ratings of Partially Effective, the District superintendent filed charges for termination based on inefficiency. The charges were duly processed through the requisite steps to this arbitration.[43]

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[38] Petitioner exhibit 29. She conducted the post-observation conference on June 6, 2015. See, e.g., Petitioner exhibits 30–31. For Chapman's response, see Respondent exhibits 16–17.

[39] Respondent exhibit 21.

[40] *Id.*

[41] *Id.* at 0225 and 0235. The format of the summary report changed slightly to show the range of RIT and percentile scores based on the standard error of measurement. *Id.* at 0227 and 0239. Moreover, this SGO report, unlike that for the previous year, showed that the RIT target scores for the two students who did not take the pre-test were based on their "winter" (i.e., mid-year) MAP testing results. *Id.* at 0229–0230.

[42] Petitioner exhibit 45.

[43] E.g., Joint exhibits 1–4.

## Applicable Statutes and Regulations

The TEACHNJ Act[44] includes various relevant requirements, including, for example:

- an evaluation "that incorporates analysis of multiple measures of student progress and multiple data sources"[45]
- annual summative efficiency ratings of "ineffective," "partially ineffective," "effective," and "highly effective"[46]
- a "corrective action plan"[47]
- a "school improvement panel"[48]
- a Commissioner-approved "evaluation rubric"[49] that must include, *inter alia*, (1) the four aforementioned[50] summative rating categories[51]; (2) "multiple measures of practice and student learning," with standardized achievement as a required but not predominant factor[52]; (3) "multiple observations during the school year," including an ongoing process for consistency[53]; and (4) a pilot implementation program by Jan. 31, 2013.[54]

The regulations for TEACHNJ specific to student growth objectives (SGOs), which are one of the two alternative methods for measuring the student learning component,[55] include the following excerpted provisions:

> (a) Measures of student achievement shall be used to determine impact on student learning. The student achievement measure shall include the following components:
>
> . . . .
>
> 2. [SGO(s)], which shall be specific and measurable, based on available student learning data, aligned to New Jersey Student Learning Standards, and based on growth and/or achievement. . . .

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[44] N.J. REV. STAT. § 18A:6-117 *et seq*.

[45] *Id.* § 18A:6-119. For the definition of "multiple measures of student learning," see *id.*

[46] *Id.* §§ 18A:6-119 and 18A:28-5(b)(3). For the specification of the annual written performance conference and report, see N.J. ADMIN. CODE § 6A:10-2.4(c)–(g).

[47] N.J. REV. STAT. § 18A:6-119.

[48] *Id.* § 18A:6-120. For the role and responsibilities of the SCIP and the over-arching District Advisory Evaluation Committee (DAEC), see N.J. ADMIN. CODE § 6A:10-2.4(b).

[49] N.J. REV. STAT. §§ 18A:6-122–123.

[50] *See supra* text accompanying note 46.

[51] N.J. REV. STAT. § 18A:6-123(b)(1).

[52] *Id.* §§ 18A:6-123(b)(4) and 18A:6-123(b)(6).

[53] *Id.* §§ 18A:6-123(b)(7) and §§ 18A:6-123(b)(11). For the types and timing of observations, see N.J. ADMIN. CODE § 6A:10-1.2.

[54] N.J. REV. STAT § 18A:6-123(d). Moreover, the act required the prompt subsequent adoption of regulations the standards for evaluation rubrics. *Id.* § 18A:6-124.

[55] N.J. ADMIN. CODE § 6A:10-4.1.

(c) [SGOs] for teachers shall be developed and measured according to the following procedures:

1. The chief school administrator shall determine the number of required [SGOs] for teachers. . . . A teacher without a student growth percentile shall have at least two and a maximum of four [SGOs]. . . .
3. Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each [SGO]. If the teacher does not agree with the [SGOs], the principal shall make the final determination.
4. [SGOs] and the criteria for assessing teacher performance based on the objectives shall be determined, recorded, and retained by the teacher and his or her supervisor by October 31 of each academic year . . . .
5. Adjustments to [SGOs] may be made by the teacher in consultation with his or her supervisor only when approved by the chief school administrator or designee. Adjustments shall be recorded in the teacher's personnel file on or before February 15.
6. The teacher's designated supervisor shall calculate each teacher's SGO score. The teacher's SGO score, if available, shall be discussed at the teacher's annual summary conference and recorded in the teacher's personnel file. . . .[56]

The companion regulations for teacher evaluations require each school district to follow specified training procedures that include, *inter alia*, the following:

4. Annually require each supervisor who will conduct observations for the purpose of evaluation of a teacher to complete two co-observations during the academic year.
   i. Co-observers shall use the co-observation to promote accuracy in scoring, and to continually train themselves on the instrument. . . .
5. Chief school administrators shall annually certify to the Department that all supervisors of teaching staff members in the school district who are utilizing educator practice instruments have completed training on the instrument and its application and have demonstrated competency in applying the educator practice instruments.[57]

These regulations also have various requirements for the evaluation observations, including the following:

(c) Each teacher shall be observed . . . at least three time during each school year but not less than once during each semester. For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference, and at least one of the required observations shall be unannounced. . . . The following additional requirements shall apply: . . . .

6. The teacher shall submit his or her written objection(s) of the evaluation within 10 teaching staff member working days following the conference. The objection(s) shall be attached to each party's copy of the annual written performance report.[58]

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[56] *Id.* § 6A:10-4.2.
[57] *Id.* § 6A:10-2.2(b).
[58] *Id.* § 6A:10-2.4.

The related statutory provisions for the termination of tenured teachers include the following:

a. [Tenured teachers] shall not be dismissed . . . except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member of other just cause . . . .[59]

2) if the employee is rated partially effective in two consecutive annual summative evaluations . . ., the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. . . .[60]

The related applicable arbitration provisions provides the following considerations for the arbitrator in rendering a decision:

a. [In an inefficiency case] in rendering a decision the arbitrator shall only consider whether or not:
   (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
   (2) there is a mistake of fact in the evaluation;
   (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
   (4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.[61]

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[59] N.J. REV. STAT. § 18A:28-5.
[60] *Id.* § 18A:6-17.3(a).
[61] *Id.* § 18A:6-17.2.

## Discussion

Rather than separately reciting the parties' arguments, I shall address them based on the foregoing factual findings and applicable legal standards under headings that correspond to the three challenges in the Respondent's posthearing brief.[62] I address the respective challenges in ascending order of their arbitrally assessed strength. As an important contextual matter, this case arose during the transitional period of this state-operated district's implementation of TEACHNJ.[63]

### Exceptional Circumstances[64]

The Respondent claims that "the District should have found exceptional circumstances and granted her a third year."[65] The statutory basis is the over-arching statutory allowance for districts to defer a tenure charge for inefficiency for an additional year after two consecutive summative evaluations of Partially Effective.[66]

The Respondent argues that her particular pattern within the two consecutive summative

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[62] The Respondent's prehearing arguments obviously were akin to a shotgun, but in light of the parties' waiving of closing oral arguments, the prudently rifle-style after the evidentiary phase provide the controlling framework.

[63] The act, singed in August 2012, went into effect for the 2012–13 school year. http://www.njleg.state.nj.us/2012/Bills/PL12/26_.PDF However, full implementation was pending a pilot program and regulations. *See supra* note 54 (N.J. REV. STAT §§ 18A:6-123 – 18A:6-124). Moreover, the District did not become state-operated until the end of 2012–13 and initiate its implementation until 2013–14. *See supra* notes 4–5 and accompanying text. Finally, the application of the District's MAP-based student component to Chapman and similarly situated elementary teachers was not until 2014–15. *See supra* notes 8–10 and accompanying text.

[64] The Respondent's posthearing brief (at 47) uses a broad "and/or" subheading for this challenge. As explained in this section, the primary focus is this particular statutory ground, and any cognizable alternate bases are subordinated and addressed within this section of the Opinion.

[65] The Respondent circularly argues that "the District, by and through [its superintendent], abused its discretionary powers and acted arbitrarily and capriciously by failing to investigate and find exceptional circumstances applicable to the within matter." To the subordinated extent that the Respondent is raising the statutory ground of "arbitrary and capricious" conduct (*supra* note 61 and accompanying text: N.J. REV. STAT § 18A:6-17.2(a)), the arbitrator concludes that it has no separable successful application in this case. Assuming arguendo that there is a duty to investigate under the exceptional circumstances provision, the evidence in the case lacks the requisite trigger—whether it is reasonable suspicion or probable cause—to activate such a duty.

[66] *See supra* note 60 and accompanying text (N.J. REV. STAT § 18A:6-17.3(a)(2)).

evaluations of Partially Effective constitutes exceptional circumstances. More specifically she points to (1) the overall practice scores of Effective for both years, (2) the increase in the overall SGO scores, and (3) and the resulting overall summative score for the second of the two year being only .03 below the requisite minimum for the Effective category. This argument fails for two successive but independent reasons. First, such calculations are not exceptional, instead being part and parcel of the overall process, which includes a whole host of carefully weighted factors specified in state law and District policy. Second, even if this particular pattern did qualify as an exceptional circumstance, the applicable law specifically delegates the matter—via the clear statutory language of "may defer"[67]—to school district discretion. Certainly in the context of a large state-operated district, this strict emphasis on teacher accountability and student achievement, does not constitute an abuse of that discretion.

**Observational Violations**

The Respondent targets three alleged fatal observer deficiencies in its second challenge: (1) the various observers' alleged violation of the requirement for annual training/competency; (2) the observers' alleged violation of the requirement to complete two observations annually; and (3) Whitzell's failure to review Chapman's observation rebuttal.

First, the aforementioned[68] regulatory requirement is for annual reporting that the supervisor-observers have completed training and demonstrated competency with regard to the teacher-practice instruments. Even if the regulation is interpreted to require annual training and competency, the evidence is sufficient that Chapman's observers received regular training and

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[67] *Id.*

[68] *See supra* note 57 and accompanying text (N.J. ADMIN. CODE § 6A:10-2.2(b)(5)).

exhibited competency in the Danielson instrumentation.[69] It is clear that proof does not come close to preponderant to fulfill one or more of the limited arbitral standards, such as arbitrary and capricious conduct, much less a resulting material effect on the Respondent's evaluation.[70]

Second, the aforementioned[71] regulatory requirement of two annual co-observations is expressly for the purpose of accuracy and training in scoring. Although the evidence is preponderant that none of the observers met this requirement in 2013-14,[72] for the two years at issue for Chapman's evaluation the only identified violation is for Whitzell; her co-observations were limited to one in 2014–15.[73] On balance, the evidence is preponderant that this violation did not materially affect the outcome of Chapman's 2015–16 evaluation, which was the year in which she conducted an additional, final observation at Chapman's request. Although her observation scores were lower than the other observers, the difference was relatively modest,[74] and this difference may be reasonably attributable to other factors, such as the acceptable range for inter-observer agreement,[75] Whitzell's district-wide perspective, and this observation's

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[69] The only evidence that Respondent identifies that arguably was to the contrary was the one-time completion of the Danielson proficiency exam. However, this exam was obviously for the initial threshold to perform observations, and competing it successfully at the end of the 2012–13 school year (e.g., Tr.-I at 48) is timely for purposes of conducting the observations at issue. The regular training of supervisors and administrators starting in December 2012 (Tr.-I at 23) and continuing the summers of the pertinent period (e.g., Tr.-II at 164) was certainly sufficient in the absence of any proof of nonproficiency.

[70] *See supra* note 61 and accompanying text (N.J. REV. STAT § 18A:6-17.2(a)).

[71] *See supra* note 57 and accompanying text (N.J. ADMIN. CODE § 6A:10-2.2(b)(4)).

[72] E.g., Tr.-I at 88; Tr.-II at 166.

[73] Tr.-I at 87–88. There is no evidence that the relationship of her scores with those of the co-observer indicated any inaccuracy or other lack of training, an area that the Respondent could have explored during the cross-examination.

[74] For the 1.0 to 4.0 scale, her domain 1 score was .1 less than the lowest other observer; for domain 2, the corresponding difference was .2; and for domain 3, it was .25. Petitioner exhibit 45. The principal was the major contributor for the final domain. E.g., Tr.-II at 240.

[75] Akin to the standard error of measurement for normed instruments such as MAP, inter-observer agreement is also known as interrater reliability, and its measurement does not have one consensus formula. E.g., KILEM LE GWET, HANDBOOK OF INTER-RATER RELIABILITY (2014).

unannounced status.[76] Additionally, she was a credible witness whose demeanor and testimony conveyed respectable professional expertise and diligence rather than any indication of evaluative bias or error with regard to the disputed observation. Finally, her extensive experience conducting the Danielson observations[77] and her reallocated responsibilities during 2015-16, upon her promotion to senior lead teacher,[78] mitigated the effect of her limited number of co-observations. Although this shortfall for the co-observation requirement is of concern and merits requisite attention, in this case it does not provide the basis for revising or reversing the summative evaluation for the second year, particularly in light of the statutory limitation of the arbitrator's authority in terms of the quality of an employee's classroom performance.[79]

The final alleged observation violation pertains to the regulatory requirement for any written teacher objections after the post-observation conference.[80] The Respondent characterizes the objections as "rebuttals" and claims that Whitzell's failure to review and respond to Chapman's timely objections circumvented their "entire purpose." However, the regulation does not express or imply the purpose of being a debate, requiring in effect a surrebuttal. Rather, it merely provides for a teacher to add her perceptions to those of the observer for review at the summative and any subsequent stages.[81] Although it would have been best practice for Whitzell to review and respond to Chapman's objections, the regulation does not require this action, and

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[76] For the regulatory requirements for announced and unannounced observations, *see supra* note 58 (N.J. ADMIN. CODE § 6A:10-2.4(c)). In the District for the 2015–16 school year, unannounced observations were additionally different due to their length—a minimum of 20 minutes compared to a minimum of 40 minutes for the announced observations. Tr.-I at 33.

[77] She had performed well over 100 such observations since 2013-14. Tr.-I, at 39.

[78] She conducted less observations n 2015–16 because her position required more time with curriculum and professional development. *Id.* at 88.

[79] *See supra* note 61 and accompanying text (N.J. REV. STAT. § 18A:17.2(c)).

[80] *See supra* note 58 and accompanying text (N.J. ADMIN. CODE § 6A:10-2.4(c)(6))

[81] There was no evidence that Corvi did not consider Chapman's side of the story or that Chapman raised the issue at or before her summative conference for 2015–16. Moreover, the contents of her objections largely amount to a difference of professional perception as to the quality of her performance, which—again (*supra* note 79)—is beyond arbitrator's authority.

its absence does not meet the applicable, restricted two-part standard,[82] such as being not only arbitrary and capricious but also prejudicial to Chapman's summative evaluation for 2015-16.

In sum, although the Respondent partly proved two of the three alleged observation deficiencies, neither one nor their combination met the requisite standard for reversal. They did not amount to substantial noncompliance, mistaken fact, or arbitrary and capricious conduct that materially affected the outcome of the Chapman's evaluation for 2014–15 and/or 2015–16.[83]

**2014–15 SGO**

The Respondent's final challenge presents a close call.[84] The factual basis for the challenge is relatively simple: (1) relying on the principal's training and assistance, Chapman and Colligan developed their joint SGOs for 2014–15 and submitted them to Corvi by the designated deadline in October; (2) Corvi promptly approved them; and (3) upon submission of the results of the SGOs in May, Corvi unilaterally rejected and revised them to scoring based on the students' RIT projected scores.

The preliminary part of analysis is to eliminate two distractors, or red herrings. First, the Respondent argues that, under the applicable regulations, "only a teacher" may initiate changes to his or her SGO and that no such changes are allowable after February 15, especially without

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[82] *See supra* note 61 and accompanying text (N.J. REV. STAT § 18A:6-17.2(a)).

[83] *Id.* There was no allegation with regard to the other statutory standard, which concerns various civil rights or "other conduct prohibited by State or federal law." *Id.*

[84] Although preponderant proof is indisputably applicable quantum, the evidence, however, is not so closely balanced as to be in "equipoise." *See, e.g.*, Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 58 (2005). Thus, burden of proof is not determinative for this issue, much less for the previous two issues. This situation is fortunate here because the TEACHNJ statute, although expressly putting the burden of persuasion on the District for the tenure charges, is not clear as to whether the teacher's burden to "demonstrate" one or more of the four arbitral standards signifies burden of production, burden of persuasion, or burden shifting. *See supra* note 61 and accompanying text (N.J. REV. STAT. § 18A:6-17.2(b) and *id.* § 18A:6-17.2(d)).

any written memorialization of the amendment."[85] Yet, the regulations expressly leave the final determination of the SGOs to the principal, and they establish a Feb. 15 deadline for adjustments "made by the teacher."[86] Thus, the regulations do not prohibit the administration from correcting an improper SGO at any time during the school year, with the inferable proviso of sufficient justification.[87] Moreover, notice is not the key in this case because Chapman received effective notice inasmuch as Colligan, as her delegated intermediary, immediately communicated the situation to her.

Second, in light of the commissioner's approval,[88] the Respondent's broad-based contention about the legality of the District's MAP assessment is, like any corresponding challenge to TEACHNJ, belongs in another forum. More specifically, the extent that the Respondent's challenge extends on a system-wide policy basis to TEACHNJ as applied via the District's use of MAP RIT projected scores, this issue, like the fairness or legality of TEACHNJ on its face, is either for the state legislature or the courts, which have been notably deferential to the defendants.[89]

Instead, a careful review of the evidence in relation to the applicable legislation and

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[85] Respondent's posthearing brief at 33. For the notice, Respondent alternatively relies on basic notions of fairness and due process, citing confirmation in the testimony from the District's evaluation director. *Id.* Yet, the evaluation director's testimony neither supported the limitation to written notice nor the limitation to Feb. 15. Tr.-I at 233–43.

[86] *See supra* note 56 and accompanying text (N.J. ADMIN. CODE § 6A:10-4.2(e)(2) and *id.* § 6A:10-4.2(e)(5)). However, contrary to the Petitioner's posthearing brief (at 14), the chief school administrator only determines the number of the SGOs. *Id.* § 6A:10-4.2(e)(1).

[87] In the absence of express specifications, this determination, as shown *infra*, ultimately depends on the circumstances, with due weight for objective and equitable considerations.

[88] *See supra* text accompanying notes 9–10. Although not finding it necessary to address this issue within the confines of this case, the arbitrator cannot help but wonder whether the MAP RIT projection system meets TEACHNJ's repeated and varied references to "multiple measures" in relation to student growth. N.J. REV. STAT §§ 18A:6-119 et al. The statute allocates this determination to the commissioner on an annual basis. *Id.* §§ 18A:6-122 and 18A:6-122. For subsequent years and less narrowly confined cases, this issue, if not resolved more definitively and defensibly, may well become the key in future arbitral or judicial proceedings.

[89] *See, e.g.*, Cook v. Bennett, 792 F.3d 1294 (11th Cir. 2015); Wagner v. Haslam, 112 F. Supp. 3d 673 (M.D. Tenn. 2015); State *ex rel.* Stapleton v. Skandera, 346 P.3d 1191 (N.M. 2015).

regulations reveals that resolving the SGO issue, within the ambit of the arbitral standards,[90] warrants in this case a two-step, flowchart-type objective analysis.[91] The first step is to determine the expectations for 2014–15 SGOs that a reasonable teacher would understand under the circumstances at Chapman's time and place. The second step is to determine whether Chapman's 2014–15 SGO fit within the reasonable range of those expectations.

For the first step, the conclusion is inescapable that the NWA turnkey training materials upon which the District relied were confusing and conflicting. The MAP system that projected RIT target scores for the post-testing based solely on pre-test scores came closer to the "misconceptions" identified in NWA's training slides[92] than the content of this training.[93] For example, the emphasis on SGOs being teacher-, rather than administrator-, driven lacks the nuance in the reality of state law and District policy.[94] Finally, the examples in the training materials and the principal's assistance were tiered,[95] thus interfering with the ultimate priority on individual RIT projected scores.[96] In contrast, the evidence about the other teachers at Chapman's school was a "wash," thus having no significant effect on reasonableness other than

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[90] *See supra* note 61 and accompanying text (N.J. REV. STAT. § 18A:6-17.2(b)). Contrary to the Petitioner's posthearing brief (at 16), if Chapman passed this two-step test, the material effect would be use of her unchanged SGOs, thus resulting in an Effective summative rating for 2014–15.

[91] This objective approach keys on reasonableness under the circumstances.

[92] *See supra* note 16.

[93]

[94] *See supra* text accompanying note 86.

[95] *See supra* notes 16 and 18.

[96] More specifically, while the final slide referred to the required SGO basis being RIT projected scores (*supra* text accompanying note 17), the preceding content referred to multiple initial sources rather than the MAP pre-test score for the baseline and showed unexplained averages per tier rather than the individual RIT projected scores (*supra* note 16). What is sorely missing for that year and not part of the training until 2015–16 (*supra* text accompanying note 35) is the basic template of a simple (i.e., nontiered) example showing the pre-test and, as otherwise available in the initial summary report, the projected MAP scores on an individual student-by-student basis.

failing to confirm the necessity of a narrow uniform understanding.[97] Thus, a reasonable range of expectations for a teacher in Chapman's circumstances, including the aforementioned[98] context of a transitional year with acknowledged inconsistencies,[99] was to produce SGOs with a tiered (or simple) format and based on RIT projected scores or target scores that were otherwise ambitious yet achievable.[100]

However, at the second step, rather than the purported formulation of the target scores based on Colligan's and Chapman's assessment of multiple sources after a month and a half of student data,[101] including tiers based on similar considerations,[102] the joint SGOs in reading and math were uniformly based solely on the MAP pre-test score, and the tiers for both SGOs were uniformly based on 10-point intervals.[103] Moreover, the target scores were uniformly and rather meagerly one point above the designated range for each tier.[104] As a result, their projected scores represented average gains of 5.3 points and 6.3 points and for reading and math, respectively,

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[97] On the one hand, Colligan testified that two other pairs of co-teachers at the school had submitted SGOs that were not based on RIT projected scores and that the Principal had similarly changed two of them. Tr.-I at 406–10. However, her testimony was generally not entirely credible, being replete with one-sided overstatement. Moreover, the Chapman's response to the charges and various prehearing discovery documents, including the required "list of witnesses with a complete summary of their testimony" (N.J. REV. STAT. § 18A:6A-17.1), did not provide any warning about this evidence or request for corroborating SGOs (e.g., Joint Exhibits 7–12), and the Respondent did not provide testimony or documentation from any of these four teachers. Completing the neutralization of this factor, the principal rather vaguely testified that he had no recollection of receiving and changing such SGOs. Tr.-II at 317–19. When the arbitrator tried to elicit clarification, including whether he his recollection was definitive or, instead, he did not recall either way, he ambiguously replied: "not so even to my vivid recollection." *Id.* at 319.

[98] *See supra* note 63 and accompanying text.

[99] *See supra* note 34 and accompanying text.

[100] This overall standard was reasonable inferable in the focus of TEACHNJ on "improved student outcomes, including objective measures of student growth" (N.J. REV. STAT. § 18A:6-118(b)); the District's state-operated particular priority on raising student achievement (*see supra* text accompanying note 4); and the training materials accurate use of these reasonably rigorous terms (*supra* note 16).

[101] Tr.-I at 377.

[102] Tr.-II at 338.

[103] *See supra* text accompanying note 19. The use of the pre-test MAP scores also contradicts Colligan's testimony that she could not access the RIT data. Tr.-I at 446. Colligan's assertions apply as well to Chapman based on her proxy-like reliance on Colligan for the formulation and communication of the SGOs during 2014–15. E.g., Tr.-II at 337 and 388–89.

[104] *See supra* text accompanying notes 20–21.

compared to the RIT projected scores corresponding average gains of 14.3 and 15.2 points.[105] The inescapable conclusion is that the targets in Chapman's 2014–15 SGOs, which amounted to well under half of the generally applicable targets, were much too achievable but far less than ambitious, thus not at all fitting in the reasonably expected range. For Chapman to rely on the principal's cursory acceptance of her SGOs, akin to equitable estoppel, is not sustainable in light of her equal lack of diligence.[106]

Finally, the arbitrator finds that neither the District's nor the teacher's actions within this two-step analysis were intentional or in bad faith. Rather akin to negligence, under either the standard of arbitrary and capricious conduct or that of mistake in fact,[107] Chapman ultimately negated her claim with a commensurate contribution via her lack of due care in implementing her part of the accountability process. As a matter of the applicable law, with due weight to considerations of equity, this close call cannot be fairly in her favor. The arbitrator is without authority to be an angel of mercy or to apply his views of educational effectiveness and accountability to the MAP system and the District's administration of it.

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[105] The arbitration calculated these results by (1) applying the target scores in the two SGOs (Petitioner's exhibits 11 and 13) to the students' pre-test scores in reading and math for 2014–15 (Petitioner's exhibit 16) and computing the corresponding averages of the "SP 15 Growth Projection" column in the same 2014–15 MAP summary report (*id*). Each entry in this column represents the difference between the pre-test score and the projected RIT score.

[106] Reflecting the lack of care, which further effectively lowered their SGO bar, the calculations included various errors. *See supra* notes 23 and 27.

[107] For the elimination of the other alternative arbitral standard that the Respondent raised, which is substantial adherence standard to the evaluation process, *see supra* notes 85–89 and accompanying text.

**Award**

In sum, after careful attention to the parties' arguments, the applicable law, and the case evidence, the arbitrator concludes that the District's tenure charges for inefficiency are sustained. The dismissal of Gerri A. Chapman is upheld.

Perry A. Zirkel, Arbitrator — 12/13/16 Date

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
ANGELA MARIE CARWELL
Notary Public
SOUTH WHITEHALL TWP., LEHIGH COUNTY
My Commission Expires Jan 27, 2017

Angela Marie Carwell

420-16

STATE BOARD OF EXAMINERS DOCKET NO. 1112-190
OAL DOCKET NO. EDE 09560-12
COMMISSIONER APPEAL NO. 1-2/16A

IN THE MATTER OF :
THE CERTIFICATES OF :
GAIL WUNSCH :

COMMISSIONER OF EDUCATION

DECISION

Denial of Interlocutory Review by the State Board of Examiners, January 11, 2016

For the Respondent-Appellant, William P. Hannan, Esq.

For the Petitioner-Respondent State Board of Examiners, Lauren A. Jensen, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) denying interlocutory review of the December 18, 2015 Order of the Administrative Law Judge (ALJ), which granted the Board's motion to exclude appellant's expert report and preclude the expert's testimony. On appeal, the appellant maintains that the Board's denial of her request for interlocutory review was arbitrary, capricious and unreasonable. Appellant also seeks reversal of the ALJ's decision to exclude her expert's report and testimony.

Appellant argues that – following receipt of the ALJ's decision on December 28, 2015 – she filed a timely request for interlocutory review with the Board on December 29, 2015, and her request was denied on January 11, 2016, on the basis that the Board lacked a quorum during its January 8, 2016 meeting to review the matter.[1] Appellant posits that such denial was arbitrary, capricious and unreasonable, and the Board abused its discretion by

[1] The Board noted in its denial letter that appellant's request was considered denied, pursuant to *N.J.A.C.* 1:1-14.10(c), since the Board did not act within ten days to determine whether to review the interlocutory appeal.

not extending the ten-day timeframe, pursuant to *N.J.A.C.* 1:1-14.10(g), to consider her request. The Board argues that its actions were in accordance with *N.J.A.C.* 1:1-14.10, and therefore, were not arbitrary, capricious, or unreasonable. The Board maintains that it intended to review appellant's request but was unable to do so because it lacked a quorum during its January 8, 2016 meeting. The Board further notes that it did not abuse its discretion with regard to the extension of timelines because in order for the timeframes to be extended, the Board would have had to act collectively – which it could not, due to lack of quorum at the January 8, 2016 meeting. Finally, the Board argues that appellant has failed to meet the standard for interlocutory review because there is no likelihood that such review would have an impact on the outcome of the case.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a). The record reflects that appellant's due process rights were denied throughout the proceeding before the Board. The Commissioner concludes that the Board's denial of interlocutory review – on the basis that it lacked a quorum to review appellant's request – deprived the appellant of her due process rights. The Board failed to consider the request due to administrative issues beyond appellant's control. Therefore, the Board's decision was arbitrary, capricious and unreasonable as the denial was not based on the substance of the request for interlocutory review. "Lack of a quorum" simply is not a legitimate basis for denying such requests.

*N.J.A.C.* 1:1-14.10(g) provides that the time limits set forth in the regulation "may be extended by the agency head where the need for a delay is caused by honest mistake,

accident, or any cause compatible with due diligence." The Board's lack of a quorum during its January 8, 2016 meeting relates to the issue of due diligence and certainly was an internal issue that should not have affected a party's due process rights. In this particular case – where appellant filed a timely request for interlocutory review, the Board failed to review the matter pursuant to *N.J.A.C.* 1:1-14.10(c) for lack of quorum, the extension of timelines would not have delayed the scheduling or conduct of hearings, and the next Board meeting was scheduled for January 21, 2016 – the proper course of action would have been to extend the ten-day time limit. Therefore, the Board also abused its discretion when it did not extend the ten-day time limit pursuant to *N.J.A.C.* 1:1-14.10(g).

Additionally, inclusion of the expert report would certainly have an impact on the outcome of the case because the authenticity of one of the documents is in dispute and appellant relies on the expert report to prove that both documents are authentic. Therefore, appellant met the standard for interlocutory review.

In her request for interlocutory review,[2] appellant argued that the ALJ erred in finding that the expert report relies on incorrect information and that it would not assist in determining a fact in issue, as the expert independently authenticated both documents. Appellant further argued that the ALJ erred in finding that the expert report constituted a "net opinion," and that excluding the expert's testimony was improper because the ALJ could have determined whether any weight should be given to the expert opinion *after* considering the testimony. Finally, appellant proffered that the expert report and testimony were critical to her defense, and should have been admitted as it did not unfairly surprise or prejudice the Board. In response, the Board maintains that the ALJ's exclusion of the expert report and testimony was proper because

[2] A copy of the letter brief in support of appellant's Motion for Interlocutory Review has been submitted to the Commissioner.

the report was untimely and the ALJ is allowed to exclude evidence for failure to fulfill procedural requirements. The Board also argues that the report constitutes a "net opinion" and is inadmissible because the expert made bare conclusions and failed to provide sufficient information to support his opinion. Additionally, the Board argues that the report is based on inaccurate information and does not concern any fact at issue in this case.

With regard to the ALJ's decision to exclude appellant's expert report and testimony, which appellant intended to rely on to rebut the Board's testimony that the Teacher of Elementary School Certificate was fraudulent, the ALJ found: the expert report relied on incorrect information and did not address the fact in issue, *i.e.* whether the disputed certificate was authentic; the expert report was a "net opinion" because it relied on unfounded speculation and reached a bare conclusion without explaining the methodology; the expert was not timely identified during discovery and the evidence was non-pivotal to the fact in issue and, thus, admission of the expert report and testimony would unfairly surprise and prejudice the Board. The Commissioner disagrees with the ALJ's findings and conclusions.

As a preliminary matter, the Commissioner finds procedural deficiencies in the determination that the expert report and testimony were inadmissible. *N.J.A.C.* 1:1-15.9 provides in relevant part that expert testimony is admissible if such testimony will assist the fact-finder to understand the evidence or determine a fact in issue, and the fact-finder determines whether the expert opinion or inferences are "[b]ased on facts and data perceived by or made known to the witness at or before the hearing; and within the scope of the special knowledge, skill, experience or training possessed by the witness." *N.J.A.C.* 1:1-15.9 further provides, "[a] witness may be required, before testifying in terms of opinion or inferences, to be first examined concerning the data upon which the opinion or inference is based." Similarly, pursuant to *N.J.A.C.* 1:1-15.1,

when the "qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, the judge shall hold a preliminary inquiry to determine the issue." *N.J.A.C.* 1:1-15.1 mirrors *N.J.R.E.* 104, which requires the trial judge to make a preliminary determination pertaining to the admissibility of proffered evidence when there is an issue or dispute pertaining to the admissibility of evidence. A preliminary hearing is also utilized to determine the reliability of scientific testing relied upon by an expert. *See Kemp ex rel. Wright v. State*, 174 *N.J.* 412 (2002). The expert can be questioned on his data and methodology, and the relevancy and reliability of the proffered evidence can then be appropriately considered by the fact-finder. *See N.J.A.C.* 1:1-15.9; *N.J.R.E.* 702. Therefore, the proper procedure would have been to conduct a preliminary hearing as to the admissibility of the evidence, which would allow the ALJ to explore and address any concerns about the expert's methodology, and then give the expert opinion the weight deemed appropriate.

The expert conducted an examination and analysis of both documents, and opined that both documents were authentic. As such, the expert opinion, if accepted, would assist the ALJ in determining a fact in issue – whether the Teacher of Elementary School Certificate is authentic. It is evident that the expert mixes up the two certificates in Exhibits 1 and 2. Whether this confusion is the result of misinformation from appellant's counsel or a misunderstanding by the expert is not relevant to the expert's conclusion because there is no dispute concerning the authenticity of one of the documents, and the expert's report suggests that his opinion is based on independent testing and comparison of the two documents. To the extent the expert's confusion may be relevant to his conclusion, it can be appropriately explored and clarified during a preliminary hearing. No such inquiry was made by the ALJ before excluding the expert report

and testimony; therefore, finding that the evidence would not assist in determining a fact in issue was improper.

The net opinion rule allows exclusion of expert opinion if it is not based on "facts or data." *See N.J.R.E.* 702. An expert's opinion is construed as net opinion and deemed inadmissible when the expert makes bare conclusions, unsupported by factual evidence or other data. *See State v. Townsend*, 186 *N.J.* 473 (2006). Here, the expert purportedly conducted independent review of the two documents and opined on the authenticity of both. Therefore, the uncertainty over whether the expert's opinion was based on such data or on facts provided by the respondent's attorney, should have been explored as part of the ALJ's preliminary inquiry into the expert's qualifications, the methodology and tests used, the significance of each test, the expert's analysis, and the facts relied upon by the expert. No such opportunity was provided to the expert to explain his findings, the tests performed, or the methodology used. Without such inquiry, the expert report and testimony – which appear to be based on independent testing and analysis – were prematurely disqualified as net opinion.

The Commissioner further disagrees with the ALJ's exclusion of the expert report and testimony on the basis that it was untimely, not pivotal to the fact in issue, and that it would unfairly surprise and prejudice the Board. The Initial Decision relies on *Wymbs v. Twp. of Wayne*, 163 *N.J.* 523 (2000) in excluding the expert report and testimony. In *Wymbs*, the Court found that exclusion of the surprise witness was the only option because "[t]he surprise to the plaintiffs was real, the State's conduct was inexcusable, and the prejudice to plaintiffs irreparable. A continuance was not a viable option because plaintiffs had tried their case for twelve days, believing the State would offer no testimony." *Id.* at 545. Here, the appellant provided a copy of the expert report to her adversary on the morning of the first day of trial,

May 14, 2014, and the next scheduled hearing was on June 2, 2014. The surprise to the Board in this case was, therefore, vastly different. The Board not only had an opportunity to review the expert report between the two trial dates, but the ruling to exclude the report and testimony was also not made until over a year and a half later.

Additionally, there is no evidence that appellant sought an advantage over the Board by presenting the expert report, dated May 13, 2014, to her adversary on May 14, 2014. In *Wymbs*, the Court noted, "[f]actors that would 'strongly urge' the trial judge, in the exercise of his discretion, to suspend the imposition of sanctions, are (1) the absence of a design to mislead, (2) absence of the element of surprise if the evidence is admitted, and (3) absence of prejudice which would result from the admission of the evidence." *Id.* at 544. It does not appear that appellant intended to mislead her adversary or the tribunal. Nor is there any element of "real" surprise in this case because, unlike *Wymbs*, appellant presented the expert report before trial started and made it clear that she intended to rely on the expert's testimony. There would not have been any prejudice to the Board from admission of the expert report and testimony at the time because the parties would have had the opportunity to consider and rebut the proffered evidence in time for the next hearing date.

Finally, when the "testimony in question is 'pivotal' to the case of the party offering the testimony, a court should seek to avoid exclusion where possible." *Id.* It is clear that the expert report and testimony are pivotal to appellant's case and the opinion was essential to appellant's defense of her position, as it is intended to resolve a fact in dispute and is the only support for appellant's claim that the Teacher of Elementary School Certificate is authentic. Therefore, exclusion of the evidence as a form of sanction was improper in this matter.

In sum, determining the admissibility of expert testimony requires the fact finder to first deem the witness qualified to proffer testimony as an expert. Once qualified, the fact finder must determine whether the testimony is relevant to the issues in the case, based upon sufficient facts or data, and whether the principles and methods used are reliable. Whether an expert opinion deserves any deference – or determining how much weight should be afforded to an expert's opinion – is a separate issue, and should not have any bearing on the admissibility of the opinion. The ALJ, therefore, erred in excluding the expert report and testimony without conducting a preliminary hearing into the admissibility of the evidence. *See N.J.A.C.* 1:1-15.1 and *N.J.R.E.* 104.

Accordingly, for the reasons expressed herein, the ALJ's decision to exclude appellant's expert report and testimony is reversed and the matter is remanded to the OAL for further proceedings in accordance with this opinion.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/14/16

Date of Mailing: 12/15/16

422-16

| | | |
|---|---|---|
| G.P. and I.R.-P., on behalf of minor child, A.P, | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

*Pro se* petitioners filed an appeal of the determination of the respondent Board that their child, A.P., was not entitled to a free public education in Hamilton Township schools for the 2015-2016 school year. Petitioners further appealed the Board's associated tuition claim for the period of A.P.'s ineligible attendance. Petitioners asserted that they share custody of A.P., with the child's time equally divided between G.P. – who is domiciled in Hamilton Township – and I.R.-P., who resides in Trenton. The Board contended that the results of a residency investigation proved that A.P. did not reside in Hamilton. Accordingly, the Board sought tuition reimbursement for the period from October 23, 2015 to March 16, 2016 – when petitioners filed a consent order in the Superior Court of New Jersey that designates Hamilton as the district of residency for education purposes.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; in the instant case, the provisions of *N.J.A.C.* 6A:22-3.1(a)1ii apply, and state that in equal-time parenting situations where no court order or written agreement exists between the parents designating the school district of attendance, "the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date; although petitioners' behavior indicates the existence of an agreement between them as to A.P.'s district of residence, the regulation explicitly calls for a court order or written agreement, which was not in place until the entry of the Consent Order in March 2016; on the last school day prior to October 16, 2015, A.P.'s domicile was I.R.-P.'s home in Trenton. The ALJ concluded that A.P. was not entitled to a free public education in Hamilton Township schools until the entry of the court order on March 16, 2016. Accordingly, the ALJ ordered that the Board's residency determination be affirmed, and ordered petitioners to pay respondent tuition in the total amount of $5,891.70 for the period of A.P.'s ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 12/15/16

OAL DKT. NO. EDU 02621-16
AGENCY DKT. NO. 23-2/16

| | | |
|---|---|---|
| G.P. and I.R.-P., on behalf of minor child, A.P, | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] Petitioner, I.R.-P., filed exceptions.[2]

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioners failed to sustain their burden of establishing that A.P. was a domiciliary of Hamilton between October 26, 2015 and March 16, 2016. The Commissioner further concurs with the ALJ's conclusion that A.P. was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Board is entitled to tuition reimbursement in the amount of $5,891.70 ($71.85 per day for eighty-two days) for the time period from October 26, 2015 and March 16, 2016,[3] during which time A.P. was ineligible to attend, as detailed in the ALJ's Initial Decision.

[1] The Commissioner was not provided with a transcript of the July 6, 2016 hearing at the OAL.

[2] I.R.-P.'s exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4. Additionally, there is no indication that I.R.-P's exceptions were served upon the Board and G.P. Accordingly, the exceptions were not considered by the Commissioner. However, with regard to the concerns raised by I.R.-P. about payment of tuition, the Commissioner notes that both G.P. and I.R.-P. are liable for the assessed tuition, and it is the responsibility of the parties to determine the schedule and method of remittance.

[3] The Initial Decision notes that between October 26, 2015 and March 16, 2016, there were eight-five school days held, but the Board was willing to revise the days down to eighty-two school days because of a concern raised by petitioner, G.P., over the number of school days in January.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioners are directed to reimburse the Board in the amount of $5,891.70 for tuition costs incurred during the time period that A.P. was ineligible to attend school in Hamilton. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 422-16

Date of Mailing: 422-16

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 02621-16
AGENCY REF. NO. 23-2/16

**G.P. AND I.R.-P., ON**
**BEHALF OF MINOR CHILD, A.P.,**
Petitioners,
v.
**BOARD OF EDUCATION**
**OF THE TOWNSHIP OF HAMILTON,**
**MERCER COUNTY,**
Respondent.

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**G.P.** and **I.R.-P.,** on behalf of minor child, **A.P.,** petitioners, pro se

**Christopher B. Parton,** Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: July 6, 2016 Decided: October 28, 2016

BEFORE **ELIA A. PELIOS**, ALJ:

## STATEMENT OF THE CASE

Petitioners, G.P. and I.R.-P., on behalf of minor child, A.P., appeal the residency determination and tuition due associated with same, of the Board of Education of the

Township of Hamilton, Mercer County (respondent, Board), disallowing their minor child, A.P., from attending public school within the respondent's school district. The Board seeks to remove A.P., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demands tuition reimbursement.

## PROCEDURAL HISTORY

G.P. and I.R.-P. filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, appealing respondent's determination that A.P. did not reside in the District, and lived in Trenton, New Jersey. On February 19, 2016, the Board filed an answer, motion for dismissal, and cross-petition for assessment of tuition. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 23, 2016, for determination as a contested case pursuant to N.J..A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to –15. A hearing was held on July 6, 2016, and the record closed.

## STATEMENT OF FACTS

G.P. and I.R.-P. are the divorced parents of minor child A.P. While G.P. and I.R.-P. were married, the family resided together in Hamilton Township, Mercer County. After they divorced, G.P. remained in the house in Hamilton and I.R.-P. now resides in Trenton. The parents' divorce decree (J-3) calls for joint custody of A.P. with her time equally divided between G.P. and I.R.-P. For the 2015-2016 school year, A.P. was enrolled in third grade in the Hamilton Township School District. The Board completed a residency investigation On October 23, 2015, and conducted a residency hearing on November 30, 2015. Respondent filed its notice of final determination of ineligibility on January 6, 2016, determining that A.P. does not reside in the Township of Hamilton. In March of 2016, petitioners filed a consent order in the Superior Court of New Jersey, designating respondent District as the district of residency for education purposes. Respondent does not dispute this order, acknowledges that A.P. is entitled to attend Hamilton public schools as of the entry of that order, and limits the tuition reimbursement sought to the period of October 23, 2015, to March 16, 2016. Although this represents eighty-five school days, respondent has amended its request to eighty-two days to account for confusion over

possible weather-related closings, when the issue was raised by petitioners. The tuition rate of reimbursement as filed with the State is $71.85 per day.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Michael Celentana (Celentana) testified on behalf of the respondent. He has been employed by the respondent as a residency investigator for eight years. Celentana received a referral for suspicion of an out-of-district student with regard to the current matter. He described his process as performing surveillance on the property where the student resides or is alleged to reside, and writing a report of his findings. He acknowledged performing an investigation involving A.P. for the school year 2015-2016.

Celentana stated that he usually has six or seven open investigations at any one time, maybe as many as ten. He does not perform surveillance on every student on every day. He consults the school calendar for guidance in deciding what days to perform surveillance. He identified the 2015-2016 Hamilton Township School District Calendar (R-1). He noted that January 14, 2016, was crossed-out, and that a make-up day was held on May 31, 2016.

Celentana identified and referred to his investigation report (J-1, Exhibit 2). He indicated that he performed his investigation surveillance over the period of time from October 2, 2015, to October 20, 2015, during which thirteen school days were held. Celentana performed surveillance of A.P. on nine of the thirteen school days during that time. He noted that of the nine days, on October 2, 2015, he was performing surveillance at A.P.'s father's house and did not observe A.P.; the rest of the days he did observe A.P. while at her mother's house. He made a conclusion that A.P. lives in Trenton with her mother. Celentana performed two surveillances in the morning, observing the time that A.P. would be expected to leave to go to school, and confirmed her attendance in school on those days. He noted that there were no other investigators covering the present matter.

I. R.-P., the mother of A.P., testified on behalf of the petitioners. She stated that she does not understand the importance of October 15, 2015. She expressed concern that all the days that were listed for observation were days during which she was expected to have custody of A.P. She notes that A.P. spends the night every other weekend with her. She

does not have $6,000 to pay the tuition, and already has to pay alimony. On cross-examination, I.R.-P. acknowledged that she did remember discussing the test for residency at the Board hearing, and noted that she understood that where A.P. is in the morning is likely to be where she had spent the night.

G. P. also testified on behalf of the petitioners. He is A.P.'s father. With regard to the divorce decree (J-3), he stated that he believed it is just a guideline that is subject to change, and that they do not need to go to court when they are in agreement to alter where A.P. spends the night on a particular night. He does note that part of the consent decree includes a memorandum of understanding which calls for equal parenting. He also questioned how Celentana, in the course of conducting ten cases, is to observe all the students he is investigating.

Mr. Celentana was recalled by petitioners. He stated that the only surveillance technique that he uses is visual observation. He stated that A.P. attends Kuser Elementary School, one of twenty-three schools located in the District. Not all the schools are elementary schools, and all the school do not start at the same time. Celentana noted that high school starts early in the morning at 7:55 a.m., while Kuser Elementary School does not start until 8:50 a.m.; because of this he was able to conduct multiple investigations concurrently.

With regard to the cross-claim for tuition, the District relied upon documents that had been admitted into evidence, including the school calendar (R-1) and the initial notice(J-1) in which the tuition assessment was made known and the per diem rate identified on page two. Respondent also relied on the final notice (J-2) which identifies the per diem rate and the possible tuition assessment. Noting that as per Celentana's report (J-1, Exhibit 2), the investigation concluded on October 23, 2015, the District conceded that on March 16, 2016, A.P. became eligible to attend the Hamilton Township schools. Referring to the school calendar (R-1), between October 26, and March 16, 2016, there were eighty-five school days held. The Board is willing to revise down to eighty-two days, based on a concern raised by petitioner G.P. over days in January which may or may not have been made-up subsequently.

## FINDINGS OF FACT

The facts are essentially not in dispute in this matter. Having heard the testimony presented at the hearing, and having reviewed the documentary evidence, I additionally **FIND** that Celentana observed A.P. depart her mother's home in Trenton on the following days that she was confirmed to be in attendance in the Hamilton School District:

Monday, October 5, 2015
Tuesday, October 6, 2015
Friday, October 9, 2015
Monday, October 12, 2015
Tuesday, October 13, 2015
Friday, October 16, 2015
Monday, October 19, 2015
Tuesday, October 20, 2015

I further **FIND** that A.P. had spent the night immediately preceding the above-listed dates at her mother's home in Trenton, New Jersey.

## CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. N.J.A.C. 6A:22-3.1 provides that :

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.

> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
>    i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
>    ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

Petitioners' Final Judgment of Divorce (J-3) includes a memorandum of understanding (MOU) which contains the following provisions:

> The parties agree the mother shall share time with [A.P.] every Monday and Thursday overnight as well as every other weekend from Friday to Monday. The father shall share time with [A.P.] every Tuesday and Wednesday overnight as well as every other weekend from Friday to Sunday.

The record reflects that Celentana only observed A.P. at her mother's house in Trenton on Monday, Tuesday, and Friday mornings. The MOU dictates that A.P. will sleep at her mother's every Sunday, Monday, and Thursday evening. So while Celentana and the Board contend that since she was observed a total of eight times in thirteen school days during the investigation, and that A.P. lives with her mother more than with her father, such argument fails in light of the fact that every observation by Celentana of A.P. was consistent with the terms of an MOU which the Board stipulated provides for even parenting time split down the middle between G.P. and I.R.-P.

Accordingly, we must look to the provisions of N.J.A.C. 6A:22-3.1(a)1ii which state that in equal-time parenting situations "the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date," in the absence of court order or written agreement between the parents designating the school district of attendance.

The last school day prior to October 16, 2015 was Thursday, October 15. The MOU renders it likely that A.P. woke up at her father's house in Hamilton that day and the record reflects she spent the night at her mother's in Trenton. In Board of Education of the Borough of Lodi v. Board of Education of the Township of Rochelle Park, OAL Dkt. No. EDU 20236-15 (Initial Decision, June 10, 2016, adopted July 21, 2016), Administrative Law Judge Ellen Bass concluded that it is reasonable to deem the home a child returns to on any given day the home in which he "resides" on that particular day.

Although petitioners' behavior certainly seems to indicate the existence of an agreement between them as to A.P.'s district of residence, the regulation explicitly calls for a court order or a written agreement, neither of which has been provided. Considering the foregoing, I am constrained to **CONCLUDE** that until the entry of the Consent Order in March 2016, A.P.'s domicile on any given day is to be determined in accordance with the provisions of N.J.A.C. 6A:22-3.1(a)1ii, and that on the last school day prior to October 16, 2015 A.P.'s domicile was her mother's home in Trenton. I further **CONCLUDE** that she was therefore not entitled to a free public education in the Hamilton Township schools until the entry of that Consent Order. The Board's residency determination should be **AFFIRMED,** and the petitioners' appeal **DISMISSED**.

With regard to the Board's cross-claim for tuition, I **CONCLUDE** that the Board is entitled to reimbursement of residence tuition in the amount of $71.85 per day for eighty-two days for a total of $5,891.70.

## DECISION AND ORDER

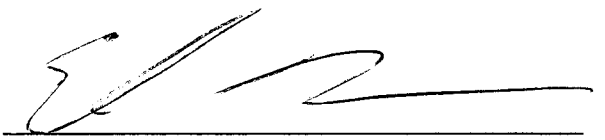
It is, therefore, **ORDERED** that the Board's determination be **AFFIRMED** and that petitioners pay respondent tuition in the total amount of $5,891.70 for unauthorized

attendance in the District schools for the periods stated above. Petitioners' appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



October 28, 2016
DATE

**ELIA A. PELIOS**, ALJ

Date Received at Agency: October 28, 2016

Date Mailed to Parties: 10/31/16

nd

## APPENDIX

## WITNESSES

**For Petitioner:**

G.P.

I.R.-P.

**For Respondent:**

Michael Celentana

## EXHIBITS

**Jointly:**

J-1 Transcript of the State of New Jersey, Hamilton Public Schools Residency Hearing, Commencing Monday, November 30, 2015

J-2 Hamilton Township Public Schools, Central Registration, Notice of Final Determination of Ineligibility, dated January 6, 2016

J-3 Superior Court of New Jersey, Chancery Division-Family Part, Mercer County, Final Judgement of Divorce, Docket No. FM-11-43-15B, filed March 9, 2015

**For Petitioner:**

P-1 None

**For Respondent:**

R-1 Hamilton Township School District, 2014-2016 Pupil/Teacher Calendar, Board Approved January 28, 2015, Revised Testing Dates July 23, 2015, September 1, 2015

423-16

OAL DKT. NO. EDU 08352-16
AGENCY DKT. NO. 130-5/16

| | | |
|---|---|---|
| RALPH SALVATORE, | : | |
| PETITIONER, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION ON |
| BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, | : | APPLICATION FOR EMERGENT RELIEF |
| RESPONDENT. | : | |

The record of this emergent matter and the recommended Amended Order of the Office of Administrative Law (OAL) have been reviewed.[1] Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.[2] Specifically, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Amended Order – that petitioner has failed to demonstrate that he will suffer irreparable harm absent emergent relief. As petitioner must demonstrate all four *Crowe* factors in order to warrant emergent relief, the Commissioner need not make a determination on the remaining three factors.

Accordingly, the recommended Amended Order of the OAL – to the extent that it denies petitioner's application for emergent relief – is adopted. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/15/16

Date of Mailing: 12/15/16

[1] There was no oral argument on this emergent matter.

[2] The Board's cross motion to compel petitioner to be examined by the Board's doctor was not filed as a motion for emergent relief, and will therefore not be addressed in this opinion.

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON MOTION FOR EMERGENT RELIEF**
OAL DKT.NO. EDU 08352-16
AGENCY DKT. NO. 130-5/16

**RALPH SALVATORE,**
Petitioner,
v.
**WEST ORANGE BOARD OF EDUCATION**
**ESSEX COUNTY.**
Respondent.

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**Aileen Driscoll**, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman)

**Bradley Tishman,** Esq., for respondent West Orange Board of Education (Cleary, Giacobbe, Alfieri Jacobs, LLC.)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, Ralph Salvatore, (Salvatore) filed a petition demanding the West Orange Board of Education (Board) return him to work and restore his sick time for the period of time he was placed on involuntary sick leave. The matter was transmitted to the Office of Administrative Law (OAL) and filed on June 6, 2016. On September 16, 2016, petitioner filed a motion for a temporary restraining order compelling the Board to reinstate petitioner to his position and enjoin the board from compelling petitioner to be

examined by the Board's doctor. The motion was requesting emergent relief. Respondent filed a response to petitioner's motion on September 20, 2016. I denied the motion on September 22, 2016 because it was not filed with the Department of Education. Petitioner refiled her motion with the Department of Education. That motion is now before me. Respondent filed a reply to the motion on October 12, 2016. A hearing is scheduled to begin on December 6, 2016.

Petitioner was placed on Administrative Leave on January 7, 2016. He was required to undergo a fitness for duty exam with Dr. Mario Finkelstein on January 13, 2016. Dr. Finkelstein's report of January 20, 2016 found petitioner unfit to return to work and recommended petitioner undergo weekly psychotherapy with a cognitive behavioral therapist for twelve weekly sessions and return to him for reassessment. Petitioner's Administrative Leave time ended on February 4, 2016. Beginning February 8, 2016 through March 29, 2016 petitioner utilized sick leave and personal days. Petitioner treated with Mary Culley, LCSW having twelve sessions in approximately seven weeks. Petitioner utilized donated sick leave from March 30, 2016 through the end of the 2015-2016 school year.

The Board would reinstate petitioner once he was cleared by its doctor, Dr. Finkelstein. Petitioner's doctor, Dr. Gollin states that petitioner is fit for duty. Respondent will not reinstate petitioner until he is cleared by Dr. Finkelstein. Petitioner has not been to Dr. Finkelstein for a reevaluation. Respondent will continue to pay petitioner and provide medical benefits to him as if he is an active employee, without imposing any sick days or any type of unpaid leave days to his attendance record pending the outcome of this matter. Petitioner is requesting emergent relief. Petitioner alleges that he meets the criteria for emergent relief set for in Crowe v. DeGoia 90 NJ 126,132-134(1982)

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe v. Degoia test.

In this matter petitioner has not succeeded in the irreparable harm prong of the test. Petitioner has previously been examined by Finklestein. There is no irreparable harm in petitioner being examined by a doctor who has previously examined him. In addition petitioner will be paid as if he was an active employee pending the outcome of this matter.

The petitioner has not established that there is a likelihood of prevailing on the merits. Respondent cited two similar cases in his response Chambers v. Pleasantville Board of Education EDU-8498-97, Initial Decision (May 1, 1998) adopted, Comm'r (June 18, 1998) <http://lawlibrary.rutgers.edu/oal/search.html> and Diaz v. Board of Education of the Township of Milburn,EDU-01751-09, Initial Decision (March 2, 2010) adopted Comm'r (August 27, 2010) <http://lawlibrary.rutgers.edu/oal/search.html> In both cases the petitioner refused to submit to a reexamination by the physician who performed the initial evaluation. Those petitioners' appeals were both dismissed.

I **CONCLUDE** that petitioner did not meet the Crowe v. DeGoia standards.

## ORDER

Based on the foregoing, it is **ORDERED** that petitioner's request for emergent relief is denied. If is further **ORDERED** that petitioner's motion for temporary restraints is **DENIED**.

It is further **ORDERED** that respondent pay petitioner and provide medical benefits to him as if he is an active employee, without imposing any sick days or any type of unpaid leave days to his attendance record pending the outcome of this matter.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 17, 2016

DATE

**KIMBERLY A. MOSS**, ALJ

ljb

424-16

**STATE OF NEW JERSEY COMMISSIONER OF EDUCATION**

| | | |
|---|---|---|
| IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE | :: | DOE DOCKET NO. 119-4/16 |
| between | :: | |
| **SCHOOL DISTRICT OF THE CITY OF BURLINGTON, BURLINGTON COUNTY** | :: | |
| Petitioner, | :: | **OPINION** |
| -and- | :: | **AND** |
| **PENNY KEOUGH,** | :: | **AWARD** |
| Respondent | :: | |

**BEFORE:** Michael J. Pecklers, Esquire, Arbitrator

**DATE(S) OF HEARING:** November 1, 2016; November 15, 2016; November 16, 2016

**RECORD CLOSED**: December 5, 2016 (Post-hearing briefs)

**DATE OF AWARD**: December 15, 2016

**APPEARANCES:**

For the Petitioner:

John B. Comegno, II, Esquire, COMEGNO LAW GROUP, P.C.
Alicia D. Hoffmeyer, Esquire, "
Patricia Doloughty, Ed.D., Superintendent of Schools
Susan Kirk, Bookkeeper/Health Benefits [November 1, 2016]
Raymond Coxe, School Business Administrator
Ingrid Walsh, Asst. School Business Administrator [November 16, 2016]

For the Respondent:

Alan H. Schorr, Esquire, SCHORR & ASSOCIATES
Adam Schorr, Esquire, "
Penny Keough, Respondent
Frederick L. Ballet, M.D. [November 15, 2016]

## I. BACKGROUND CONSIDERATIONS

At all times that are relevant for the purposes of this proceeding, Penny Keough was employed as an Administrative Assistant/Payroll Secretary by the City of Burlington School District Board of Education, having held this position since December 1, 2011. By operation of law, she became tenured in this position as of December 2, 2014. On April 8, 2016, Superintendent of Schools Patricia T. Doloughty, Ed.D. filed tenure charges against Ms. Keough pursuant to N.J.S.A. 18A:6-10-11, alleging conduct unbecoming, incapacity, and other just cause. At its meeting of April 25, 2016, the Board of Education determined that the tenure charges and the evidence in support of the same were sufficient, if true, to warrant dismissal or a reduction in salary. By roll-call majority of the full membership, the Board thereafter voted to certify the tenure charges and suspend Ms. Keough from her position without pay for 120 days. See CERTIFICATE OF DETERMINATION by School Business Administrator/Board Secretary Coxe, dated April 26, 2016.

On April 27, 2016, M. Kathleen Duncan, Director Bureau of Controversies and Disputes, acknowledged receipt of the charges on behalf of the New Jersey State Department of Education. The boilerplate checklist advised Ms. Keough that she was required to file a written response to the same within 15 days, per N.J.A.C. 6A:3-5.3, 6A:3-5.4(f). On May 3, 2016, counsel for Respondent Alan H. Schorr, Esquire of SCHORR & ASSOCIATES, P.C. sent a representation letter to David C. Hespe, then-Commissioner of Education. This respectfully requested

that the Commissioner stay the tenure proceedings per Winters v. North Hudson Regional Fire & Rescue, 212 N.J. 67 (2012), pending the outcome of a New Jersey Superior Court, Burlington County, action that had been filed that same date. The complaint in that matter alleged inter alia, violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq. by the District.

On May 5, 2016, Ms. Duncan sent a correspondence to counsel, which acknowledged the May 4th receipt of the Respondent's Motion for a Stay. She went on to advise that within 7 days the Petitioner should file a response, with a reply by Respondent within 3 days. John B. Comegno, II, Esquire of the COMEGNO LAW GROUP, P.C. formally opposed the motion on behalf of the District, filing a letter brief. Mr. Schorr's May 16th reply was received by Controversies and Disputes on May 17, 2016. Then-Acting Commissioner Peter Shulman denied Respondent's request for a stay in a May 26, 2016 letter to the parties, principally citing the fact that the irreparable harm requirement of Crowe v. DeGioia, 90 N.J. 126 (1982) had not been satisfied. Mr. Shulman further concluded that Respondent had misread the import of Winters, and directed that an Answer to the tenure charges be filed within 10 days.

Mr. Schorr responded to Mr. Shulman on May 31, 2016, reporting that he had only just received the May 26th letter and requesting an additional 30 days so that an application for a stay could be made in Superior Court. On June 2, 2016, Ms. Duncan notified Mr. Schorr that his May 31, 2016 letter did not say that he attempted to obtain the consent of his adversary. She closed by stating,

"[w]hether he consents or not, please be advised that a 30-day extension will extend the 120-day period without pay pursuant to N.J.S.A. 18A:6-14. By copy of this letter I am requesting that Mr. Comegno promptly advise of any opposition to the request." Counsel for Petitioner indicated his opposition to Respondent's application that same date, while underlining that the purpose of the tenure reform laws was to streamline tenure cases.

Mr. Schorr again wrote to Mr. Shulman on July 1, 2016, informing him that as the Appellate Division's June 28, 2016 ORDER had denied the stay, Ms. Keough would be filing an ANSWER to the tenure charges no later than July 6, 2016. This was done on July 5, 2016. In a July 7, 2016 letter, Mr. Comegno responded to a July 6, 2016 email from Ms. Duncan, wherein counsel were requested to advise her of the status of Respondent's NOTICE OF MOTION seeking an emergent stay and leave to file an interlocutory appeal, filed on June 8, 2016. This recited the foregoing facts of the denial and emphatically requested that an arbitrator be assigned within the statutory time frame so that the matter could proceed.

On July 18, 2016, Ms. Duncan notified me that I had been appointed to serve as the Arbitrator in the case pursuant to *P.L. 2012, c. 26.* A conference call was conducted with counsel on July 28, 2016, with a correspondence sent afterwards memorializing the agreed upon discovery schedule, which included the propounding of interrogatories as well as a document exchange. Hearings were additionally set down for August 31, 2016 and September 12, 2016.

However, prior to the initial hearing, on August 30, 2016, the New Jersey Supreme Court granted temporary, emergency relief, staying the August 31, 2016 hearing. See SINGLE JUSTICE DISPOSITION ON APPLICATION FOR EMERGENT RELIEF (Rule 2:9-8) by Justice Timpone.

This led to the cancellation of the hearing on the 31st, and when no further notice by the Court was received the September 12th hearing as well. On September 19, 2016, Mr. Schorr wrote to report that the Court had apparently ruled on September 12, 2016 that the emergency stay was vacated, with a copy of the ORDER enclosed. After offering additional hearing dates to the parties on September 20, 2016 that were not mutually acceptable, a conference call was held which resulted in the selection of a number of dates.[1]

Hearings were held at the City of Burlington Board of Education, 518 Locust Avenue, Burlington, New Jersey, on November 1, 2016 and November 16, 2016. An additional hearing was also convened on November 15, 2016 at the Offices of SCHORR & ASSOCIATES, 5 Split Rock Drive, Cherry Hill, New Jersey, in order to accommodate Dr. Ballet whose offices were located nearby. All hearings proceeded in an orderly manner, and at that time counsel were provided with a full opportunity to introduce relevant and admissible documentary

1/ An additional conference call was conducted on October 11, 2016 in order to entertain Respondent's request for an Order to conduct a *de bene este* deposition of Dr. Ballet, which would obviate the need for live testimony and was opposed by Petitioner. My letter of that same date denied this motion based upon N.J.S.A. 18A:6-17.1, but requested that Mr. Schorr provide a draft affidavit to Ms. Hoffmeyer in order to explore the possibility of Dr. Ballet certifying the authenticity of Ms. Keough's medical records. Ultimately, there was no agreement on a stipulation and Dr. Ballet testified at the November 15th hearing.

evidence; to engage in oral argument; and to undertake the direct and cross-examination of witnesses who testified under oath. A verbatim transcription of the proceedings was provided by MASTROIANNI & FORMAROLI, INC., with the transcripts identified as TI (11/1/16); TII (11/15/16); TIII (11/16/16).

At the conclusion of the November 1, 2016 hearing, Respondent made a motion to restore Ms. Keough's salary effective November 9, 2016, pursuant to N.J.S.A. 18A:6-14. The parties were directed to submit their positions in writing, resulting in the issuance of a November 11, 2016 INTERIM AWARD & ORDER, which in pertinent part indicated:

> [t]he language which controls the resolution of the 120 day issue is found at N.J.S.A. 18A:6-14 **Suspension upon certification of charge; compensation**; **reinstatement**. This provides in full:
>
> > [u]pon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, **excluding all delays which are granted at the request of such person**, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless

> and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.
>
> [*Emphasis added*].

As indicated by the position statements of the parties, they are in agreement that the delayed filing of Respondent's Answer to the tenure charges added 56 days to the 120 day period. They further concur that the New Jersey Supreme Court Appeal along with late notification by the Court was the source of 20 more days. Therefore, when this 76 day period is tacked on to the statutorily prescribed 120 day period, the result is the date of November 9, 2016.

There is a sharp dispute, however, as to whether or not that is the controlling date. In that regard, Respondent argues that the September 19, 2016 date should attach, as that is when counsel were notified of the lifting of the Supreme Court stay. She additionally posits that any delays are directly attributable to the Board's unavailability for a hearing. Petitioner takes a dim view of that assertion, contending that but for the Respondent's appeal to the Supreme Court, the matter would have concluded long ago. The argument is then advanced that the period of August 30th until November 1, 2016, when the first hearing took place is the correct measuring period. By Petitioner's computation, this extends the period of suspension until December 22, 2016.

My determination of the correct date of course turns upon an interpretation of the words highlighted above "excluding all delays which are granted at the request of such person." As this is a fact specific situation, the exact circumstances of the case are instructive. Hearings in the case were originally scheduled for August 31, 2016 and September 12, 2016. Petitioner is correct in that were it not for Respondent's Supreme Court appeal and resulting 11th hour stay entered on August 30th, the matter would have been heard and adjudicated by now, as my Award would have been statutorily mandated on or before October 15th.

In my view, a fair reading of this "delays" language involves delays in the case which are reasonably attributable and foreseeable. Respondent expressly recognized this by conceding that the extra 12 days until the receipt of the Supreme Court's order lifting the stay should be counted, even though it was not attributable to Ms. Keough because she had requested the stay. So it is with the

exigent scheduling of hearings, which based upon the full calendars of counsel and arbitrators set months before does not happen quickly. This consideration then requires an arbitrator to utilize a rule of reasonableness in determining when to place a tenured employee back on the payroll. Simply put, was a petitioner engaging in dilatory tactics to avoid rescheduling?

Notwithstanding the muscular assertions of Respondent in this regard, the facts do not support such a conclusion *vis-à-vis* Petitioner. Moreover, a review of my emails reveals that on September 20, 2016 (the day after the Supreme Court stay was lifted), I offered the dates of September 28-29, 2016; October 11, 2016; October 13, 2016. Mr. Schorr responded that he was available September 28, 2016, and the morning of October 11th only. He further advised that he began a 2 week trial on October 17, 2016. When the 28th was not good for the Board due to a scheduling conflict, on September 21st, I proposed a conference call for September 27th.

During the call, various dates for the hearings were discussed. The Board advised from the outset that the only date it was available was November 1, 2016, with the rest of the month devoted to other tenure cases the firm was handling. At the time I was not available on November 1st. Respondent is correct in arguing that I had told Petitioner that response was unacceptable and that I would set down the hearing dates, if necessary. Subsequently, my out-of-state case on November 1st cancelled, and the Petitioner was able to make itself available on November 15th. The foregoing facts were contained in my September 28th letter to Ms. Duncan, which resulted in the DOE granting an extension for the submission of the Award.

The bottom line is that November 1st was the first date both parties and I were available to start the hearing. That is so, notwithstanding the fact that Respondent was available on September 28th, and Petitioner was unavailable due to the N.J.S.B.A. Conference the week of October 24, 2016. On that count, I do not perceive the former as unreasonable, since that was only a week later. As to the latter, Mr. Schorr was on trial any way.

Accordingly, based upon the discrete facts of this case, I find that any delays in rescheduling the case are reasonably attributable to Respondent's Supreme Court filing and that the period from August 30, 2016 until November 1st should stay the running of the 120 day period. That will then set the date Ms. Keough would come back on

the payroll *after* the December 15, 2016 due date for my Award, and for these reasons, Respondent's motion is **DENIED**.

In lieu of oral closing argument, the parties agree to submit post-hearing briefs, which following receipt of the expedited transcripts were returnable December 5, 2016. By virtue of the delays caused by Respondent's Supreme Court appeal, the briefing schedule and at my request, on September 30, 2016, Director Duncan graciously granted an extension for the issuance of this AWARD until December 15, 2016. The same is accordingly submitted in timely fashion, pursuant to N.J.S.A. 18A:6-17.1.d.

## II. FRAMING OF THE ISSUE

*Has the District established whether the actions of Ms. Keough, a tenured Administrative Assistant and Payroll Secretary of the Board, amount to unbecoming conduct sufficient for her termination and/or alternatively, whether she is incapacitated and unable to complete and perform her job duties? And if not, what shall the remedy be?*

## III. STATUTORY & REGULATORY FRAMEWORK

### NEW JERSEY STATUTES ANNOTATED TITLE 18A

**18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system.** No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

**18A:6-16 Proceedings before commissioner; written response; determination**

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

**18A:6-17.1 Panel of arbitrators**

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

**NEW JERSEY ADMINISTRATIVE CODE TITLE 6A EDUCATION**

* * *

**SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES' HEARING ACT**

* * *

**6A:3-5.3 Filing and service of answer to written charges**

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

**6A:3-5.5 Determination of sufficiency and transmittal for hearing**

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

## IV. APPLICABLE BOARD POLICIES

SUPPORT STAFF FAMILY LEAVE 4431.1 [Petitioner Exhibit 1 at Tab 9]

A. Introduction

The Board will provide family leave in accordance with the Federal Family and

Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA).

FMLA leave for eligible staff members shall be up to twelve weeks leave of absence in a twelve month period upon advance notice to the district for the birth of a son or daughter of the staff member and in order to care for such son or daughter; for the placement of a son or daughter with the staff member for adoption or foster care; in order to care for the spouse, son, daughter, or parent of the staff member if such spouse, son, daughter, or parent has a serious health condition; or for a serious health condition that makes the staff member unable to perform the functions of the position of such staff member, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call[ed] to active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees may take up to a combined total of twenty-six workweeks in a single twelve month period to care for a covered service member with a serious injury or illness.

NJFLA leave for eligible staff members shall be up to twelve weeks of leave of absence in any twenty-four month period upon advance notice to the district so that a staff member may provide care made necessary by the birth of a child of the staff member, the placement of a child with the staff member in connection with adoption of such child by the staff member, and the serious health condition of a spouse, parent, or child.

* * *

D. Eligibility

1. Federal Family and Medical Leave Act (FMLA)

   A staff member shall become eligible for FMLA leave after he/she has been employed at least twelve months in the district and employed for at least 1250 hours of service during the twelve month period immediately preceding the commencement of the leave. The twelve months the staff member must have been employed need not be consecutive months pursuant to 29 CFR §825.110(b). The minimum 1250 hours of service shall be determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work pursuant to 29 CFR §785. Entitlement to FMLA leave taken for the birth of a son or daughter or placement of a son or daughter with the staff member for adoption or foster care shall expire at the end of the twelve-month period beginning on the date of such birth or placement.

* * *

2. New Jersey Family Leave Act (NJFLA)

A staff member shall become eligible for NJFLA leave after he/she has been employed at least twelve months in this district for not less than 1,000 base hours, excluding overtime, during the immediate preceding twelve month period. The calculation of the twelve month period to determine eligibility shall commence with the commencement of the NJFLA leave. NJFLA leave taken for the birth or adoption of a healthy child may commence at any time within a year after the date of the birth or placement for adoption.

* * *

SUPPORT STAFF ATTENDANCE 4212 [Petitioner Exhibit 1 at Tab 18]

The regular and prompt attendance of support staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.

A support staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to an injury or illness or because the support staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such disease in the staff member's immediate household. No support staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective bargaining agreement negotiated with the member's majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of the attendance data, the training of support staff members in their attendance responsibilities, and the counseling of support staff members for whom regular and prompt attendance is a problem.

* * *

UNCOMPENSATED LEAVE 3431 [Respondent Exhibit 19]

The Board of Education recognizes, under certain circumstances, that the interests of the school district and of an individual employee may be served by the employee's extended absence from the school district for a purpose other than disability.

Except as may be otherwise provided by negotiated agreement, the Board reserves the right to establish the conditions under which uncompensated leaves of absence may be taken. An extended leave of absence may be granted for the purpose of study, childcare, recuperation, a special work assignment, or such other purpose as will tend to serve the best interests of the school district. No leave will be granted for a period of time longer than one school year, but may be extended following annual consideration by the Board to a maximum of one year following the completion of this year in which the leave was granted.

The Board reserves the right to require that the commencement and termination of an extended leave be such as to cause the least interruption to the instructional program of the schools. Wherever possible, partial year leaves of absence will begin and end at a division in the academic calendar and will cause not more than one interruption in teaching continuity during the school year in which the leave is taken.

A person absent from district service on an extended leave of absence does not enjoy a direct employment relationship with the Board, and the period of the leave will not accrue toward tenure and seniority, except as expressly permitted by law. No such person will receive compensation or benefits during the period of the leave.

Whenever possible, an uncompensated leave of absence will be granted for a time certain. When an employee cannot foretell the date on which the leave will terminate, the employee shall inform the Board not less than eight weeks in advance of the anticipated date of return to district employment.

A change in the purpose of a leave which has been granted must be reported to the Superintendent. The Board reserves the right to terminate any uncompensated leave of absence for which the purpose has been altered by the employee without permission.

At the expiration of the uncompensated leave of absence, the employee may return to district employment in a position for which he/she is appropriately certified.

## V. CONTENTIONS OF THE PARTIES

Petitioner City of Burlington Board of Education

Ms. Keough has been employed by the Board as a Payroll Secretary since December 1, 2011, earning tenure in her position as of December 2, 2014. TI19:7; 20:20. During her time with the Board she was counseled by a prior supervisor due to her failure to transfer funds necessary to process payroll. TIII150:6-151:9. Ms. Keough's work history also shows evidence of significant and habitual absenteeism. Between January 2012 and June 2012, Ms. Keough was absent seven times (7). TI 21:22-25; Petitioner's Exhibit 1. During the 2012-2013 school year, Ms. Keough was absent twenty-eight (28) times. TI23:16-22; Petitioner's Exhibit 2. During the 2013-2014 school year, Ms. Keough was absent thirty (30) times. TI24:11-16; Petitioner's Exhibit 4. During the 2014-2015 school year, Ms. Keough was absent forty-three and a half days (43.5). TI24:18-25; Id. Finally, during the 2015-2016 school year, Ms. Keough was absent one hundred and twenty-eight and a half days (128.5), which only covers her absences through April 1, 2016. TI24:24-25:2; Petitioner's Exhibit 5. In total, Ms. Keough has been absent two hundred and sixty-seven days (267), in less than five years of employment.

Ms. Keough suffered a workplace injury in March, 2013, wherein she hit her face on a door while turning her head. Petitioner's Exhibit 6. As a result, Ms. Keough underwent jaw surgery, which was paid for by the Board's Workers'

Compensation insurance, and which required her to be out on Workers' Compensation leave beginning October 1, 2015. TI25:9-16. The Board's understanding was that Ms. Keough's Workers' Compensation leave would last anywhere from four (4) to eight (8) weeks. TI37:20; TII42:18. Due to the Board's understanding of the limited duration of Ms. Keough's leave, and the expectation that Ms. Keough would be returning to work, the Board opted not to hire anyone on a temporary basis. TI37:15-38:19. This decision was made, in part, due to the difficulty in finding a temporary employee that would be willing to undergo the background check required as a pre-requisite to employment, while not knowing how long the assignment would last. TII65:19-66:17.

Unfortunately, Ms. Keough's Workers' Compensation leave lasted beyond the originally forecasted duration, and she was not cleared to return to work until January 4, 2016. Petitioner's Exhibit 7. The Board learned of Ms. Keough's clearance to return to work on December 22, 2015, when Ms. Keough called Susan Kirk (a/k/a Susan Croce), the Board employee tasked with handling bookkeeping, health benefits, and Workers' Compensation, to advise of her ability and intent to return on January 4, 2016, the first day after winter break. TI161:11-19; 162:15; 163:11-19.

Upon being informed that the Board would require a note from her doctor, clearing her to return, Ms. Keough became frustrated, and accused Ms. Kirk and her colleagues of being useless. TI162:18-21; 163:11-19, 164:1-2. Ms. Kirk testified that Ms. Keough called several times during the day, and was "adamant"

that she could return on January 4th. TI163:5-19. Ultimately, the Board received the required clearance from Ms. Keough's Workers' Compensation doctor, which stated "Mrs. Keough is medically cleared to return to work on Jan. 4, 2016. Mrs. Keough had surgery on Oct. 1, 2015 and has had several follow-up visits to demonstrate that she had the *mental and physical capacity* to return to work on Jan. 4, 2016." Petitioner's Exhibit 7. [*Emphasis added*].

Despite Ms. Keough's insistence, and her doctor's assurance, that she was fit to return to work, just eight (8) days later, Ms. Keough's story changed. On December 30, 2015, Ms. Keough texted Ray Coxe, School Business Administrator, and her immediate supervisor, and advised that she would not be returning on January 4th, as she previously promised. TII18:25-19:1; TII24:1-6; TII25:5-21. The precise text exchange went as follows:

| | |
|---|---|
| Keough (at 12:25 pm): | Hey Ray, is there a reason why I can't get into email? |
| Coxe (at 12:36 pm): | I know they were going to be taking the system down to work on issues. I'm not aware of anything else. |
| Keough (at 12:42 pm): | I have not been able to get in since I've been out.<br><br>I just saw my hand doctor yesterday n [sic] he wants me out for 2-3 months cos [sic] I'm having it fused together. So effective the 4 of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th<br><br>I have the Drs [sic] note |
| Coxe (at 12:44 pm): | When is your surgery? |

Keough (at 12:45 pm): 4th

Respondent's Exhibit 16.

Based upon Ms. Keough's text messages, set forth above, Mr. Coxe was led to believe that Ms. Keough's surgery was scheduled prospectively for January 4th. TII26:4-8. Mr. Coxe's belief in this regard was bolstered by the note received by the Board from Ms. Keough on January 4, 2016, the first day back after the winter break. TII27:13-21; Petitioner's Exhibit 8. Ms. Keough's note read as follows:

> Dear Ray,
>
> Per our text conversation today my request for medical leave of absence effective January 4th, 2016.
>
> Please find this letter as my formal request for my medical leave of absence without pay effective January 4th, 2016.
>
> My doctor will be keeping me out of work for approximately two to three months.
>
> Sorry for the short notice but this was beyond my control.
>
> Thank you for your time and consideration.
>
> Sincerely,
> Penny Keough.

Petitioner's Exhibit 8.

Mr. Coxe understood Ms. Keough's statement that "this was beyond [her] control" to mean that Ms. Keough was unaware that she would be having the surgery she mentioned in her December 30, 2015 texts. TII29:1-6. Likewise, Dr. Patricia Doloughty, Board Superintendent, also understood Ms. Keough's note to

mean that she was having an unforeseen surgery. TI36:1-15. Ms. Keough's note was accompanied by a note from the Hand and Surgery Rehabilitation Center of New Jersey, and purportedly signed by Dr. Frederick Ballet. Petitioner's Exhibit 8. Dr. Ballet's note reflects that Ms. Keough was seen on December 29, 2015, and that she would be out of work starting January 4th, 2016, for 2-3 months. Dr. Ballet's note does not contain any diagnosis, provides no explanation of Ms. Keough's treatment, and gives no insight into why she was unable to work. Id.

Further confusing matters, on or about January 7, 2016, Ms. Keough's mother dropped off one (1) page of a disability application for Mr. Coxe to complete. TII31:11-16; TIII170: 9-10; Petitioner's Exhibit 10. The form contained no further information regarding Ms. Keough's diagnosis or the reason she was unable to work. Id. Having received clearance from her Workers' Compensation doctor on December 22, 2015, stating that she had the mental and physical capacity to return to work, Dr. Ballet's December 29, 2015 note provided little insight into the reason for Ms. Keough's supposed inability to return to work.

Both Dr. Doloughty and Mr. Coxe were confused regarding the type of leave Ms. Keough was requesting, and the justification for her request. TI35:23-36:-5; TII30:21-31:2. As a result, Dr. Doloughty sent Ms. Keough three (3) letters, seeking the information necessary to review her request for unpaid leave, as follows:

1. January 4th Letter. Petitioner's Exhibit 9. Dr. Doloughty sent Ms. Keough a letter, enclosing the Board's Family Medical Leave Policy, and advising Ms. Keough that the purpose of the letter was to respond

to her leave request, and clarify the designation of her leave. Id. The letter further advised that the leave request would be reviewed by the Board, pending receipt of a medical provider's certification, referenced and enclosed with the letter. Id. At the time Dr. Doloughty wrote the letter, Ms. Keough's eligibility for Family Medical Leave was uncertain. TI39:8-16. Nonetheless, as per the Board's standard practice, Dr. Doloughty provided information about Family Medical Leave, to be sure Ms. Keough had it in the event she was eligible. Petitioner's Exhibit 9.

2. January 13th Letter. Petitioner's Exhibit 11. After determining that Ms. Keough was not eligible for Family Medical Leave, due to not having worked sufficient hours to qualify, Dr. Doloughty sent Ms. Keough a second letter on January 13, 2016. Id. Dr. Doloughty's January 13th letter advised Ms. Keough that if she was seeking leave under Board Policy 3431, entitled "Uncompensated Leave" she must specify an emergent inability to work, supported by a physician's statement. Id. The January 13th letter also enclosed the Board's anti-discrimination policy, and invited Ms. Keough to contact Dr. Doloughty in the event she required an accommodation. Id. The letter advised Ms. Keough that she was not presently authorized to take uncompensated leave at that time and that in the absence of the appropriate documentation, she must return to work on January 22, 2016. Id.

3. February 4th Letter. Petitioner's Exhibit 15. Having received no clarification from Ms. Keough, Dr. Doloughty wrote to Ms. Keough, in another attempt to gain clarity. Id. She reiterated that Ms Keough still had not provided a physician's statement supporting her request for leave, a requirement that was noted in both the January 4th Letter and the January 13th Letter. Id. Dr. Doloughty reiterated the Board's willingness to engage in the interactive process if Ms. Keough required an accommodation due to a disability. Id. Dr. Doloughty's letter also advised Ms. Keough that the Board had received information from her Worker's Compensation doctor, which created more uncertainty, as Worker's Compensation had previously cleared her to return to work. Id. Specifically the Board received a fax from the Workers' Compensation doctor, dated January 21, 2016, but not received until February 2, 2016. Id. Dr. Doloughty warned Ms. Keough, consistent with her prior letter, that in the absence of the appropriate documentation, she must return to work within ten (10) days of receiving the letter. Id.

After receiving Dr. Doloughty's January 13th Letter, Ms. Keough called the Board offices and spoke with Dr. Doloughty. TI52:4-7; TIII65:16-68-6. Dr.

Doloughty testified that she advised Ms. Keough that a physician's certification was still needed to review her leave request, and in response Ms. Keough said that she would try to get what was needed. TI57:3-7. After this phone call, the Board received no response to Dr. Doloughty's February 4th Letter. TI70:11-25.

The next time the Board received any information from Ms. Keough was on or about March 14, 2016. TII40:2-25. On March 14, 2016, the Board received three (3) pages of medical documents regarding Ms. Keough, from the Hand Surgery Rehabilitation Center of New Jersey, in an envelope postmarked March 12, 2016, by Ms. Keough. TI169:19-170:1; TIII140:1-7; Petitioner's Exhibit 17. The first page is a note dated March 1, 2016, which indicates that Ms. Keough is having surgery, and cannot work until after surgery. Id. It does not contain a diagnosis, or any other information about the surgery, other than to note that her next appointment is on March 16, 2016. Id. The next page is a note dated February 11, 2016, which reflects that Ms. Keough had surgery on December 16th and December 18th. Id. The February 11th note encloses a page of dictation from the appointment, which reflects that Ms. Keough was "unable to return to work due to the pain she is experiencing." Id.

Rather than clarifying Ms. Keough's situation, the documents received on March 14th created greater confusion. TI72:15-73:8; TI41:1-8. Based on Ms. Keough's representations, the Board believed up until this point that Ms. Keough had surgery on January 4th. Id. This was the first time they learned that she had underwent not one, but two surgeries, and that those surgeries pre-dated her

representations on December 22nd that she would be returning on January 4th. Receiving the March 14th documents made clear that Ms. Keough had lied. TII41:9-43:3.

After more than two (2) months of requesting clarification from Ms. Keough, and receiving none, Dr. Doloughty recommended the certification of the Charges to the Board, as an act of last resort. TI79:2-80:5. As Dr. Doloughty testified, she waited as long as she thought she could, in the hopes that Ms. Keough would submit the necessary documentation. Id. After receiving the March 14th documents, and learning that yet another surgery was scheduled, and a return date was still not provided, the Board was left with no other option to compel Ms. Keough's compliance or be able to fill her position. Id. Ms. Keough was in violation of the Board's Attendance Policy, which puts staff on notice that if an employee fails to give prompt notice of an absence, falsifies the reason for an absence, or is absent without authorization, they will be subject to discipline, up to and including tenure charges. Petitioner's Exhibit 18; TI81:4-15.

Further, Ms. Keough's delinquency in paying both her Chapter 78 contributions, and her health insurance premiums, led to the conclusion that she would not be returning to her position. TI77:1-10; TII49:23-50:11. Mr. Coxe supported Dr. Doloughty's recommendation, referencing the pressure on the Business Office due to Ms. Keough's absence, and Ms. Keough's dishonesty. TII47:16-49:23. Mr. Coxe testified that he hoped receiving the charges would compel Ms. Keough to finally providing the clarification the Board had been

requesting. TII48:1-11.

Ms. Keough's testimony demonstrates in no uncertain terms that she lied to Mr. Coxe on December 30, 2015, and has been trying to explain it away ever since. Ms. Keough acknowledges that on December 22, 2015, she told Sue Kirk that she would be returning to work on January 4, 2016. TIII41:13-20. She claims she was bound and determined to return to work, despite having already had two surgeries, unbeknownst to the Board. TIII41:22-42:2. She further acknowledges that in the text exchange on December 30, 2015 with Mr. Coxe, she told him that she was "having" surgery, as opposed to having already "had" surgery. TIII46:2-9. Ms. Keough claims that despite what she typed, she was trying to tell Mr. Coxe that she "had" surgery. TIII46:8-19. Her exact testimony, when asked about this discrepancy, was as follows:

> Q. Why did you write "having"?
>
> A. You know what, I was -- I really don't have an answer for that. The text messaging, when you text message, there is a lot of like auto correct on the text messaging, and I can't honestly begin to tell you why in God's name I would put "having".
>
> Q. You were on narcotics at the time?
>
> A. Yes. I also need glasses to read, too.
>
> Q. Did you not have your glasses on?
>
> A. I may not have, no.

TIII46:10-19.

After first attempted to blame autocorrect for her supposed mistake, Ms.

Keough, when prompted by her attorney, also attempted to attribute her lie to narcotics and/or not having her glasses on. Id. When she was asked why she told Mr. Coxe that her surgery was on the "4th," Ms. Keough claimed she was still on the previous text. TIII47:7-15. On cross examination, she admitted that she did not think any other words were autocorrected in the text, other than the word "having." TIII109:25-113:24. In fact, she testified to abbreviating words, which were not autocorrected, claiming that she was "loopy" but still functioning. Id.

Notably, Ms. Keough has given different answers each time she has been asked about the December 30th texts with Mr. Coxe. During an initial phone hearing with unemployment, in response to the claims examiner relaying the Board's understanding that Ms. Keough had surgery on January 4th, Ms. Keough said "I don't know what they're talking about." Respondent's Exhibit 12 at KEOUGH046, 22:21-25. When asked again several weeks later, this time under oath, during an appeal hearing before an unemployment hearing officer, why she told Mr. Coxe her surgery was on the 4th, Ms. Keough finally acknowledged that she lied. Id. at KEOUGH074, 55:10-17. Her explanation for lying, however, was not that she was "still on the prior text" but rather that she was "very confused" because she was on "Dilaudid and Vicodin." Id. In total, Ms. Keough has given three different explanations for why she lied, after initially denying her lie, none of which are credible.

Ms. Keough told Mr. Coxe that her inability to return to work was "beyond her control." Petitioner's Exhibit 18. Combined with her text wherein she said she

"just saw [her] hand doctor," and that she was "having" her wrist fused together, Ms. Keough undoubtedly created the impression that her need for surgery had recently manifested. Respondent's Exhibit 16. Nonetheless, prior to her Workers' Compensation leave, Ms. Keough had told two (2) of her colleagues, Ingrid Walsh and Sue Kirk, that she planned on having wrist surgery over the winter break. TI168:24-169:9; TIII12:18-13:18.

Further, Ms. Keough's own doctor's records confirm that she was planning on having this surgery as far back as March 24, 2015, a fact which Ms. Keough admits. TIII40:10-19; Respondent's Exhibit 11 at KEOUGH130. Her medical records further reflect that on December 8, 2015, Ms. Keough attended a pre-operative appointment with Dr. Ballet, wherein "the procedure, the recovery and expected outcomes" were reviewed. R11 at KEOUGH183. Dr. Ballet testified that the expected recovery from a wrist fusion was eight to twelve weeks. TII177:25-178-8. As such, Ms. Keough was aware of her surgery, and recovery time well in advance of the representations she subsequently made to the Board.

Ms. Keough's attempts to characterize her surgery as emergent are further contradicted by her own request for clarification to Dr. Ballet. TII185:19-21. As evidenced by Dr. Ballet's records, even Ms. Keough, herself, was not clear on why her surgeries were "emergent." Respondent's Exhibit 11 at KEOUGH100. Dr. Ballet's records reflect that he scheduled her surgery on an "urgent" basis due to the pain Ms. Keough had been experiencing. Id. Further, Dr. Ballet described her December 16th, surgery as "urgent" rather than

emergent, which he defined as "sooner than later was recommended" due to the pain Ms. Keough was experiencing. TII145:9-18. Accordingly, as Ms. Keough was aware of the underlying symptoms, and as the surgery had been discussed for months, both with Dr. Ballet, and with her colleagues, there is no credible explanation for Ms. Keough's obfuscation. While her surgery may have become urgent, it was not unforeseen, and there was no reason she could not have notified the Board.

Similarly, Ms. Keough would have been well aware of her inability to return to work on December 22, 2015, despite her representations to the contrary to the Board. Ms. Keough testified that when she saw her doctor on December 29, 2015, he told her she could not go back to work due to the narcotics she was taking and the extent of her pain. TIII43:7-16. She claims that this was the first time she learned of the 2-3 month recovery period for her surgery. Id. Even if this were believable, Ms. Keough was still aware of the underlying conditions preventing her return, per Dr. Ballet, namely her pain and her medication. Again, Ms. Keough's feigned surprise, and implausible explanations, do not detract from the fact that she was well aware of her inability to return to work, despite what she has represented to the Board.

Three (3) witnesses testified that the Board only received one (1) page of Ms. Keough's disability application, despite Ms. Keough claims that all four (4) pages, including Dr. Ballet's certification, were dropped off to the Board on January 7th. Ingrid Walsh, Assistant School Business Administrator, testified that

she received a single page of a State disability application to complete on Ms. Keough's behalf. TIII11:21-12:14. Dr. Doloughty, likewise, testified that a single page of a disability form was received. TI118:2-14. Mr. Coxe testified that he only ever saw one (1) page of a disability application, with a handwritten post-it note affixed to the front from Ms. Keough's mother. Petitioner's Exhibit 10; TIII170:14-17. He further testified that he did not see the full (4) four page application until after the parties were in litigation. TIII174:1-4.

While the Board's witnesses were consistent in this regard, Ms. Keough's testimony has been far more mercurial. In prior sworn testimony, both Ms. Keough and her mother testified that the disability paperwork was dropped off on January 8, 2016. Respondent's Exhibit 12 at KEOUGH071, 44:9-15; Id. at KEOUGH075, 60:18-24. That testimony was subsequently contradicted by text message conversations between Ms. Keough and Mr. Coxe, evidencing their discussion of the disability form on January 7, 2016. Respondent's Exhibit 17.

Ms. Keough now claims that the paperwork was dropped off on January 7, 2016. TIII58:14-24. Interestingly, in her text conversation with Mr. Coxe on January 7, 2016, Ms. Keough states "You told me that the paperwork would be ready yesterday." Respondent's Exhibit 17. Ms. Keough's statement makes no sense given that she testified that the paperwork was not dropped off until January 7, 2016, and that she did not speak with Mr. Coxe in the prior days. TIII63:14-19. When questioned about this statement, Ms. Keough merely replied "I don't understand why I would put that." TIII63:23-64:2.

Ms. Keough also testified that her mom suggested she put the disability papers in an envelope to protect her social security number, and that she recalls seeing all four (4) pages of the disability application be placed in the envelope. TIII57:2-22; Respondent's Exhibit 2. In prior testimony before an unemployment hearing officer, Ms. Keough's mother testified that the disability papers were not in an envelope. Respondent's Exhibit 12 at KEOUGH076, 63:15-18.

According to Ms. Keough, regardless of when and how the disability paperwork was provided, the Board would have had the disability paperwork by the time she spoke with Dr. Doloughty on January 21, 2016. During that conversation, in addition to her January 4th and January 13th letters, Dr. Doloughty advised Ms. Keough that she needed to provide a physician's certification. Petitioner's Exhibits 9 & 11; TI57:3-7. Nonetheless, Ms. Keough admitted that she never mentioned the disability paperwork to Dr. Doloughty, or the fact that it contained the very medical certification that Dr. Doloughty was seeking. Respondent's Exhibit 12 at KEOUGH072, 47:14-18; TI57:3-7. Further, after receiving the February 4th letter, which again advised of the need for a physician's certification, Ms. Keough still never contacted the Board to inquire what was deficient in the certification contained within the disability paperwork she claims she provided, and claims, despite the numerous letters, that Dr. Doloughty never told her she needed a medical certification. Petitioner's Exhibit 15; TIII69:14-22.

Ms. Keough maintains she was in constant contact with the Board during

her unauthorized absence. As proof of this, Ms. Keough testified to the phone calls she made to the Board offices during the month of January, and provided her phone records. Respondent's Exhibit 9. Ms. Keough's phone records show she made nine (9) calls in the month of January. Id. Seven (7) of those nine (9) calls were made to Sue Meredith, who was a secretary in the business office, rather than a person who held authority over Ms. Keough's leave request. Id. Two (2) of the calls were placed on January 5, 2016, for the purpose of confirming receipt of the letter Ms. Keough's mom dropped off the day before. TIII54:1-7. Four (4) calls were placed on January 7th, for the purpose of making sure the disability paperwork would be filled out. TIII58:16-60:2. The January 8th call was also for the purpose of making sure the disability paperwork would be filled out. TIII64:3-9.

As such, despite her representations about being in "constant contact" with the Board, only two (2) of the phone calls were in any way responsive to the Board's request for clarification, specifically the January 21st call with Dr. Doloughty, and the January 22nd call to Sue Meredith. TIII66:1-7; TIII71:9-19. Further, the phone calls were ultimately irrelevant, as the necessary medical certification would have to be provided in writing, from a physician.

Ms. Keough also claims that she mailed in all her doctor's notes. The Board acknowledges receiving the December 29, 2015, note. Petitioner's Exhibit 8. The Board further acknowledges receiving the March 1, 2016, and February 11, 2016, notes, both on March 14, 2016. Petitioner's Exhibit 17. Ms. Keough

claims that she sent the February 11, 2016 note within a few days of receiving it, but that "something just told [her]" to send it again with the March 1, 2016 note. TIII73:1-74:22; TIII76:7-77:17. Nonetheless, the February 11, 2016 note was eventually received. Ms. Keough admits that she did not sent the Board the April 12, 2016 and May 3, 2016, notes, but that she had her lawyer do it after she commenced litigation. TIII90:14-92:19.

Accordingly, the only note whose receipt is in dispute is the March 22, 2016, note. Respondent's Exhibit 6; Petitioner's Exhibit 20. Ms. Keough claims she sent it immediately, while Mr. Coxe confirms that the first time he saw that note was after litigation commenced, in June 2016. TIII77:21-78:6; TIII180:14-25. Further, none of the notes prior to the April 12, 2016 note, provided a return to work date. As of April 12th, the Charges had been served, and were pending certification. Joint Exhibit 1; Petitioner's Exhibit 19.

Ultimately, rather than take accountability for her own request, and protect her position, Ms. Keough assumed an adversarial posture with the Board and stopped communicating in any productive way after being advised that she needed to provide a medical certification in support of her leave. Ms. Keough testified that after receiving Dr. Doloughty's January 13th letter, she called several attorneys to see what her legal rights were. TIII67:1-10. Ms. Keough claims at that time that she had not received the January 4th letter. TIII51:9-15. So by her version of the facts, she received one letter from the school, seeking clarification, and offering accommodation, and Ms. Keough's response was to immediately

call an attorney, rather than try to clarify what she could do to have her leave approved.

Ms. Keough claims she can return to work in her full capacity, yet Dr. Ballet's testimony in this regard was less convincing. Dr. Ballet testified that a total wrist fusion results in permanent loss of motion. TII128:4-17. He further testified that someone with a heavily keyboard oriented job could "probably" return to that job with some modifications to the work station. TII128:18-24. Ms. Keough has acknowledged that she has not requested any modifications to her work station. TIII129:3-7.

Further, Ms. Keough points to two notes that purport to clear her to return to work. She provides an April 12, 2016, note that clears her to return on May 16, 2016, to sedentary duty. Respondent's Exhibit 14. She also provides a note from May 3, 2016, that clears her to return to work on May 4, 2016. Id. Ms. Keough testified that after receiving the Charges, she went back to the doctor to obtain a note that allowed her to return soon. TIII91:10-92:3. Dr. Ballet testified that, notwithstanding these two notes, he never performed a functional capacity examination on Ms. Keough. TII192:9-14.

Tenure is intended to protect teachers, supervisors, and employees from dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for

"inefficiency, incapacity, unbecoming conduct, or other just cause," but only after a hearing in compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to - 30.1. While tenure laws are designed to protect public employees from arbitrary action or political favoritism, they were never intended to perpetuate the employment of individuals who are not properly performing their jobs. In re Tenure Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004).

Although tenure protections are generally reserved for those with a statutory entitlement (e.g., teachers), there is no dispute that Ms. Keough is a tenured, albeit non-certificated, secretary. Accordingly, although much of the authority regarding tenured employees does not speak specifically to tenured secretaries, it is nevertheless applicable. The Charges brought by the Board collectively demonstrate conduct unbecoming an employee, incapacity and other just cause in the form of absenteeism. In short, Ms. Keough intentionally misrepresented her medical information to the Board. Although she claims it was unintentional, and that she was confused at what the Board needed, her long history of absences demonstrates she had substantial experience in requesting time off. Further, Ms. Keough has yet to prove definitively she can return to work in her prior capacity, with or without accommodations.

Ms. Keough's has gone out of her way to ascribe motive to the Board, going so far as to accuse them of discrimination, in an attempt to avoid answering the Charges. To the contrary, the Board provided documentation of

misrepresentations made by Ms. Keough's via text, leading to the certification of the Charges. As such, and in light of the conflicting testimony, the credibility of the witnesses must be evaluated. The choice of accepting or rejecting the witness' testimony or credibility rests with the finder of facts. In re Tenure Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004) (citing Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. Id. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. Id. (citing Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super 1 (App. Div. 1961). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. Id. (citing Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed 2d 380 (1973)). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Id. (citing Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963)).

Ms. Keough is guilty of unbecoming conduct, due to her misrepresentations about her surgery dates, her failure to provide adequate documentation to support her leave request, and her failure to advise the Board of her wrist surgeries, thereby preventing them from filling her position and prejudicing their operations. Her bad faith conduct is further evidenced by her

decision to sue the Board for discrimination, although she failed to plead discrimination as a defense, rather than provide the documentation clarifying her condition, as requested several times.

"Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Giglio, supra (citing Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998)). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which develops upon one who stands in the public eye as an upholder of that which is morally and legally correct. Id. (citing Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." Id. (citing In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), cert. denied, 65 N.J 292 (1974)). The determination of whether to remove an individual from a tenured position requires consideration of the nature of the act, the *totality of the circumstances*, and the impact on the individual's career.

Ms. Keough admits that she never told the Board about her two surgeries prior to having them. Both she and Dr. Ballet acknowledge that the surgery was scheduled well in advance, and that she was advised of the recovery time prior to submitting to surgery. Ms. Keough claims that she was "bound and determined"

to return to her position, despite claiming to be in incredible pain, and "loopy" from narcotics. At best this evidences terrible judgement, and at worst, further lies. Ms. Keough was aware that she was having this surgery, and, in fact, discussed it with her colleagues prior to going out on worker's compensation leave. She has offered no credible or justifiable reason for withholding this information from the Board. In doing so, Ms. Keough prejudiced the Board's operations, as testified to by Dr. Doloughty and Mr. Coxe. Furnishing false information to the Board, and withholding critical information about her medical condition, unequivocally constitutes conduct unbecoming a public employee.

None of the notes provided to the Board provided a diagnosis, or a return date, or specified the emergent nature of Ms. Keough's inability to return to work. As Ms. Keough's initial Workers' Compensation leave was anticipated to be one (1) to two (2) months, no temporary employee was hired. That leave, which began October 1, 2015 was unexpectedly extended an additional month, until January 4th. In light of Ms. Keough's representations that should would be returning, again, no temporary employee was sought.

After Ms. Keough failed to return in January, and as the duration of her absence remained uncertain, the Board was unable to find temporary help, as none of the potential candidates were willing to undergo the fingerprinting process, and pay the application fee, for only a few months of work. Ms. Keough herself acknowledged that her position is "irreplaceable." TIII99:14-100:11. Both Dr. Doloughty and Mr. Coxe, and Ms. Walsh testified to the disruption in the

Board's operations caused by a hole in this irreplaceable position. But for Ms. Keough's obfuscation of her surgeries, the Board could have secured someone for the several months of Ms. Keough's absence.

Ms. Keough holds a position of trust within the Board's operations, and yet she betrayed that trust by lying about her surgery dates, and then failing to provide the necessary documentation to support her leave request, presumably in an attempt to delay the Board's inevitable discovery of her lie. In doing do, Ms. Keough has displayed, at best poor judgement, and at worst, a willingness to lie without compunction. Ms. Keough was warned repeatedly that failure to communicate or provide information regarding her leave, in addition to her failure to return to work, may result in discipline, yet she ignored those warnings and began communicating with an attorney, rather than her employer. While Ms. Keough may paint this all as a big misunderstanding, it was her obligation as an employee to provide this information. In light of the foregoing, it is clear Ms. Keough's engaged in conduct unbecoming a public employee.

Ms. Keough's excessive absenteeism alone constitutes just cause to bring these Charges, despite her claim that her absences were permitted and/or justified. Further, Ms. Keough provided no proof of her ability to return to work until after the Charges were certified, and after she had sued the Board. To date, her ability to return remains uncertain.

There is ample authority amidst tenure cases holding that "chronic or

excessive absenteeism has been found to constitute both 'incapacity' and 'unbecoming conduct,' within the meaning of N.J.S.A. 18A:6-10" justifying dismissal from employment. In re Tenure Hearing of Gillespie, EDU 09195-11, Initial Decision (April 26, 2016). Excessive absenteeism warrants dismissal, even where absences are the result of a legitimate physical ailment, and even where an employee is contractually entitled to time off. Id. (quoting Bd. of Ed. of the City of Camden v. Rucker, 94 N.J.A.R. 2d (EDU); State-Operated School District of Jersey City v. Pellecchio, 92 N.J.A.R. 2d (EDU) 267). In fact, removal of tenure can be justified even where the employee's absence is the result of a workplace injury. Id. It is within the Board's discretion to determine whether the absenteeism is excessive. Id. (Citing Trautwein v. Bd. of Educ. of Bound Brook, 1 980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980)). See also In re Tenure Hearing of Stapleton, EDU 168-13, Initial Decision (May 7, 2013). In sum, excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute incapacity, unbecoming conduct, and/or just cause within the meaning of N.J.S.A. 18A:6-10, so as to warrant dismissal from employment.

Here, it is uncontested that as of April 1, 2016, Ms. Keough has been absent from her position for a total of two hundred and sixty-seven days (267). By her testimony, she was cleared to return, effective May 4, 2016, which adds and additional five weeks worth of absences to that total. The Board's witnesses testified as to the disruption in its operations occasioned by Ms. Keough's

absences, and Ms. Keough herself confirmed that she plays a vital role in the Board's functioning. In fact, she confirmed that her position is irreplaceable. Accordingly, in light of the Board's need to have an employee in this position, the Board determined, in its discretion, that being absent for approximately twenty percent of working days over a less than a five (5) year period, constitutes excessive absenteeism and/or incapacity, justifying Ms. Keough's termination.

Ms. Keough claims that she is prepared to return to work, yet she admits she did not provide the Board the notes clearing her until after the Charges were filed. She further admits that they were provided by her attorney, in connection with notification that she was suing the Board for discrimination. The two (2) notes she relies upon to support her ability to return offer conflicting conditions. One appears to have no conditions, and the other requires sedentary duty.

Having established Ms. Keough's unbecoming conduct, incapacity and excessive absenteeism, there is no doubt that just cause exists to discipline Ms. Keough. The Board is limited by N.J.S.A. 18A:6-10, which prohibits the Board from imposing any discipline beyond a warning letter, or increment withholding. The Board has no independent ability to impose any greater discipline without the filing of tenure charges, such as an unpaid suspension. Here, Ms. Keough's misconduct justifies her termination, in light of the totality of the circumstances.

Just cause has been regularly defined as "[a]n adverse employment action based on facts that (1) are supported by substantial evidence; and (2) are

reasonably believed by the employer to be true; and (3) not for any arbitrary, capricious, or illegal reason." See Maietta v. United Parcel Service, 749 F. Supp. 1344, D.N.J. (1990). The concept of "just cause" requires an arbitrator to make two (2) essential inquiries. "First, is the employee guilty of misconduct. Second, assuming the employee is guilty, is the discipline imposed a reasonable penalty under the circumstances of the case." Lozier Corp., 121 LA 1187 (Fitzsimmons, 2005). Put differently, the just cause standard requires that the consequence assessed in a given situation be reasonable in light of **all of the circumstances**. City of Portland, 77 LA 820, 826 (Axon 1981).

Here, under the above-cited authority, Ms. Keough's excessive absenteeism alone justifies her termination. The Board needs, and is entitled to have an employee in the position of payroll secretary who reliably shows up to work. The number of days Ms. Keough has been absent in her less than five year tenure is excessive, and constitutes just cause to terminate her.

More importantly, the Board has the right to trust in the honesty of its employees, and an employee's dishonest act compromises not only the Board's trust, but the public's trust. In re Tenure Hearing of Depasquale, 92 N.J.A.R.2d (EDU) 537 (N.J. Adm. Aug. 31, 1992). Ms. Keough lied by omission when she failed to advise the Board of the two wrist surgeries she underwent while out on worker's compensation leave. She again lied by omission on December 22nd when she called the Board offices and claimed to be returning to work on January 4th, again failing to mention the surgeries. Ms. Keough affirmatively lied

to Mr. Coxe on December 30th when she told him she was having her wrist fused on January 4th, all the while knowing that surgery had already occurred. She lied to him again on January 7th when she claimed that Mr. Coxe told her that her disability paperwork would be ready yesterday, when they had never spoken, nor had the paperwork been dropped off. Ms. Keough claims she provided a medical certification with the disability paperwork, yet admits that she never mentioned it to Dr. Doloughty when they spoke on January 21st. Whether intentionally, or recklessly, Ms. Keough has destroyed her credibility with the Board, such that she should not be returned to the highly sensitive role of payroll secretary.

In conclusion, Ms. Keough's pattern of lies, omissions and deflections, along with her habitual absenteeism and incapacity, was amply demonstrated by both the documentation and testimony offered in these proceedings. Accordingly, the Board has carried its burden of proof in demonstrating that Ms. Keough's termination is not only appropriate, but necessary to ensure the Board can continue to function with full confidence in the honesty and capacity of its employees.

2

Respondent Penny Keough

N.J.S.A. 18A:6-17.2 states that "[t]he board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for

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2/ During his cross-examination of Dr. Doloughty at the November 1, 2016 hearing, counsel for Ms. Keough pursued a line of questioning related to the New Jersey Law Against Discrimination, and whether or not it contained a leave provision that was broader than the Family Medical Leave Act. Counsel for Petitioner objected, arguing that the question was beyond the scope of the arbitration proceeding and crossing over into discrimination issues and theories that had been asserted in another tribunal. Mr. Schorr then emphatically replied that "[t]his goes to their policy, Okay? If their policy is an unlawful policy, the Department of Education has assured me that I would [be] able to have a full hearing on the discrimination issue in this tribunal. I have a letter from Acting Commissioner Shulman which says I assure you you will have a full opportunity to discuss the discrimination issues. Now, whether or not Burlington believes that the FMLA is the only law that protects Ms. Keough is one of the most relevant issues we have here, because it goes to their motive in seeking to terminate her." TI101:10-25; 102:1-6.

Arbitrator: "I don't believe Respondent raised that though, as an issue here, within this forum. I know, I read your whole Complaint in Superior Court, it's everywhere there, I understand that, but all you did in your Answer [before the Commissioner] was you just admit deny, you raise no affirmative defenses, I saw, right?" Mr. Schorr: "Correct." Arbitrator: "And in the August 5th response, your Statement of Evidence, I don't think you raised anything in there, right? Mr. Schorr: "No. I am not seeking to litigate - - I want to be clear. I am not seeking to litigate the discrimination matter here." TI102:7-22.

When I then permitted Respondent to ask the limited question posed, Mr. Comegno again objected "I think it's inappropriate to get into any policy points, any legal conclusions, any issue that's going to come up in the Superior Court matter. This cannot be used as a vehicle for taking an early deposition or further developing theories. The District has separate counsel that's appointed on the discrimination matter. Frankly, I think the District is being prejudiced if we go down that road. I just want to note it on the record." TI104:17-25; 105:1.

Similar skirmishes ensured leading to an Executive Session with counsel followed by a period of deliberation. My decision to exclude that line of questioning was then placed on the record. After reiterating my prior observations, I found that "[t]herefore, at no point in this proceeding has Respondent chosen to argue any of those affirmative defenses. The very line of cross-examination as being pursued here is attempting to in some ways get in the back door to firm up, if you will, that contention. But that contention at the choice of Respondent is being heard in Superior Court at some point. So this is not the proper forum for that on that basis. That line of questioning is not going to be permitted." TI114:20-25; 115:1-4.

At the beginning of the November 15, 2017 hearing, Mr. Schoor renewed his objection to the prior ruling, with parallel arguments made. I then responded as follows: "Since that time, I did have the opportunity to review the entire file and when Assistant Commissioner Shulman made that comment, that preceded the filing of Respondent's Answer, as well as her Statement of Evidence in this matter. And as I noted the last time, neither of those documents contains any kind of a pleading or affirmative defense regarding those discrimination claims which are properly the subject of a Superior Court action and wherever that goes. And at the risk of an editorial comment, I do not read Winters as standing for the proposition that if you don't raise that defense here that you can't raise that then in Superior Court. I read Winters to say that you don't get two

tenure charges have been met." As a general rule of law, establishing the truth of the charges presented in either an administrative proceeding or in a discipline or discharge arbitration means proof by a preponderance of the believable evidence. Atkinson v. Paresekian, 37 N.J. 143, 149 (1962); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971). Where the standard is preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 104 (App. Div. 1959). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because its overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

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(n. 2 continued) bites of the apple. You don't raise it here in this proceeding and then if you're unsuccessful then try to raise it in Superior Court.

So I would like the record to be abundantly clear how Respondent repeatedly attempted to raise this defense. I have ruled that that's not proper because its been preserved, it's a - - it's in my view, very clearly an election of remedies issue and Respondent has chosen to go to Court, as is her right, but that will not be the subject of any kind of examination here." TII8:20-25; 9:1-20.

In his brief, counsel for Respondent thanked me for my courtesy and respect throughout the proceeding, and I echo those comments. He then went on to make a number of muscular arguments related to this evidentiary ruling, insisting that I had committed reversible error by barring all actions related to the District's purportedly discriminatory and retaliatory actions against Ms. Keough. See Brief at pps. 27-30. These primarily focused on Mr. Shulman's May 26, 2016 Order, as well as the Appellate Division and Supreme Court's decisions denying Respondent's motion(s) for an Interlocutory Appeal. In the interest of arbitral economy, these arguments have not been summarized, but are incorporated by reference herein.

While not specifically referenced in my bench ruling, Respondent is reminded that per N.J.S.A. 18A:6-17.1, the arbitrator is to determine the case under the American Arbitration Association labor arbitration rules unless there is a conflict with the statutory procedures in which case, the latter govern. Pursuant to AAA Labor Arbitration Rule 27, "[t]he arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary."

Whatever standard of proof the arbitrator determines applies in this case, it is an established tenet of law that, when evidence is in equipoise and there is no other persuasive evidence, the question in issue must go against the party who has the burden of persuasion, in this case, against the School District. In re Tenure Hearing of Clare Miller, Union County Educational Services Commission, O.A.L. Dkt. No. 5812-01, Agency Dkt. No. 240-7/01 (decided April 8, 2002).

The School District seeks to strip Ms. Keough of her tenure and terminate her employment based upon conduct which they claim is "unbecoming". The statute, N.J.S.A. 18A:6-10, provides that a tenured school employee cannot be dismissed or reduced in compensation except for inefficiency, incapacity, or "conduct unbecoming". The statute does not define "conduct unbecoming", but our Supreme Court has. Recently, the Supreme Court defined "conduct unbecoming" as "conduct which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services. In re Young, 202 N.J. 50, 66 (2010).

"'Conduct unbecoming' is not specifically defined in the statute. It has been called an elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the public entity or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. The touchstone of the decision as to whether particular behavior is properly considered conduct unbecoming lies in the certificate holder's fitness to discharge the duties and functions of one's office or position.

Conduct unbecoming is a type of disciplinary charge that is determined on a case-by-case basis and can embrace a wide range of conduct. Under appropriate circumstances, unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." In the Matter of the Tenure Hearing of Thomas Strassle, Agency Dkt. No. 131-5/16 (internal citations and quotations omitted).

Ms. Keough is not a certificate holder and she is not a teacher. Arguably, since she does not have contact with children as part of her job duties, her behavior should be required to meet a lower bar as opposed to a teacher, whose behavior directly impacts children and students. Virtually every case reported on conduct unbecoming involves the alleged bad actions of a teaching professional. Ms. Keough is not a teaching professional. She is a payroll clerk. Nevertheless, the cases and arbitrations that have found good cause to affirm a charge of conduct unbecoming have included for following behaviors:

- Having inappropriate sexual conversations with a student, resulting in 120 days without pay, In the Matter of the Tenure Hearing of Thomas Strassle, *supra*;

- Sending and receiving nude photographs on district-issued laptop and iPad, on four occasions during the school day and on multiple occasions outside of school, resulting in 120 days without pay, In the Matter of Tenure Hearing of Glenn Ciripompa, Agency Dkt. No. 177-7/14, *aff'd* Bound Brook Board of Education v. Glenn Ciripompa, 442 N.J. Super. 515 (App. Div. 2015);

- Helping students to exchange marijuana for money in her presence without reporting the students, resulting in termination, In the Matter of Tenure Hearing of Loretta Young, Agency Dkt. No. 8-1/14;

- Having sexual relations with a student, resulting in termination, In re Young, *supra*;

- Making racist statements, resulting in a decision by the Appellate Division that termination was not the appropriate penalty, In re Tenure Hearing of Geiger, 2015 N.J. Super. Unpub. LEXIS 2649 (App. Div. 2015).

The Tenure Charges for "Conduct Unbecoming" are in six separately categories:

1. Ms. Keough was cleared to return to work on or before January 4, 2016, but failed to report, thereby abandoning her position. ¶49-50.

2. Ms. Keough scheduled elective surgery while out on leave without notifying the Board, demonstrating poor judgment. ¶51.

3. Ms. Keough willfully provided false and incomplete information and intentionally withheld other information in an attempt to mislead the Board. ¶52-53.

4. Ms. Keough refused to provide a response to the Board's numerous attempts to clarify her leave. ¶54, ¶57.

5. Ms. Keough refused to provide the Board with information regarding her potential return to work date, despite being warned repeatedly. ¶55, 56.

6. Ms. Keough refused to pay her Chapter 78 contributions. ¶58.

The School District falsely alleges that Ms. Keough simply abandoned her position because she was cleared to return to work and simply decided not to do so. The evidence clearly demonstrates that this was not the case. While the Workers' Compensation physician cleared Ms. Keough to return to work after her jaw surgery caused by a work-related injury, Ms. Keough also had a wrist injury that had been causing her increasing pain and other difficulties during the

previous year.

The medical records and testimony from Dr. Frederick Ballet demonstrate that Ms. Keough had urgent wrist fusion surgery on December 16, 2015 and then an emergent carpal tunnel surgery on December 18. See *Dr. Ballet's medical records, KEOUGH100 and KEOUGH117-118, and Dr. Ballet's testimony,* TII169:19-170:8. Ms. Keough had every intention to return to work, as scheduled, on January 4, 2016. *Ms. Keough's testimony,* TIII102:16-23. She believed at the time she had the surgery that she would be able to return to work on January 4, 2016. *Ms. Keough's testimony,* TIII41:19-42:2.

Unfortunately, she did not initially understand the severity of the surgery or the amount of recovery that would be necessary. *Ms. Keough's testimony,* TIII106:4-21. Dr. Ballet's records and testimony confirm that he did not tell her how long she would be out of work. While one can opine that he should have told her that she would be out of work for an extended period of time, he does not recall telling her and there is nothing in his records to indicate that she was told prior to surgery that she would out of work for any amount of time. *Keough96-206; Dr. Ballet's testimony,* TII125:12-24.

Ms. Keough based upon her medical history, reasonably believed on December 22, 2015 that she would be returning to work as scheduled on January 4, 2016. She based her belief upon two (2) previous procedures she had on her wrist. *Ms. Keough's testimony,* TIII106:8-15. On December 31, 2014,

Ms. Keough underwent arthroscopic surgery on her wrist and promptly returned back to work on the first day after break. *Ms. Keough's testimony,* TIII106:8-15; *KEOUGH133, KEOUGH140.* She also reasonably believed that the School District would accommodate her injury as they had in the past. When she had her arthroscopic surgery and returned to work one-handed, her supervisor bought her a left handed keyboard so that she could calculate her numbers left-handed. *Ms. Keough's testimony,* TIII38:10-39:11.

Similarly, in February 2015, Ms. Keough's wrist became aggravated and her arm was placed in a cast as the result of an accident. *KEOUGH133-134; Ms. Keough's testimony,* TIII39:12-16. Again, despite being airlifted from the accident and missing a week because of other accident-related injuries, Ms. Keough returned to work with her cast and worked. *Ms. Keough's testimony,* TIII39:12-40:9. Ms. Keough was shocked when she received unexpected news from Dr. Ballet on December 29, 2015 that she would not be able to return to work on January 4, 2016. *Ms. Keough's testimony,* TIII43:7-23.

Dr. Ballet explained that due to the significant pain from the wrist fusion surgery, Ms. Keough would need to be on morphine and oxycodone, narcotics that would render her unable to work. *Dr. Ballet's testimony,* TII143:2-144:4. He provided Ms. Keough with a note excusing her from work for "2-3 months". Respondent's Exhibit 1; Petitioner's Exhibit 8. Ms. Keough provided this note, along with a letter, on December 30, 2015, which Petitioner received on January 4, 2016. Respondent's Exhibit1/Petitioner's Exhibit 8. *Dr. Doloughty's testimony,*

TI34:24-35:22.

The School District would not wait for Ms. Keough to be medically cleared to return to work. They brought these Tenure charges for abandonment on April 26 or 28, 2016. *Dr. Doloughty's testimony,* TI146:8-19. As soon as Dr. Ballet cleared Ms. Keough to return to work, this office sent a copy of the Doctor's note to Mr. Comegno, who was by then already representing the School District. Respondent's Exhibit 18. Ms. Keough was ready and able to return on to work May 4, 2016, just a few days after these Tenure Charges were brought.

Nevertheless, the School District refused to permit her to return to work because the Tenure Charges had already been brought. *Dr. Doloughty's testimony,* TI146:8-148:8. This charge brought by the School District is false. There IS no evidence whatsoever to support the School District's claim that Ms. Keough abandoned her job. She was not cleared for work by her physician after urgent and emergent surgeries and provided medical documentation from her doctor. When she was cleared by her doctor to return to work, the return-to-work note was immediately submitted and the School District refused to allow her to work because the tenure charge was already pending and for no other reason. Accordingly, the arbitrator should reject this charge.

The School District accuses Ms. Keough of exercising poor judgment by scheduling elective surgery. First of all, the allegation is untrue. Secondly, there is a substantial difference between exercising poor judgment and engaging in

conduct unbecoming a public employee. Many educational employees make decisions that in retrospect could have been wiser. That is not the standard for stripping tenure and terminating employment. Nevertheless, Ms. Keough did not exercise poor judgment. She had wrist surgery because it was urgent.

When pressed during cross-examination, Superintendent Doloughty explained that she believes that Ms. Keough's surgery was "elective" because it was scheduled and was without a diagnosis. *Dr. Doloughty's testimony,* TI139:6-11. By Dr. Doloughty's own definition, Ms. Keough's surgery was not elective. Dr. Doloughty then claimed that she was unaware of any diagnosis. *Dr. Doloughty's testimony,* TI139:12-14. That was also proven to be completely untrue. Although the parties disagree on the date that the School District received Dr. Ballet's detailed explanation of the diagnosis and surgeries, the School District admits that they received Dr. Ballet's documents no later than March 12, 2016. *Dr. Doloughty's testimony,* TI139:15-140:8. Therefore, on April 26, 2016, when Dr. Doloughty filed these tenure charges, the School District was well aware that there was a diagnosis and had an explanation of the reason for each of the two (2) surgeries.

Furthermore, Dr. Ballet testified in detail regarding the surgeries, which he considered to be urgent, emergent, and unavoidable. *Dr. Ballet's testimony,* TII145:9-146:11. Throughout his testimony, we reviewed his medical records where he had been recommending wrist fusion for almost a year. See *testimony and medical records, Dr. Ballet's testimony,* TII119:19-140:13. Respondent's

Exhibit 11. *(KEOUGH124-144, 183, 205).* The second surgery, which was unexpected, was emergent and according to Dr. Ballet would have resulted in permanent injury if not performed immediately. *Dr. Ballet's testimony,* TII145:19-24. Dr. Ballet's definitions comport with generally understood definitions of the urgency of surgeries. See https://en.wikipedia.org/wiki/Elective_surgery.

In this case, the surgery had been scheduled for August 2015, but because Ms. Keough needed urgent surgery on her jaw (a surgery ordered by the District's Workers' Compensation physician), the wrist surgery needed to be postponed until the jaw was stable due to the potential complications with the anesthesia. *Dr. Ballet's testimony,* TII136:17-138:3. And, as stated above, the second surgery was emergent. *Dr. Ballet's testimony,* TII145:19-24.

Furthermore, the Board does not believe that Ms. Keough intended to return immediately after her surgery, but that contention is belied by the testimony of Sue Kirk, who spoke to Ms. Keough repeatedly on December 22 - less than a week after her two wrist surgeries - and during those conversations Ms. Keough repeatedly insisted that she was planning to return to work on January 4, 2016, as planned. *Ms. Kirk's testimony,* TI161:25-164:21.

Accordingly, the School District cannot prove the allegations of Paragraph 51 in that (1) the surgeries were not elective, they were urgent and emergent; (2) Ms. Keough did not exercise poor judgment; and (3) even if Ms. Keough had used poor judgment in scheduling the surgery while out on Workers'

Compensation leave, it would not rise to the level of conduct unbecoming a public employee.

The School District admitted that its sole basis for accusing Ms. Keough of providing false information to the Board is her text of the word "4th" to Raymond Coxe, allegedly in response to the question "When is your surgery". *Dr. Doloughty's testimony,* TI141:17-144:5. There is no other alleged false information provided.

At the outset, it is important to note that Ms. Keough text-messaged Mr. Coxe on December 30, 2015 because she could not access the School District's e-mail system. Respondent's Exhibit 16 *(CITPK327)*. During this text message conversation, Ms. Keough advised Mr. Coxe that:

> I have not been able to get in since I've been out.
>
> I just saw my hand doctor yesterday n he wants me out for 2-3 months cos I'm having it fused together. So effective the 4 of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th.

This message truthfully advised the School District that her hand doctor wants her out for 2-3 months effective "the 4 of January". The text also contains a request for the reasonable accommodation of a leave of absence without pay "effective January 4th." The entire remainder of this very brief conversation was as follows:

> I have the Drs note 12:42 PM

When is your surgery? 12:44 PM

4th 12:45 PM

The School District's entire claim of fraudulent misrepresentation against Ms. Keough is based upon her typing of "4th" which appears in this text message to be in response to the question, "When is your surgery?" Ms. Keough testified, and medical records confirm, that she was under the influence of narcotics at the time this text was written. *Ms. Keough's testimony,* TIII46:2-17. She clearly does not remember why she responded "4th" and opined that she was answering the previous question. *Ms. Keough's testimony,* TIII47:7-20. She testified that she was still on the previous question, correcting where she made a typo "4 of January" to make clear she meant to say "4th of January", so she corrected it by writing "4th". *Id.* It was never meant to answer Mr. Coxe's question about the date of surgery.

Clearly, the purpose of the text message was to advise that Ms. Keough's physician had put her out of work and she needed a leave of absence for 2-3 months. Logically, there would be reason for Ms. Keough to lie about the dates of her surgeries. It would not matter whether the surgery was December 16th and 18th or on January 4th because she needed a 2-3 month leave of absence beginning January 4, 2016. Ms. Keough had her mother deliver the Doctor's note along with a written request for a leave of absence on January 4, 2016, the first day back from winter break. *Ms. Keough's testimony,* TIII50:6-51:8. The School District received it on January 4, 2016. *Mr. Coxe's testimony,* TII71:5-7.

We know that because the Business Administrator testified that it is the School District's policy to stamp incoming mail and deliveries so that they know when mail is received. *Mr. Coxe's testimony,* TII73:25-74:23.

The only other allegation of misrepresentation was made by Superintendent Doloughty at the arbitration. Dr. Doloughty alleges that Ms. Keough made a misrepresentation by stating that the physician-imposed leave of absence was beyond Ms. Keough's control. *Dr. Doloughty's testimony,* TI142:9-17. That allegation was fully debunked by Dr. Ballet's testimony. *Dr. Ballet's testimony,* TII149:21-151:2. Under cross-examination, Mr. Coxe was unable to name a single misrepresentation other than when he asked the date of surgery, Ms. Keough responded "4th". *Mr. Coxe's testimony,* TII66:18-67:10.

Ultimately, as will be discussed in the subsection below, Ms. Keough and her physician repeatedly provided additional information regarding the dates, but it does not change the fact that Ms. Keough was not lying or misrepresenting anything when she contacted Mr. Coxe to tell him that she could not return on January 4, 2016, and that her physician had put her out for 2-3 months. The School District has not produced any competent evidence that Ms. Keough made any knowing or intentional misrepresentations, and certainly has not demonstrated any deliberate conduct unbecoming a public employee due to typing "4th" in a text message.

The most unfair and patently untrue allegations against Ms. Keough are

the Board's continued complaints that Ms. Keough never contacted the School and refused to provide information. At the arbitration it was clearly established that Ms. Keough did everything possible to keep the Board up to date on her condition. It was equally clear that the Board interfered and affirmatively prevented Ms. Keough from communicating on numerous occasions.

There is absolutely no history during her entire employment of Ms. Keough failing to provide communications to the School Board regarding her absences. *Dr. Doloughty's testimony,* TI88:4-8. It is uncontested that there was nothing in Ms. Keough's prior years of employment that would have caused Ms. Keough to have been disciplined or terminated from her position. In fact, Mr. Coxe testified that they were "fully prepared to welcome her back" on January 4, 2016. TII25:11-16.

Ms. Keough testified and presented documented evidence that she constantly and consistently kept communication with the School regarding her absence. She started on December 30 by immediately, as soon as she knew, notifying Raymond Coxe via text message that she would not be returning on January 4, 2016 due to wrist surgery, and that she would require a leave of absence. Respondent's Exhibit 16. She followed that text conversation with a letter which requested the leave of absence and enclosed a note from Dr. Ballet placing her out of work for 2-3 months. Respondent's Exhibit 1. The School Board admits that they received the December 30th letter, which was hand-delivered on January 4, 2016 by Ms. Keough's mother. *Mr. Coxe's testimony,*

TII71:5-7. It was stamped received, as is the School's policy to stamp incoming documents. *Mr. Coxe's testimony,* TII73:25-74:23.

The School alleges that it sent Ms. Keough a letter and package on January 4, 2016, but Ms. Keough insists that she never received the letter or package. *Ms. Keough's testimony,* TIII51:9-15. There is ample evidence to conclude that the letter was never sent. Ms. Keough, who received all the other letters, did not receive it. The school keeps no mail log, so they cannot prove it was ever mailed. If it was sent certified as they claim, they should have some certified mail receipt. None have been produced. There is no returned mail unclaimed.

In addition, the School keeps producing different versions of this package. The package identified as an exhibit in the School's initial identification of exhibits was different than the version introduced at arbitration. The School attempted to insert a blank certification that was not part of the original package. The arbitrator correctly barred the attempt to "revise" the package that the School claimed it sent.

Even though she did not receive any January 4 letter, Ms. Keough followed up her own letter and note with a telephone call on January 5, 2016, to make sure that the School received it. That is proven by Ms. Keough's telephone records. Respondent's Exhibit 9. Ms. Keough testified that she called for the express purpose of making sure that the note was sufficient and that Ms.

Meredith told Ms. Keough that the School had all the documentation it needed. *Ms. Keough's testimony,* TIII54:1-10.

Ms. Keough then had four (4) pages of disability papers delivered to the school by her mother on January 7, 2016. *Ms. Keough's testimony,* TIII56:23-57:16. The third page of that package contained a medical certification from Dr. Ballet, explaining that Ms. Keough had wrist surgery on December 16 and 18, 2015, and provided dates that Ms. Keough was expected to need for recovery. Respondent's Exhibit 2. Ms. Keough followed that up with five (5) phone calls on January 7 and 8, 2016. Respondent's Exhibit 9. The School admits that no one ever returned any of Ms. Keough's five (5) telephone calls.

The School claims that they only received one (1) of the four (4) pages, but the School's claim is full of holes. First, there is no "received" stamp on the page it claims it received, even though it is the School policy to stamp incoming documents. *Mr. Coxe's testimony,* TII73:25-74:23. A logical conclusion is that the school stamped the top page of the four pages and then lost or discarded the other three pages. This theory is supported by the text message that Raymond Coxe sent Ms. Keough on January 7 regarding the disability paperwork. While referring to the disability paperwork, Mr. Coxe referred to the paperwork in the plural by stating:

> You will be contacted when they are ready if we are able to complete them.

Mr. Coxe admitted on cross-examination that he does not generally refer to one

piece of paper as "they" or "them". *Mr. Coxe's testimony,* TII81:9-82:3.

The School claims it then sent a letter to Ms. Keough on January 13, 2016 denying Ms. Keough's request for leave and demanding that Ms. Keough must return to work by January 22, 2016 or face disciplinary action. Ms. Keough testified that she did not receive the letter until "four (4) or five (5) days later". *Ms. Keough's testimony,* TIII65:14-18. It was corroborated at arbitration that the School marked the letter as having been mailed on January 19, 2016. *Dr. Doloughty's testimony,* TI123:2-12. Ms. Keough spent the next day trying to obtain legal advice because she believed that the School was violating the law by refusing to grant her leave. *Ms. Keough's testimony,* TIII67:6-9.

Dr. Doloughty certified in her statement, which she signed subject to punishment for false statements, that Ms. Keough never responded to the January 13, 2016 letter. *See Statement of Evidence ¶35, Joint-1.* At arbitration, that statement was proven untruthful. Ms. Keough's phone records confirm a telephone call from Ms. Keough on January 21 responding to the letter. Respondent's Exhibit 9. Furthermore, Dr. Doloughty admitted that Ms. Keough spoke to her about the leave on January 21. *Dr. Doloughty's testimony, TI122:15-123:1.* Dr. Doloughty's statement in ¶35 that Ms. Keough never responded to the letter was knowingly false. Dr. Doloughty was well-aware that Ms. Keough responded to the letter because she spoke to her on January 21 about it.

Ms. Keough testified that Dr. Doloughty insisted that Ms. Keough must return on January 22nd. When Ms. Keough told that her physician has her out on disability, Dr. Doloughty responded that "I don't know what to tell you." *Ms. Keough's testimony,* TIII68:23-69:9.

Ms. Keough received another threatening letter which was mailed by the School around February 5. Petitioner's Exhibit 5. She promptly responded by scheduling an appointment with Dr. Ballet. In another attempt to keep the School District fully informed regarding her condition, on February 11, 2016, Ms. Keough saw Dr. Ballet, and promptly mailed the School an updated status report and Dr. Ballet's dictation from the visit. Respondent's Exhibit 4. *Ms. Keough's testimony,* TIII73:1-8. The School admits it received the report but claims it did not receive the report until March. *Dr. Doloughty's testimony,* TI129:21-22. Regardless, the School clearly had all of these documents prior to bringing the tenure action in late April. The School's repeated allegations that Ms. Keough never provided them with any information at all are demonstrably false.

Ms. Keough continued to keep the School updated and provided more physician's notes in March. Respondent's Exhibits 5 & 6. In direct contradiction to the School's certified statement that Ms. Keough never responded to its requests for medical information, Raymond Coxe testified that Ms. Keough "inundated" the School with a "plethora of documents". *Mr. Coxe's testimony,* TII48:23-*5,* 99:4-100:8. Mr. Coxe and Dr. Doloughty had absolutely no excuse as to why nobody ever returned any of Ms. Keough's phone calls. *Mr. Coxe's testimony,* TII102:12-

103:3. Nobody ever spoke to Ms. Keough to try to clarify any confusion despite her repeated calls.

The School should not have been confused. They admittedly had all of Dr. Ballet's records long before any Tenure action was taken. This tribunal should not accept the Petitioner's outlandish claim that Ms. Keough's typing of the word "4th" in a text message (which was followed up the next day with medical documentation) so confused them that all of the other medical documentation was a mystery. The letters to Ms. Keough do not indicate confusion - they reflect an employer determined to rid themselves an employee who had too many disabilities for their liking.

The burden here is upon the employer to prove their allegations that Ms. Keough never responded to their requests. They cannot come close to meeting that burden. Ms. Keough did everything possible to respond to the School's numerous requests and always did so promptly. The arbitrator should reject these meritless allegations

The final allegation of conduct unbecoming alleges that Ms. Keough refused to pay her Chapter 78 contributions. The allegation is every bit as false as the previous allegations. Ms. Keough produced at arbitration the bills that she received and her canceled checks evidencing payment in full for the Chapter 78 contributions. Respondent's Exhibit 20. The Petitioners were forced to admit that there were never any Chapter 78 contributions that were unpaid. *Ms. Walsh's*

*testimony,* TIII27:10-12. The allegations are meritless and the charge accusing Ms. Keough of not paying her Chapter 78 contributions is false.

In summary, none of the allegations of conduct unbecoming a public employee are true, and none of them indicate any conduct by Ms. Keough that was unbecoming a public employee. The arbitrator should reject the meritless allegations of the Petitioner.

The Petitioner additionally does not state an actionable claim for removal due to incapacity. The Petitioner merely concludes that "Ms. Keough's abandonment of her position, her excessive absenteeism, her unprofessional conduct, her failure to cooperate, and her decision to willfully provide false information leads to only on conclusion: Ms. Keough no longer has the capacity to perform the essential functions of her job." *Tenure charges at* ¶62. The Petitioner's logic is fatally flawed because it begins with a series of untrue premises, assumes facts that are false, employs definitions that are erroneous, and reaches a conclusion that has absolutely nothing to do with its major premise.

First of all, as set forth in the previous sections, Ms. Keough did not abandon her job. She did not act unprofessionally, she cooperated at all times, and did not provide any false information. Most importantly for this section is that even if she had done all of the things she is alleged to have done, it still would not result in a finding of incapacity. The Petitioner confuses conduct unbecoming

with incapacity.

Incapacity does not refer to the misconduct of an employee. Incapacity refers to the physical ability of the employee to perform labor. The term "incapacity" is not defined by the tenure statute but the Courts that have defined the term have always equated incapacity with the inability to perform the job due to physical or mental limitations. "Incapacity as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work." In the Matter of the Tenure Hearing of Carson Steltz, Agency Dkt. No. 260-9/14 at 25 (internal citations and quotations omitted). For example, the inability to work due to severe depression warranted tenured clerk's dismissal for incapacity. Matter of Tenure Hearing of Stanley, 95 N.J.A.R.2d (EDU) 495.

In the absence of a statutory or regulatory definition of "incapacity", the arbitrator should be guided by the plain meaning of the word. Webster's Dictionary defines "incapacity" as "the quality or state of being incapable; especially lack of physical or intellectual power or of natural or legal qualifications". See *https://www.merriam-webster.com/dictionary/incapacity.*

If Ms. Keough was unable to return to work or perform her duties because her injuries prevented her from working, then a charge of incapacity might be applicable. That is not the case here. Within days of being charged with incapacity, Dr. Ballet released Ms. Keough to return to work full-duty. Respondent's Exhibit 18. The return to work note was promptly served upon the

District's attorney. Id. Nevertheless, the School District refused to reinstate Ms. Keough despite the fact that Ms. Keough was not incapacitated in any way.

The only other charge of incapacity is equally faulty. The Petitioner alleges that, "[e]ven though being on Workers' Compensation leave may be a good reason to justify a number of absences, such status is irrelevant to the determination of incapacity." *Tenure charge at ¶63.* We agree that this is a correct recitation of the law, but it is confusing as to why the Petitioner would make such statement. Ms. Keough was cleared to return to work on January 4, 2016. Petitioner's Exhibit 7. There should be no issue or controversy regarding Ms. Keough being incapacitated due to her Workers' Compensation injury.

Apparently, the Petitioner is arguing that due to the number of days that Ms. Keough missed due to the Workers' Compensation injury, the arbitrator should declare her incapacitated and permit the School District to fire her. Such an argument is discriminatory and retaliatory on its face, and should be rejected in any event as patently false. It was admitted by Petitioner that missing time due to a Worker's Compensation injury is not a reason to be fired. *Dr. Doloughty's testimony,* TI89:16-18. Ms. Keough is not incapacitated and the arbitrator should reject the baseless claims of the School District.

Excessive Absenteeism has been well-defined by previous Arbitration decisions, and the language has been consistently followed. In order to terminate a tenured employee for chronic or excessive absenteeism, the Board must

demonstrate that there was consideration of:

A. the particular circumstances of the absences and not merely the number of the absences;

B. the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and

C. that there be some warning given to the employee that his or [her] supervisors were dissatisfied with the pattern of absences.

In the Matter of the Tenure Hearing of Carson Steltz, *supra*, at 21, citing In the Matter of the Tenure Hearing of Velez, OAL Dkt. No. EDU 3255-05 (2006), aff'd C.D. (April 27, 2006) and In re White, 92 NJAR 2d (EDU) 157, 161.

The Board fails to demonstrate any of these three factors. First, it was admitted that Ms. Keough's absenteeism in the prior years was not a factor in the decision to terminate. *Dr. Doloughty's testimony,* TI89:3-7, 90:14-17. She had never even been warned that there was a problem with her attendance. *Dr. Doloughty's testimony,* TI89:25-90:4. In fact, if Ms. Keough had been able to return on January 4, 2016, she would have been welcome to return without any warnings or consequences at all. *Dr. Doloughty's testimony,* TI90:14-17.

The allegations that Ms. Keough's absences were unexplained are patently false. The Petitioner fully knew at all times that Ms. Keough's absences in 2015-2016 were due to a Workers' Compensation jaw injury that was suffered the previous year, followed by wrist surgery. The analysis requires the arbitrator to take into consideration the reasons for the absences. Ms. Keough's absences were caused by a series of bad luck events that are not likely to occur - a car

accident which aggravated an old wrist injury and a Workers' Compensation injury - and there is no basis to believe that these events would be an indicator of poor attendance in the future.

The Petitioner falsely accuses Ms. Keough of creating "bookend" weekends during the 2015-2016 school year by taking off Fridays and the following Mondays. Ms. Keough's attendance records show nothing of the sort. The school year begins July 1, 2015 and ends June 30, 2016. As Ms. Keough testified, she was out Friday, August 21 and Monday, August 24, but that was for a pre-approved vacation. *Ms. Keough's testimony,* TIII95:3-10. The next Friday-Monday was September 18 and September 21. But Ms. Keough was not absent that Friday. The School's physician required her to be examined that Friday so she was only able to work a ½ day. She was sick on Monday. *Ms. Keough's testimony,* TIII95:21-96:6. There were no other Friday-Mondays. Her last physical day of work before her Workers' Compensation leave was Thursday, September 24. Although her records reflect that Friday September 25 and Monday September 28 were personal days, they were called personal days because Ms. Keough was paid by the school rather than the Workers' Compensation carrier, but this was part of her leave of absence, not a bookended weekend. *Ms. Keough's testimony,* TIII96:9-21.

The Petitioner complains that Ms. Keough's absence caused the School District a hardship, but the arbitrator should take those claims with a grain of salt. The School District never hired a temporary employee. *Mr. Coxe's testimony,*

TII65:14-15. Not a single employee incurred a minute of overtime. *Mr. Coxe's testimony,* TII65:4-5. Despite the fact that Ms. Keough has been out for 15 months as the result of her unpaid suspension, she has not been replaced by anyone either temporarily or permanently. *Mr. Coxe's testimony,* TII64:12-16. The only testimony this tribunal heard regarding the School District's claim of "a detrimental effect on the Board's operations" was that the Assistant Business Administrator, Ms. Walsh, is now working through most of her lunch periods instead of working through some of her lunch periods. *Ms. Walsh's testimony,* TIII19:-20:2.

Given the complete lack of hardship, it is far more likely that the real reason that the School District is so anxious to get rid of Ms. Keough is because it realized while she was out that they could complete all of their work with one less person, and this way they could save payroll.

The final step in the analysis is whether she had ever been warned before about her attendance. It was established that Ms. Keough had never before been warned or counseled regarding her attendance. *Dr. Doloughty's testimony,* TI89:25-90:4. She would have been welcomed back with open arms. *Mr. Coxe's testimony,* TII57:8-14. The Petitioner has not come close to establishing good cause for terminating Ms. Keough for excessive absenteeism. Accordingly, the Arbitrator should reject the charges in their entirety.

In conclusion, the Petitioner has not met its burden of establishing any

basis for terminating the Respondent. Accordingly, Ms. Keough should be reinstated with full back pay to May 4, 2016, the date that she was cleared to return to full duty.

## VI. STATEMENT OF THE CASE

It is well settled that the tenure laws of our State were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons. See generally Viemeister v. Prospect Park Board of Education, 5 N.J. Super, 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." And as the moving party in this disciplinary matter, the District accepts the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the unbecoming conduct and/or incapacity tenure charges by a *preponderance* of the credible evidence. See Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div.

1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); see also State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as "[g]reater weight of the credible evidence"); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954); In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ. 1996). As to *just cause*, see e.g. Maietta v. United Parcel Service, 749 F. Supp. 1344 D.N.J. (1990); City of Portland, 77LA 820 (Axon, 1981); Lozier Corp. 121 LA 1187 (Fitzsimmons, 2005).

In that event, the burden of production will shift to Respondent to proffer and establish her affirmative or exculpatory defenses. Finally, the burden returns to the District to rebut the same with substantial, credible evidence. Additionally, once a determination has been made of whether the tenure charges have been established, Petitioner thereafter is encumbered with the additional burden of demonstrating that the dismissal of Ms. Keough for the charged conduct is warranted and proportional. In deciding whether to remove Respondent from her tenured Administrative Assistant position with the City of Burlington School District, I am required to consider the totality of the circumstances; the nature of the act(s) and the impact on her career. See In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

As I have previously taken notice in other tenure cases, in Karins v. Atlantic

City, 152 N.J. 532 (1998), the Supreme Court of New Jersey determined the phrase *unbecoming conduct* "is an elastic one that has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" citing In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App. Div. 1990) (quoting In re Zeber, 398 Pa. 35, 156 A. 2d. 821, 825 (1959); see also Laba v. Board of Education, 23 N.J. 364, 129 A.2d 271 (1957); In re Young, 202 N.J. 50, 66 (2010); Hartman v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Upon a comprehensive analysis of the evidentiary record coupled with careful consideration of the respective positions and supporting case citation, I find that the instant tenure charges are **SUSTAINED IN PART**, as Petitioner's *prima facie* showing of conduct unbecoming has not been rebutted by the Respondent. The remaining charges however have not been established and are dismissed with prejudice. The material facts of the case are both disputed and undisputed, and on balance the former must be resolved in favor of the District's witnesses, whose testimony was far more credible than that of Ms. Keough. They are found to be as follow:

1. Penny Keough has been employed by the City of Burlington School District Board of Education as an Administrative Assistant/Payroll Secretary since October 1, 2011. She earned tenure in the position as of December 2, 2014. TI19:7; 20:20.

2. District Attendance records reflect that between January 2012 and June 2012, Ms. Keough was absent seven (7) times. During the 2012 - 2013 School Year, Ms. Keough was absent twenty-eight (28) days.

During the 2013 – 2014 School Year, there were a total of thirty (30) absences. During the 2014 – 2015 School Year, Ms. Keough accumulated a total of forty-three and one-half (43.5) absences. Finally, from July 2015 until April 2016, she was out a total of one hundred twenty-eight (128) days. See Petitioner's Exhibits 1-5; TI21:22-25; 23:16-22; 24:11-16; 24:18-25; 24:24-25:2. All told, these amounted to two hundred and sixty-seven (267) days in less than five (5) years of employment.

3. Throughout the course of her employment with the District, Ms. Keough has not been counselled regarding not bringing in a doctor's note when out for more than a three (3) day period, or for attendance deficiencies. TIII35:13-25; 36:1-24; 37:1; TI89:25-90:4. The only element that appears in Ms. Keough's personnel file is a counselling by a prior supervisor due to her failure to transfer funds that were necessary to meet payroll. TIII150:6-151:9.

4. On March 1, 2013, Ms. Keough suffered an on-the-job injury when she hit her face on a door while walking out of the Board offices. She was later seen at the Concentra Urgent Care Center. See CITY OF BURLINGTON BOARD OF EDUCATION WORKERS' COMPENSATION EMPLOYEE REPORT, Petitioner's Exhibit 6.

5. The injury ultimately required Ms. Keough to undergo jaw surgery, resulting in a Workers' Compensation leave, effective October 1, 2015. Based upon a September 30, 2015 meeting she had with District personnel, the expectation was that she would be out between four (4) to six (6) weeks. TIII9:21-22; 10:1-5; TI25:9-25.

6. During the period of time that she was on the Workers' Compensation leave, Ms. Keough was required to make certain payments. Included among them was her portion of the Chapter 78 contributions, which would have covered the period of time from October through December 2015 and for which she was billed monthly. TIII14:1-22; 15:1-9; TIII25:23-25. This obligation was satisfied, with Ms. Keough sending one check on January 11, 2016 in the amount of $308.14, with the balance deducted from a retro check following the conclusion of negotiations over the 2014 – 2015 C.B.A. TIII15:1-25; 16:1-17; TIII26:1-4; See also Respondent's Exhibit 20.

7. On December 22, 2015, Ms. Keough called the phone line of Administrative Assistant Susan Meredith, who was on vacation. The call was picked-up by Bookkeeper Sue Kirk (formerly Croce). During the conversation, Ms. Keough indicated that she would be returning to work on January 4, 2016, which was the first day back after Winter

break. Because Ms. Kirk handled Workers' Compensation, she knew that Ms. Keough couldn't return without formal approval or a doctor's note and there were procedures that had to be done. She therefore told Ms. Keough that a doctor's note was necessary and also contacted the District's Workers' Compensation company. TI162:1-21; TI27:13-25; TII20:21-25; 21:1-20; TIII10:11-25.

8. In a subsequent conversation with Ms. Kirk, Ms. Keough stated that she had spoken with her doctor, who assured her there would be no problem and that a note was available, if necessary. At one point Ms. Keough became frustrated because they were not able to get the doctor's note right away and was adamant that she was going to be returning on January 4th. She also expressed her belief that all the employees in that Department were useless. TI162:23-25; 163:1-25; T164:1-9.

9. The procedure that Ms. Kirk had to follow involved sending an e-mail to the Workers' Compensation company, confirming that Ms. Keough had contacted the District and was looking to come back to work. They in turn reached out to the doctor so that a note could be provided by the end of the business day, if possible. The handwritten note from the doctor clearing Ms. Keough came in at 4:21 p.m. on December 22, 2015. As this was after business hours, it was received by the District on December 23rd. TI164:10-25; 165:1-15. The note from Dr. David Sheen stated: "Mrs. Keough is medically cleared to return to work on Jan. 4, 2016. Mrs. Keough had surgery on Oct. 1, 2015 and has had several follow-up visits to demonstrate that she has the mental and physical capacity to return to work on January 4, 2016." [*Emphasis in original*]. See Petitioner's Exhibit 7.

10. On December 30, 2015, Raymond Coxe, School Business Administrator and supervisor of Ms. Keough, received a text message from her. After briefly inquiring as to why she could not get into the District's e-mail system, Ms. Keough texted "I just saw my hand doctor yesterday n [*sic*] he wants me out for 2-3 months cos [*sic*] I'm having it fused together. So effective the 4th of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th. I have a Drs. [*sic*] note." Mr. Coxe texted back asking "[w]hen is your surgery?" Ms. Keough replied "4th." TII24:1-25; TIII44:15-23; 49:1-18. See Respondent's Exhibit 16.

11. That same date, Ms. Keough wrote a letter to Mr. Coxe. This provided in full:

Dear Ray,

Per our conversation today about my request for medical leave of absence effective January 4th 2016.

Please find this letter as my formal request for my medical leave without pay effective January 4th of 2016.

My doctor will be keeping me out of work for approximately 2-3 months.

Sorry for the short notice but this was beyond my control.

Thank you for your time and consideration.

Sincerely

Penny Keough.

See Respondent's Exhibit 2/Petitioner's Exhibit 8; TII27:13-21; TI34:24-25; 35:1-10.

12. The letter, which had been hand carried by Ms. Keough's mother, included a note from Frederick L. Ballet, M.D. See Petitioner's Exhibit 8/Respondent's Exhibit 1. Dr. Ballet's note provided that Ms. Keough was seen in his office on December 29, 2015, with the box "Patient may not return to work until further evaluation" checked. It further indicated "out of work starting January 4th 2016 for about 2-3 months. Next apt 1/12/2016." Id. TI35:11-18.

13. Ms. Keough's December 30, 2015 text message to Mr. Coxe that "I just saw my hand doctor yesterday n he wants me out for 2-3 months cos I'm having it fused together," coupled with the response "4th" when the BA asked when the surgery was, created the reasonable impression in District officials that her need for surgery had recently developed. This was buttressed by the statement in her January 4, 2016 leave request letter that she was "sorry for the short notice but this was beyond my control." See Respondent's Exhibit 2/Petitioner's Exhibit 8.

14. Because she was unsure what Dr. Ballet's note was in reference to and the nature of the leave, on January 4, 2016, Superintendent of Schools Dr. Patricia T. Doloughty sent a correspondence to Ms. Keough, which indicated in whole:

Dear Ms. Keough:

I am in receipt of your leave request letter, dated December 30, 2015 and received January 4, 2016. In your letter, you requested a leave of absence without pay due to medical reasons. Specifically, you requested a leave of absence without pay beginning January 4, 2016 for approximately two to three months. The purpose of this letter is to respond to your leave request and clarify the designation of your leave by the City of Burlington Public School District ("the District").

In accordance with attached Policy 443.1 Family Leave, 'the Board may, in its discretion, permit an eligible staff member, who is on an FMLA leave for reasons of the staff member's own serious health condition, to apply his/her accumulated sick days, to the extent available, during the period of otherwise unpaid leave...' During this time, you may utilize your accumulated sick days, to the extent they remain available, in order to receive pay for days which you otherwise would have been required to work. Our records indicate that you have 10 ½ sick days available to you. Your period of disability will run from January 4, 2015 through and including March 25, 2016. During this time, you will be permitted to utilize 10 of your available sick days in order to be paid for the work within that timeframe. These ten days will be withheld by the district as payment for the two weeks that were to be reimbursed because you were being paid by [W]orkers' Compensation.

The FMLA provide[s] qualified employees with up to twelve (12) work weeks of leave for certain specified reasons, which is unpaid but with the continuation of health benefits. A work week is any week in which you would otherwise have been required to work at least one (1) day.

Please be advised that your request for leave will be submitted to the City of Burlington Board of Education ("the Board"), **pending receipt** of the attached Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) according to the following schedule. If we do not receive the Certification of Health Care Provider for the Employee's Serious Health Condition, your leave will be

denied.

- Your leave will commence on January 4, 2016. Leave with pay will begin January 4, 2016 and continue during that period through January 15, 2016, which will be with pay, utilizing 10 of your available sick days, and with the continuation of medical benefits. This leave will be designated as FMLA leave based on your own disability, and you will utilize two (2) work weeks of your allotted twelve (12) work weeks of FMLA leave.

- You will be granted a leave for medical purposes from January 18, 2016 through March 25, 2016 pending the Certification of Health Care Provider for Employee's Serious Health Condition, which will be without pay but with the continuation of medical benefits. This period of leave will run under FMLA from January 18, 2016 through March 25, 2016, until the expiration of the twelfth (12th) work week of FMLA (the week of March 12, 2016).

- You have indicated your intention to inform the Board at a later date of your expected return date. Be aware that, based on the above designation and your statutory entitlement, if you were to utilize your entire statutory entitlement under FMLA, the latest possible date of your return to work would be March 29, 2016. Please advise the Board within a reasonable period of time concerning the expected date of your return. Unless you advise the Board with advanced notice within a reasonable time of your intention to return to work at an earlier date, you will be expected to return to your position at that time.

During your period of leave, you remain responsible to continually meet all obligations concerning your contributions toward health insurance premiums. Please contact the business office to make the necessary financial arrangements to ensure continued health coverage. If you are eligible for COBRA during your leave, you will receive the necessary paperwork from the business office.

> If you have any questions concerning the designation of your leave period, you may contact my office.
>
> Very truly yours,
>
> Patricia T. Doloughty, Ed.D.,
> Superintendent of Schools

Petitioner's Exhibit 9; TI36:1-15; 38:23-25; 39:1-25. [*Emphasis in original*].

15. On January 7, 2016, Ms. Keough's mother dropped off a one (1) page state disability application for Mr. Coxe to complete. This contained a Post-It note which read "[p]lease complete and notify as soon as possible when this can be picked up. She worked in private industry. Sandra 609 xxx-xxxx." It was only during the appeal process after the initial unemployment hearing in May or June of 2016 that Mr. Coxe saw the other three (3) pages of the packet which contained medical information. See Petitioner's Exhibit 10; TII31:11-21; 32:1-22; 33:1-18; TIII170:9-21.

16. Following submission of the January 4th and January 7th paperwork, Ms. Keough made a number of phone calls to the District. Per Respondent's Exhibit 9, two (2) calls were made on January 5, 2016 to Ingrid Walsh and Sue Meredith, respectively, to confirm receipt of the letter dropped off by Ms. Keough's Mom the prior day. The exhibit also indicates a total of four (4) calls were placed on January 7, 2016 to Ms. Meredith and Mr. Coxe to ensure that the disability paperwork was filled out. The January 8th call to Sue Meredith was also undertaken for the same purpose. Id. TIII54:1-7; 58:16-60:2' 64:3-9. A January 21, 2016 call that was ultimately routed to Dr. Doloughty and a January 22, 2016 call to Sue Meredith also appear. Id. TIII66:1-7; 71:9-19. No further calls were made to the District. TII133:1-23.

17. The phone calls to Sue Meredith and Mr. Coxe on January 7th were not returned. Mr. Coxe did initiate a text conversation with Ms. Keough that same date as follows:

> I am out today for some medical tests and was tied up with things yesterday. I looked at that form, but we can't fill it out. We do not pay into state disability. 12:45 PM
>
> I worked private company that I did pay into. I need this form filled out by my current employer. There was a note explaining this when dropped off. 12:49 PM

I didn't see a note... I'll look into it. 12:53 PM

How long will it take? I never held up anyone's disability paperwork. 12:54 PM

We've never filled out anyone's disability paperwork as we do not pay into it. 1:39 PM

I did family bonding with child so I did. 1:40 PM

You will be contacted when they are ready if we are able to complete them. 1:41 PM

Well I would appreciate it if my paperwork is not held up. I have never held up anyone's disability paperwork and I would hope that I am given the same consideration. There is nothing on that form that specifically states if you don't pay into it you are not to complete. You told me that the paperwork would be ready yesterday. I need to get it back asap so that the states [*sic*] gets it because it is already a long processing time with them. 1:53 PM

Respondent's Exhibit 17.

18. The January 4th letter from the Superintendent was sent to Ms. Keough via Certified and Regular Mail. While the former was unclaimed, the latter was not returned to the District. When Ms. Keough did not respond to Dr. Doloughty, on January 13, 2016, another letter was sent. See Petitioner's Exhibit 10. This provided:

Dear Ms. Keough:

On January 4, 2016, I received your request for unpaid medical leave, which you indicated would begin effective January 4, 2016. As you know, you were cleared by your physician to return to work on January 4, 2016, and stated that you would return to work on that date, but failed to do so.

Your request for unpaid medical leave has been reviewed under relevant law and Board policies. First, you do not qualify as an eligible employee for leave under the Family Medical Leave Act (FMLA) or Policy 4431.1 (Family Leave) because you have not worked the required 1,250 hours during the previous twelve-month

period. Rather, our records indicate that you accrued only 1,136 hours during the relevant calendar year. If you have any information which you contend supports your eligibility for FMLA, please immediately forward same to my attention for review and consideration.

Policy 3431 (Uncompensated Leave) provides that the Board of Education may consider an employee's request for uncompensated leave under certain circumstances and for a particular purpose, other than disability. However, it is unclear from your letter whether you are requesting leave pursuant to this Policy or whether you are requesting an accommodation because of a disability, for some other purpose, or pursuant to some other policy or Agreement. Please be advised that to constitute a valid request pursuant to Policy 3431, you must specify an emergent inability to work or a reason supported or validated by a physician's statement that such leave is required. Additionally, per the policy, the request must provide dates for start or termination of the unpaid leave. If you require a disability accommodation, please contact me immediately and provide for any supporting documentation for evaluation.

At this time, the Board has not authorized you to take uncompensated leave. Accordingly, you must report to work no later than January 22, 2016. In the absence of information or documentation that you are not able to return to work, or that you require an accommodation, should you fail to return to work by the above-specified date, you may be subject to appropriate discipline.

19. The District's January 13, 2016 letter was not received by Ms. Keough until four (4) or five (5) days later, with the Superintendent confirming during her testimony that the document bore the postmark of "January 19th." TIII65:14-18; TI123:2-12.

20. On January 21, 2016 Ms. Keough phoned the District with the call eventually routed to Superintendent Doloughty. During the ensuing conversation that was short, Ms. Keough was told the District still needed the physician certification for the leave. The response was "I will try to get you what you need." At that time, Ms. Keough failed to disclose either the December surgeries or explain why she was not reporting to work. TI57:1-20.

21. On February 4, 2016, Dr. Doloughty sent another letter to Ms. Keough. See Petitioner's Exhibit 15. This stated:

Dear Ms. Keough:

On January 4, 2016, I received your request for unpaid medical leave, which you indicated would begin effective January 4, 2016. As you know, you were cleared by your physician to return to work on January 4, 2016, and stated that you would return to work on that date, but failed to do so. In my letter dated January 13, 2016, I advised you that the Board has not authorized you to take uncompensated leave pursuant to Policy 3431 and that you do not qualify as an eligible employee for leave under Family Medical Leave Act (FMLA) or Policy 4431.1 (Family Leave). As previously stated, if you have information that you contend permits eligibility for FMLA, please forward same to my attention immediately. Because you do not qualify for FMLA and have not been approved for any unpaid leave, you were directed to return to work on or before January 22, 2016.

At this time, you have failed to return to work or provide the necessary documentation to justify your absence. It was requested that you specify the nature of your emergent inability to work or provide a reason validated by a physician's statement that such leave is required. To date, this information has not been provided. The only documents we received came from Penn Medicine's Department of Oral & Maxillofacial Surgery, the same entity that previously cleared you to return to work from Workers' Compensation, in a fax dated January 21, 2016. However, we did not receive these documents until February 2, 2016. We have no information with which to verify that you are currently receiving Workers' Compensation benefits or are eligible for same. The relevance and meaning of the Penn Medicine documents is, therefore, uncertain, and we ask for clarification from you in that regard.

In the meantime, please know that if you are requesting a reasonable accommodation pursuant to Policy and Regulation 1510 (Rights of Persons with Handicaps or Disabilities/Non-Discrimination) you must do so in writing within ten (10) days of the date you

receive this letter. At this time, we have no information that would lead us to believe you are disabled, but we deem it important to communicate that the Board is willing to engage in the interactive process should a reasonable accommodation be requested.

In the absence of information or documentation that you are not able to return to work, or that you require a reasonable accommodation, you must return to work within ten (10) days of the date you receive this letter. Should you fail to return to work, you may be subject to appropriate discipline.

Very truly yours,

Patricia T. Doloughty, Ed.D.
Superintendent of Schools

22. On March 14, 2016, the District received an envelope from Ms. Keough that was postmarked March 12, 2016. This contained three (3) pages of medical documentation from the Hand Surgery Rehabilitation Center of New Jersey. See Petitioner's Exhibit 17; TII40:2-25; TI169:19-170:1; TIII140:1-7. Included among them was:

- A note from Dr. Ballet indicating that Ms. Keough was seen on February 11, 2016 and explaining that "Patient had surgery on December 16, 2015 and December 18, 2015, which included a right total wrist fusion and carpal tunnel release. A copy of Dr. Ballet's dictation from today's visit is attached;"

- The dictation from the February 11, 2016 visit, reported in part:

  Assessment/Plan

  The patient is seen in follow-up today. She continues with symptoms about her distal radioulnar joint. The prior scars are well-healed. Finger and thumb motion are full. The patient has limited forearm rotation. The patient is having increasing difficulty with ADL and cannot do her complete therapy due to pain at

the distal ulnar joint. The exam today demonstrates persistent pain and swelling over the distal radioulnar joint. Her forearm rotation is limited. Scars well-healed. There is still residual peak reaction phenomena.

The patient is advised of a matched distal ulnar resection arthroplasty. The patient has documented tear of TFCC and review of previous x-ray is suggestive of the distal radioulnar arthropathy as well. I advised the patient that I would like to defer such surgery however until the soft tissue has reach[ed] better equilibrium and there is more consolidation of the bone graft. We are temporizing with therapy modification and I [have] given a prescription for Vicodin. She will follow-up with us in 3 weeks.

She is unable to return to work due to the pain she is experiencing at this time.

1. Osteoarthritis of wrist
   M19.031 Primary osteoarthritis, right wrist
   Narco 5 mg-325 mg tablet – Take 1 tablet(s) every 4-6 hours by oral route. Qty: 29 tablet(s) Refills: 0

- Dr. Ballet's note confirming that Ms. Keough was seen on March 1, 2016, and was having surgery on March 16, 2016. This went on to say: "No work until at least after surgery. She will know about how long on 1st post op apt."

23. The medical records and testimony in evidence from Dr. Ballet establish that Ms. Keough had urgent wrist fusion surgery on December 16, 2015 followed by emergent carpel tunnel surgery on December 18, 2015. See KEOUGH100 and KEOUGH117-118; TII169:19-170:8. The physician does not recall telling Ms. Keough how long she would be out of work. TII125:12-24.

24. Ms. Keough had previously discussed the fact that she was having difficulty with her hands due to carpal tunnel with her co-workers. She advised Sue Kirk and Ingrid Walsh during the Summer of 2015 that

her doctor had suggested hand surgery, but said she wasn't going to do it until Winter break when they were all out on leave. TI168:24-169:9; TIII13:1-7; 47:1-2.

25. On December 8, 2015 Ms. Keough underwent a Pre-Operative Evaluation with Dr. Ballet's Physician's Assistant Jane L. Fowler. According to the Assessment/Plan "[w]e reviewed the procedure, the recovery and expected outcomes..." Respondent's Exhibit 11. KEOUGH183-184.

26. District Attendance Policy 4212 provides that: "[a] support staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges."

27. On April 8, 2016, District Superintendent Patricia T. Doloughty preferred tenure charges against Ms. Keough on the grounds of: Charge One, Conduct Unbecoming, Charge Two, Incapacity, Charge Three, Other Just Cause, Excessive Absenteeism. TI79:2-80:5. By roll call majority vote of the Board of Education at its April 25, 2016 Meeting, the charges were certified and referred to the Commissioner of Education. See Joint Exhibit 1.

28. Both during the period of time after January 4, 2016, when Respondent was cleared to return from her Workers' Compensation leave and following the institution of Tenure Charges, the District was unable to find any temporary help, because none of the potential candidates were willing to undergo the fingerprinting process and pay the application fee for potentially only a few months of employment. TIII99:14-100. This caused a disruption in the operation of the Business Office and required the Assistant School Business Administrator Ingrid Walsh to perform Ms. Keough's job as well as her own, necessitating working through her lunch on a regular basis.

29. Following the initiation of tenure charges against Ms. Keough, a fact finding conference call was held by the New Jersey Department of Labor And Workforce Development, in connection with Respondent's filing for unemployment which the District had contested. After recounting the circumstances of her application, and in response to a question from Claims Examiner Traphagen, Ms. Keough replied: "*** And I didn't have surgery on January 4th. I don't know what they're

talking about. I told them I wasn't going to be returning on January 4th because I had urgent, you know, emergency surgery December 16th and 18th." See Respondent's Exhibit 12 KEOUGH046.

30. When the initial Appeal Tribunal Hearing on June 30, 2016 had to be adjourned due to incomplete paperwork, the case was assigned to Appeals Examiner Ian Spurlock and heard August 8, 2016. At that time while under cross-examination, Ms. Keough acknowledged that she had told Mr. Coxe her surgery was on the 4th of January, but urged that she was very confused as she was on two (2) types of narcotics — Dilaudid and Vicodin. Id. at KEOUGH074. Both Respondent as well as her mother also testified that the disability paperwork had been dropped off at the District on January 8, 2016. See Respondent's Exhibit 12. KEOUGH075.

At the outset of this discussion, it is abundantly clear to me that the District's alternatively pled incapacity and other just cause charges by virtue of excessive attendance contained in Charges Two and Three have not been established and must be dismissed with prejudice. I share Respondent's posture that Petitioner has improperly conflated numerous allegations in support of its incapacity theory, which has been traditionally interpreted per N.J.S.A. 18A:6-10, as "the inability to perform a position, irrespective of the cause of the inability to work." See e.g. In the Matter of the Tenure Hearing of Carson Steltz, Agency Docket No. 260-9/14.

On that count, the record reveals that Ms. Keough had been previously returned to duty on January 4, 2016 by the comp physician. She was then cleared by Dr. Ballet on April 12, 2016 to come back to the City of Burlington School District Board of Education with no restrictions on May 16, 2016. Respondent then received an earlier date of May 4th. However, the District

refused to take her back because the instant Tenure Charges had been filed. TI146:8-148:5. Concerning abandonment of position, notwithstanding any dilatory tactics by Respondent in providing full medical documentation, she did speak with the Superintendent on January 21, 2016 and by any measure the District had most of the requested medical documentation by March 14, 2016, which was several weeks before the charges were filed.

The District's excessive attendance allegation overlaps Charge Two into Charge Three, but is equally unavailing. One of the central tenets of industrial democracy is that an employee be placed on notice of a perceived deficiency and provided with the opportunity to correct her behavior. See I/M/O/ Tenure Hearing of Steltz, Agency Docket No. 260-9/14, supra. The Board's Attendance Policy, No. 4212 explicitly contemplates such a contingency where it discusses "[t]he counseling of support staff members for whom regular and prompt attendance is a problem."

On the record before me, there is not a scintilla of evidence that Respondent was counselled at any time or in any manner concerning perceived attendance improprieties. See Testimony of Dr. Doloughty, TI89:25-90:4. Moreover, as her counsel effectively established during his cross- examination of the Superintendent — attendance was not a factor in the District's decision to grant Respondent tenure on December 2, 2014; being out for Workers' Compensation was not a reason to fire an employee; and if Ms. Keough had come back on January 4th, she would not have been terminated for her prior

absences. TI89:7-18; 90:14-17.

Rather, the record establishes that due to the increased workload, the District was willing and even anxious to accept Respondent back to work in January 2016 following her clearance by the Workers' Compensation physician. Parenthetically, Mr. Coxe recalled during his testimony on direct examination that the District was "[f]ully prepared to welcome her back into the office. Fully prepared to have a fully staffed Business Office and begin the process of business operations as usual." TII25:11-16.

There also is scant support for the proposition that Respondent purportedly bundled Fridays and Mondays together in an attempt to create "bookend weekends". Instead, many of these days were the result of Workers' Compensation doctor's appointments; pre-approved vacation days; and personal days. See Petitioner's Exhibit 5. TIII95:3-10; 95:21-96:6; 96:9-21.

As such and while recognizing that discipline may be imposed even for legitimate illnesses, from my perspective these do not fall into the generally recognized category of days counted toward incapacity charges. They are also readily distinguishable from a situation where an employee is "banging-in" sick leave with impunity to enjoy an extended weekend. A prior case of mine cited by the District is also very clearly factually inapposite. See I/M/O School District of the City of Jersey City and Adele Stapleton, DOE Docket No. 284-9/12 (District attempted to correct Ms. Stapleton's attendance irregularities over a period of

years through progressive discipline, withholding her increments for 2008 – 2009; 2010 - 2011; and 2011 – 2012); see also State-Operated School District of Jersey City, Hudson County, v. Vincent Pellecchio, OAL Docket No. EDU 5129-90 at *8 ("Pellecchio had been advised during a number of years, as indicated in the record, that his absenteeism did not properly serve the District. Although he was aware of the concern of the District and indicated his willingness to improve his attendance, his record does not reflect the necessary improvement for the continued success of his students. While it may be that his increment was not withheld, he was advised on a continuing basis that his attendance was of concern and needed improvement.").

The District acknowledges the fact that absences on many of the dates were occasioned by the comp case, but nevertheless argues at Paragraph 63 that "[e]ven though being on Workers' Compensation leave may be a good reason to justify a number of her absences, such status is irrelevant to the determination of incapacity." This assertion ignores the fact that Ms. Keough had been cleared by her comp physician almost three months before the subject tenure charges were preferred.

The District additionally questions whether or not Ms. Keough is currently even able to return to her former duties. This argument suggests that there is a conflict between Respondent's return to work clearances by Dr. Ballet, with the April 12 note prescribing sedentary work and the May 4th note returning Ms. Keough to full duty with no restrictions. Concern is also expressed based on Dr.

Ballet's testimony that a total wrist fusion results in permanent loss of motion, and that someone with a heavily keyboard-oriented job could probably return to that job with some modifications to the work station. A reservation was also expressed over the fact that a Functional Capacity Test was not performed.

Dr. Ballet's testimony was clear. When asked "if your job, like Ms. Keough's job was heavily keyboard oriented, can you still do that function after you have a ...: The response was "Probably," with the explanation that "Yeah, you might have to modify the work station a little bit." He then replied affirmatively in response to the question "So people can type after they have that," stating "Oh, yeah." TII129:18-25; 130:1-2. Later in his direct examination, Dr. Ballet reiterated that Ms. Keough was able and available to work full duty. TII171:6-10. That conclusion in fact is reflected on his May 4th note as detailed above. And even assuming without deciding that Ms. Keough required a reasonable accommodation, Dr. Doloughty's letters, as recently as February 4th, all offered to engage in the interactive process in the event Respondent requested the same.

That leaves the unbecoming conduct count in Charge 1, which survives. In partial support of this allegation, the District avers in Paragraph 58 that "Ms. Keough's refusal to pay her Chapter 78 contributions or respond to the Board's attempts to obtain payments constitutes unbecoming conduct." Assistant School Business Administrator Ingrid Walsh testified regarding this topic during her direct examination at the November 16, 2016 hearing. Recalling that Respondent made one payment of roughly $300, Ms. Walsh explained that Ms.

Keough's monthly contribution would have been about $138, and said that Respondent had paid in part with the rest deducted from her retro pay following the settlement of contract negotiations for the 2014 – 2015 school year. TIII15:1-25; 16:1-17.

However, Ms. Walsh continued, once a person is out of either Workers' Comp or a protected disability, meaning Family Leave or New Jersey Family Leave which limits their contribution to their portion, the employee is required to pay the full cost contribution. Therefore after January 4, 2016, Ms. Keough had to pay the full premium. TIII16:18-25; 17:1-14. As established under cross-examination, however, when an employee isn't being paid, as was the case with Ms. Keough, those are no longer Chapter 78 payments. The assistant BA thereafter conceded that Respondent had accordingly not failed to make any Chapter 78 payments, either while she was on the Workers' Compensation leave or at any other time. TIII26:24-25; 27:1-13. Based upon these admissions, I find that the accusation of a failure to make Chapter 78 contributions has no basis in fact and was not established.

With respect to the other conduct unbecoming allegations and preliminarily, I do not read Petitioner's position to be that the sole basis for Ms. Keough being so charged was her text of the word "4th" to Mr. Coxe, allegedly in response to his question "[w]hen is your surgery?" See Respondent's Exhibit 16/Petitioner's Exhibit 23. Moreover, there is ample evidence of purposeful obfuscation on the part of Ms. Keough.

Respondent is likewise perplexed as to why the District was unclear as to Ms. Keough's medical treatment and prognosis *vis-à-vis* her unpaid leave request. However, I credit Paragraph 53 of Charge One which asserts that "[f]urther, Ms. Keough intentionally kept critical information regarding her medical condition a secret from the Board while at the same time requesting leave for medical disability, which constitutes conduct unbecoming a public employee." See Joint Exhibit 1. There is no evidentiary support for the premise that Ms. Keough refused to provide a response to the Board, per Paragraph 54, as previously discussed.

The medical prism through which this case must be viewed is that in the late afternoon of December 22, 2015, the District's Workers' Compensation physician returned Ms. Keough to full duty with no restrictions, effective January 4, 2016. See Petitioner's Exhibit 7. This was the end result of Respondent's repeated calls to Sue Kirk in the Business Office, at one point growing frustrated and referring to the entire department as "useless." TI64:1-2. After responding to these emphatic entreaties from Ms. Keough, District personnel then left for the Christmas holidays secure in the fact that she had recovered from the comp leave and would be back at work January 4th.

That nascent expectation was shattered by Respondent's December 30, 2015 text to Mr. Coxe, which as I have previously determined along with her January 4th letter requesting leave, created the reasonable impression that Ms. Keough's need for surgery had recently developed. Dr. Ballet's December 29,

2015 note at Petitioner's Exhibit 8/Respondent's Exhibit 1 did little to explain Ms. Keough's current medical situation. As detailed within, the Superintendent then sent a number of correspondence to Ms. Keough seeking clarification. Respondent denies receiving the January 4, 2016 letter that also explained FMLA leave entitlement, if applicable, but the record demonstrates that while the Certified Mail was unclaimed, the Regular Mail was not. A follow-up letter was then sent out on January 13, 2016 by Dr. Doloughty, advising that Respondent did not qualify for an FMLA leave because the 1,250 hours were not worked the preceding year but explaining the parameters of the District's Uncompensated Leave Policy 3431. See Petitioner's Exhibit 10.

While I do not believe that Ms. Keough had "elective surgery" in the sense that the District has used it in Paragraph 51 of the Charges, there is ample evidence that she used extremely poor judgment which falls just short of deception. Dr. Ballet's very credible testimony and the accompanying medical records demonstrate that Ms. Keough had been treating with him for a considerable period of time at least since 2014. The initial December 16, 2015 wrist fusion surgery was originally scheduled to be performed in August 2015, but had to be postponed due to anesthesia considerations attendant to the jaw condition. TII136:17-138:3. Petitioner has also properly underlined that Ms. Keough had discussed having the surgery over the Winter break with her colleagues Ingrid Walsh and Sue Kirk during the Summer of 2015. TIII13:1-7; 47:1-2; TI168:24-169:9. These considerations beg the question then of, why was

this apparently a secret?

Dr. Ballet classified Respondent's December 16, 2015 surgery as "urgent" by virtue of the threshold of pain that Ms. Keough was experiencing. The December 18, 2015 carpel tunnel surgery was unexpected and thus "emergent," he testified. TII169:19-170:9; KEOUGH100; KEOUGH117; KEOUGH118. Petitioner has emphasized that on December 8, 2015, Ms. Keough attended a pre-operative appointment for the wrist fusion with Dr. Ballet's Physician Assistant. According to the progress notes at Respondent's Exhibit 11 KEOUGH183, KEOUGH184 "[w]e reviewed the procedure, the recovery and expected outcomes..."

I am aware of the fact as Petitioner highlights, that Dr. Ballet testified that the expected recovery from a wrist fusion is eight (8) to twelve (12) weeks. TII177:25; 178:8, but accept his recollection that he had not specifically discussed this with Ms. Keough. TII125:12-24. Analyzed simply in burden of proof terms, the District has accordingly not established that Ms. Keough was aware of the fact that she would be incapable of returning January 4, 2016 when she spoke to Ms. Kirk on December 22, 2015.

But even accepting for the purposes of this discussion that Ms. Keough was shocked when Dr. Ballet told her on December 29, 2015 that she could not return to work for two (2) to three (3) months, her December 30th text to Mr. Coxe was not truthful, and supports the allegations of Paragraph 52 of the charges

under Karins. Rather, no mention was made of the fact that she had already undergone two (2) surgeries, and was in considerable pain taking potent narcotics. Respondent would have me perceive the texting of the date "4th" in isolation, as a byproduct of the tortured argument that this was somehow due to the "auto correct" function of her phone. Her fallback positions were that she was "loopy" because of taking the narcotics and may not have had her glasses on. TIII46:2-19; 47:7-15.

Petitioner has correctly pointed out that Ms. Keough has given different answers each time she has been asked questions about her December 30th text to Mr. Coxe. When the unemployment Claims Examiner expressed the District's understanding that she had surgery on the 4th of January during the initial phone hearing, she replied "I don't know what they're talking about." During the August 8, 2016 Appeal Hearing and under oath, Respondent acknowledged that she had told Mr. Coxe the surgery was on the 4th, but demurred that she was on "Dilaudid and Vicodin." See Respondent's Exhibit 12 KEOUGH046 and KEOUGH074.

In I/M/O Indian River Medical Center and International Brotherhood of Teamsters, Local 769, F.M.C.S. Case No. 11-51617-3 (Pecklers, 2011 at page 33, n.4), I cited with approval the analysis of a witness' credibility advanced by Arbitrator Berquist in Abbott Northwestern Hospital, 94 LA 621, 630-631 (Berquist, 1990), which includes consideration of the following:

(1) interest or lack of interest in the outcome of the case;

(2) their relationship to the parties;

(3) ability and opportunity to know, remember and relate the facts;

(4) their manner and appearance;

(5) their age and experience;

(6) their frankness and sincerity or lack thereof;

(7) the reasonableness or unreasonableness of their testimony in light of all the other evidence in the case;

(8) any impeachment of their testimony;

(9) any other factors that bear on believability and weight.

See also Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004) citing Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960); Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961); Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 2d 380 (1973); Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

The totality of the record evidence convinces me that the credibility of the Respondent is unreliable at best. The Board's witnesses evidenced no apparent bias toward Ms. Keough, and their testimony was internally as well as externally consistent. For her part, Respondent's testimony was marred by prior inconsistent statements and at times incredible when considered in the context of the entire record. That was certainly true in regard to her position that she was not attempting to mislead Mr. Coxe in her December 30th text and January 4th letter, but trying to explain that she *already* had surgery and was not *having* surgery.

This conclusion is equally applicable to what is perhaps Respondent's *linchpin* defense — Ms. Keough's testimony that she had four (4) pages of

disability papers delivered to the District by her mother on January 7, 2016, the third page of which contained a medical certification from Dr. Ballet which explained that she had wrist surgery on December 16th and December 18th and additionally provided anticipated recovery dates. Again however, Ms. Keough's proclivity for fabrication cannot be overlooked. Petitioner has again called my attention to the unemployment hearing, when Respondent maintained that this paperwork had been provided to the District on January 8th. See Respondent's Exhibit 12 KEOUGH071; TI44:9-15; KEOUGH075.

Ms. Keough also maintained that this packet had been put into an envelope to protect her social security number at the suggestion of her mother, notwithstanding the fact that contrary testimony had previously been elicited. Respondent's Exhibit 2; TIII57:2-22; Respondent's Exhibit 12 KEOUGH076, TIII63:15-18. Finally, during the January 7th email exchange with Mr. Coxe, Ms. Keough stated that he had told her the paperwork would be completed yesterday.

To underpin her position that the District had the information it sought all the time, Respondent relies upon the fact that the one (1) page that was completed had no date stamp, along with the January 7, 2016 text message of Mr. Coxe. This stated that "you will be contacted when they are ready if we are able to complete them." TII73:25; 74:23; 81:9; 82:3. I acknowledge that the BA testified on cross that he does not ordinarily refer to one (1) piece of paper as "they or them." That said, these facts must be analyzed in conjunction with the

other evidence.

Three (3) of the District's witnesses testified that they had received only the 4th page of the disability packet, which was what the employer filled out — Dr. Doloughty, TI118:2-14; Mr. Cox, TIII170:14-17; Ms. Walsh, TIII11:21-12:14. It also defies logic that the Superintendent would send out her January 13th follow-up letter seeking inter alia, the very medical certification that she had been provided with. The obligation to provide the same or return to work within ten (10) days was also reinforced in the Superintendent's February 4th letter. Perhaps the most telling evidence that the entire packet was not dropped off on January 7th, however, is Respondent's failure to mention the medical certification to Dr. Doloughty during her January 21st conversation with her. See Respondent's Exhibit 12 KEOUGH072; TI57:3-20. Accordingly, given the implausibility of this theory of the case coupled with credibility concerns, this position has been discounted.

I further do not credit Respondent's position that she was in constant contact with the District due to her documented phone calls. It is true that there were many calls made during the month of January, ostensibly for the purpose of confirming that Ms. Keough's application for leave and disability paperwork were received. There was a call that was routed to the Superintendent with a conversation ensuing on January 21, 2016, and then a final one to Ms. Meredith on the 22nd. Noticeably absent from the phone records is any indication that Respondent attempted to contact anyone at the City of Burlington School District

Board of Education after the Superintendent's February 4th letter was received. However, based upon this conversation, Dr. Doloughty's assertion in Paragraph 35 of the Charges that Ms. Keough did not respond to her January 13th letter is simply factually incorrect.

In conclusion, the only remaining issue is the correct penalty for Respondent's unbecoming conduct. Our Appellate Division has provided useful guidance in this regard. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967) stands for the proposition that I should take into account the totality of the circumstances; the nature of the act(s); and the impact upon Ms. Keough's career.

I do not endorse the Respondent's position that the District was not prejudiced by the absence of Ms. Keough. It is accurate that no overtime was expended or temporary manpower hired. But as Mr. Coxe credibly testified, a number of individuals contacted as potential candidates were not willing to undertake the fingerprinting and application fee for a job of indefinite duration. TIII99:14-100. That does not mean that there was not a disruption in the operation of the Business Office as pled in Paragraph 59 of Charge One, and Ms. Keough herself described her position as "irreplaceable." Ms. Walsh also credibly testified to additional time she was now required to spend in performing two (2) jobs.

Ms. Keough is apparently a good worker, as there is no evidence to the

contrary in the record. I also recognize that this is a small Business Office in a relatively small district, and that there is still an ongoing Superior Court lawsuit, which may create underlying tension. Those factors however, are not dispositive in determining what discipline should be meted out. Instead, the District's Attendance Policy 4212 expressly recognizes that proportionality must anchor any penalty imposed. It is beyond dispute that Respondent violated the same, by failing to verify an absence in accordance with Board policy; falsifying the reason for an absence; and being absent without authorization.

The policy then establishes a progressive discipline scheme of escalating penalties, beginning with the withholding of a salary increment. See Petitioner's Exhibit 18; TI81:4-15. In my considered opinion, that penalty will comport with the intended statutory scheme and fall within the acceptable range of discipline in the TEACHNJ tenure cases, some of which were cited by Respondent. Under these circumstances, Ms. Keough is entitled to back pay, retroactive to May 4, 2016, when she was medically cleared to return to duty with no restrictions by Dr. Ballet, minus an offset for appropriate mitigation. IT IS SO ORDERED.

## VII. CONCLUSION

The District has established by a preponderance of the credible evidence that the actions of Ms. Keough, a tenured Administrative Assistant and Payroll Secretary of the Board, amounted to conduct unbecoming sufficient to withhold her salary increment for School Year 2016 – 2017.

## AWARD

THE SUBJECT TENURE CHARGES ARE SUSTAINED IN PART, WITH CHARGE ONE, CONDUCT UNBECOMING UPHELD AND CHARGE TWO, INCAPACITY AND CHARGE THREE, OTHER JUST CAUSE, DISMISSED WITH PREJUDICE. MS. KEOUGH'S SCHOOL YEAR 2016 – 2017 SALARY INCREMENT SHALL BE WITHHELD. SHE SHALL BE IMMEDIATELY RETURNED TO DUTY WITH FULL SENIORITY. BACK PAY, RETROACTIVE TO MAY 4, 2016 IS ALSO AWARDED, SUBJECT TO ANY OFFSET FOR APPROPRIATE MITIGATION. THIS CONSTITUTES THE ENTIRE AWARD IN THIS MATTER.

Dated: December 15, 2016
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 15TH DAY OF DECEMBER, 2016, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

425-16

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|---|---|---|
| LOGAN ALEXANDER AND THE HORACE MANN INSURANCE COMPANY, | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

Petitioners sought reimbursement from the respondent Board for costs and fees incurred in the defense of a civil lawsuit – settled with no admissions of any wrongdoing – which alleged that petitioner Logan Alexander engaged in wrongful conduct against minor student K.O. while he was employed as a security guard by the Board. Pursuant to the New Jersey Supreme Court's decision in *L.A. v. Board of Education of the City of Trenton*, 221 *N.J.* 192 (2015), the matter was remanded for an evidentiary hearing in the Office of Administrative Law to resolve the issue of whether Alexander committed the acts alleged by K.O., and whether he was acting within the scope of his employment duties when the acts at issue occurred. Petitioner Alexander contended that he was not guilty of improper actions involving K.O. and, therefore, the respondent must indemnify him against the costs incurred in his defense.

The ALJ found, *inter alia*, that: the statute applicable to the present case is *N.J.S.A.* 18A:16-6, entitled "Indemnity of Officers and Employees Against Civil Actions and Proceedings," which makes clear that indemnification shall only be provided when the act or omission at issue arose out of the performance of the employee's job duties; witnesses from the Department of Children and Families Institutional Abuse Investigation Unit (DCF) testified that, based on interviews and police reports, DCF substantiated sexual abuse charges against Alexander which involved three minors – one of whom was K.O.; the testimony of K.O. regarding the incident in which she was pulled into the faculty lounge by Alexander was credible; and inappropriate touching of students clearly falls outside the scope of a school security guard's duties. The ALJ concluded that petitioner Alexander was not acting within the scope of his duties when he touched K.O. inappropriately; accordingly, the petitioners did not meet the burden required to support indemnification under *N.J.S.A.* 18A:16-6. The ALJ dismissed the petition with prejudice.

Upon independent review of the record and the Initial Decision of the OAL, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 19, 2016

OAL DKT. NO. EDU 6498-15
(EDU 10410-11 ON REMAND)
AGENCY DKT. NO. 225-8/11

| | | |
|---|---|---|
| LOGAN ALEXANDER AND THE HORACE MANN INSURANCE COMPANY, | : | |
| PETITIONERS, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Petitioners, Logan Alexander and the Horace Mann Insurance Company, and the Trenton Board of Education's (Board) reply thereto. The petitioners are seeking reimbursement for costs and fees expended in the defense and settlement of a civil lawsuit alleging that petitioner Logan Alexander engaged in wrongful conduct against minor child, K.O., while employed as a security guard by the Board.[1] A school employee's entitlement to reimbursement for his legal fees and costs in connection with the defense of a civil matter is specifically controlled by *N.J.S.A.* 18A:16-6 which provides in pertinent part:

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any...employment under the jurisdiction of any board of education...for any act or omission arising out of and in the course of the performance of the duties of such...employment...the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

[1] At the time that he was working as a security guard for the Board, Mr. Alexander was charged with sexually assaulting two students, N.F. and K.O. Mr. Alexander pled guilty to one count of second-degree endangering the welfare of a minor (N.F.) in exchange for dismissal of all other charges, including the charges involving K.O. which arose out of the same allegations contained in the civil suit.

"The plain language of the statute requires that the underlying civil action be related to conduct falling within the employment duties of the school board employee." *L.A. and The Horace Mann Insurance Company v. Board of Educ. of the City of Trenton, Mercer County*, 221 *N.J.* 192, 202 (2015). Here, the civil case against Mr. Alexander was settled without admission or adjudication of the alleged facts; therefore, a hearing was necessary to determine if Mr. Alexander committed the acts alleged by K.O. and was consequently acting outside the scope of his employment duties.[2] Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that Mr. Alexander acted outside the scope of his duties as a school security guard when he inappropriately touched K.O. in a sexual manner. Therefore, the petitioners have not met the burden required to support indemnification under *N.J.S.A.* 18A:16-6.

In their exceptions, the petitioners maintain that the ALJ's credibility determinations should be rejected by the Commissioner because they are not consistent with the record. The petitioners suggest that the ALJ incorrectly found that a hearsay statement by another student, A.C., bolstered the credibility of K.O. because the record indicates that A.C.'s recitation of the events in question were in stark contrast to that of K.O. Additionally, the petitioners argue that the ALJ overlooked crucial details of the alleged event, namely the presence of a custodian in the faculty room at the time in question. Finally, the petitioners stress that the ALJ never found Mr. Alexander to be incredible. Therefore, the Initial Decision should be rejected and the petitioners should be awarded the stipulated costs and fees of $74,249.14, plus interest.

In reply, the Board contends that the Initial Decision was proper and that the Commissioner should find that the petitioners are not entitled to attorney fees and costs pursuant to *N.J.S.A.* 18A:16-6. The Board cites to the standard that the agency head must apply when

[2] This matter was originally decided on summary decision, but was later remanded by the Supreme Court to the OAL for an evidentiary hearing. *L.A.*, *supra* at 206.

evaluating the ALJ's fact finding and credibility determinations, and emphasizes that the ALJ – who has the benefit of hearing and seeing witnesses – is generally in a better position to access the credibility and veracity of the witnesses. The Board maintains that beyond a few minor ambiguities, the statement made by A.C. during the investigation aligns with K.O.'s account of the incident. More significantly, K.O.'s testimony of what transpired during the incident was consistent with her prior accounts provided throughout the case. Based upon her observation of K.O.'s testimony, the ALJ properly found that K.O. testified credibly. Accordingly, the ALJ found as a matter of fact that Mr. Alexander touched K.O. inappropriately – thereby precluding indemnification, as the conduct was outside the scope of Mr. Alexander's duties.

Upon a comprehensive review of the record in this matter, the Commissioner agrees with the ALJ's determination that Mr. Alexander acted outside the scope of his duties as a school security guard when he inappropriately touched K.O., and, as a result, the petitioners were not entitled to indemnification under *N.J.S.A.* 18A:16-6. The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)]

In this case, all of the facts related to K.O.'s allegations against Mr. Alexander were in dispute because Mr. Alexander completely denied any wrongdoing. Therefore, witness testimony and ultimate credibility is the only means available to make a determination as to the

veracity of the charges. Based on her overall assessment of the alleged victim witness, the ALJ found "K.O.'s testimony concerning the difficulties she experienced [as a result of the incident] for a considerable length of time was credible. Her acknowledgement that the amount of time the incident lasted was brief, coupled with her remark that it nonetheless felt like a long time, also was credible, as was her complaint that she felt the therapy made her feel like she was being forced to relive the incident to her detriment." (Initial Decision at 7) Despite the petitioners' suggestion that K.O. provided inconsistent accounts of the incident, a review of the record – including the transcript from the hearing on May 18, 2016 – reveals that K.O. never wavered on the fact that Mr. Alexander inappropriately touched her legs and her chest in the faculty room. Therefore, the Commissioner finds the ALJ's fact-finding analysis and conclusions as to the truth of K.O.'s allegations against Mr. Alexander to be fully supported by the record.[3] Mr. Alexander's unacceptable conduct toward K.O. was not within the course and scope of his employment duties; thus, the petitioners are not entitled to indemnification for the legal fees incurred during his civil case.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/19/16
Date of Mailing: 12/20/16

[3] The Institutional Abuse Unit of the Department of Children and Families investigated K.O.'s allegations against Mr. Alexander around the time of the incident and issued a finding of substantiated sexual abuse.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
OAL DKT. NO. EDU 06498-15
(ON REMAND EDU 10410-11)
AGENCY DKT. NO. 225-8/11

**L.A. AND THE HORACE**
**MANN INSURANCE COMPANY,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE CITY**
**OF TRENTON, MERCER COUNTY,**
Respondent.

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**Edward A. Cridge**, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

**Patrick F. Carrigg**, Esq., for respondent (Lenox, Socey, Formidoni, Brown, Giordano, Colley & Casey, attorneys)

Record Closed: October 3, 2016 Decided: November 3, 2016

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

## STATEMENT OF THE CASE

Pursuant to the New Jersey Supreme Court's decision in L.A. v. Board of Education of the City of Trenton, 221 N.J. 192 (2015), the above matter (EDU 10410-

11), which had been determined based on summary decision, was remanded for an evidentiary hearing to the Office of Administrative Law. The Court stated that "[t]he only question to be answered when a school board employee seeks civil indemnification under N.J.S.A. 18A:16-6 is whether the employee was acting with the scope of his or her employment duties; a conviction or other unfavorable disposition in a related criminal matter answers that question in the negative." L.A., supra, 221 N.J. at 205–06. However, for this matter, the indictment regarding the allegation that L.A. behaved improperly with a student at the school where he worked was dismissed. Therefore, the Court determined, a hearing was required to determine "whether L.A. committed the acts alleged by K.O. and was therefore acting outside the scope of his employment duties." Id. at 206. Petitioner L.A. contends that he was not guilty of improper actions involving K.O., and, therefore, respondent Trenton Board of Education must indemnify him.

## PROCEDURAL HISTORY

Following the Supreme Court's remand, the matter was filed at the Office of Administrative Law on May 6, 2015. The hearing was held on May 18, 2016, and the record was left open for receipt of transcripts and briefs. The briefs having been received on September 30, 2016, the record closed on October 3, 2016.

## FACTUAL DISCUSSION AND FINDINGS

Many of the undisputed facts were recited in the Supreme Court decision. Briefly, L.A. was employed by the Trenton Board of Education (the Board) as an elementary-school security guard. At a time when he was at work, L.A. allegedly sexually assaulted two students, N.F. and K.O. The allegations were referred to the Institutional Abuse Investigation Unit of the Department of Children and Families (DCF). Additionally, L.A. was indicted. In relation to N.F., the charges were one count of third-degree aggravated criminal sexual contact and one count of second-degree endangering the welfare of a minor. The K.O. indictment charged him with two counts of second-degree sexual assault and one count of second-degree endangering the welfare of a minor. L.A. pled guilty to one count of second-degree endangering the

welfare of a minor (N.F.) in exchange for a dismissal of all other charges, including those involving K.O.

A civil lawsuit was filed on behalf of K.O. in the Mercer County Superior Court on May 11, 2009. It alleged that L.A. sexually assaulted K.O., and that the Board negligently hired L.A. The respondent did not provide L.A. with legal representation, but pursuant to a private insurance policy maintained by the New Jersey Education Association with the Horace Mann Insurance Company, L.A. was assigned counsel. The K.O. lawsuit ultimately settled without admissions of any wrongdoing. The instant matter arose when petitioners sought reimbursement from respondent for all costs and fees expended on behalf of L.A. in connection with the K.O. lawsuit.

At the May 18, 2016, hearing, L.A. testified on his own behalf. He explained that following his 1973 honorable discharge from the Navy during the Vietnam War period, he worked at AT&T for twenty-three years, starting in the copying center and working his way up to purchasing agent. Along the way, he earned ninety-seven credits toward a bachelor-of-arts degree at Cabrini College. Originally employed through an independent contractor to the Board as an assistant teacher, he accepted Board employment as a security officer in 2002, which is the position he occupied until spring 2007.

L.A. maintained that he had a friendly relationship with many students, and that he would go into the teachers' lounge to purchase sodas for K.O. and for others. He said that at one point K.O. asked to sit on his lap, a request he denied because she was a child. He said that when the allegations of inappropriate sexual contact arose he was really shocked. Ultimately, he agreed to plead guilty to the one count with N.F. because his lawyer convinced him he ran fewer risks by doing so.

L.A. said he did not sexually touch K.O. or make any comments that could be interpreted as a threat to her brother. He acknowledged that in his guilty plea he stated under oath that on the afternoon of March 9, 2006, he engaged in conversation of a sexual nature with two females, both of whom were minors and under his supervision.

(R-5 at 6.) On the same date, he engaged in an inappropriate touching of one of the two minors. (Ibid.) At hearing, he testified that neither of the two females was K.O.

Two witnesses testified in relation to the DCF investigation and report. Charmaine Thomas, who is currently an assistant commissioner at the DCF, at the time was an administrator for the DCF's Institutional Abuse Investigation Unit. She said that the DCF substantiated sexual abuse and sexual molestation charges against L.A. in relation to three children—K.O., N.F., and C.H.—based on interviews and police reports. Additionally, the investigator looked at the video obtained by the prosecutor's office, and talked to the school principal, who relayed what various students had said. Thomas had no independent knowledge of the events that occurred, having relied entirely on reports by others.

Colleen Burke was an investigator with the DCF's Institutional Abuse Investigation Unit. She testified that her 2007 report (J-6) of her interview with K.O. was based on her notes of what K.O. told her. "At that time, in '07, we were instructed to take down statements as people said, so I would just be typing in the field as they were telling me." (Tr. at 166.) Therefore, what she recorded was the actual words of K.O. (Id. at 172.) As of the date of hearing, she had no independent recollection of the conversation. (Ibid.) The report records the ten-year-old saying that she was walking in the hall with A., when L.A. grabbed her elbow area, walked next to her holding her arm, and then locked her in the teacher's lounge:

> He told me that he would hurt me or my brothers if I told anyone. He touched me on my chest, legs and shoulders. He touched my chest with his open hand over my shirt. He touched my legs by rubbing my right thigh with his open hand. . . . He saw another person coming towards the teacher lounge and that is when he threatened me about hurting me and my brothers. I just walked out of the lounge and went back to class.
>
> [J-6 at 9–10.]

Nancy Diaz, a detective in the Mercer County Prosecutor's Office, was a part of the Special Victims Unit at the time of the allegations. She interviewed K.O. on

videotape on March 27, 2007. She said she was called to help with the case because of the language barrier with some of the Spanish-speaking children. She recalled K.O. telling her that L.A. had put his hands on top of her clothes over her breast and thighs. She said this occurred in the faculty lounge, and he threatened to hurt her brothers if she told anyone what happened. L.A. stopped because he realized someone was in the maintenance closet close by, and went to talk to that person. The girl said she was afraid.

Jerry L. Sherman, who retired in 2007 after a career of some thirty years with the Board, was the head custodian at the school where L.A. worked at the time of the allegations. Sherman said he had no recollection of L.A. behaving anything other than normally with students; did not see him with a child in the faculty room; and would have reported his presence with a child in that room because it would have been inappropriate.

K.O., now nineteen, testified that in 2006, after lunch, she was following her friend from the lunchroom into the main hallway, when L.A. pulled her into the faculty room, and closed the door behind them. He placed her next to the refrigerator, and started "touching on my legs, . . . on my breasts." (Tr. at 135.) He also touched her thighs through her skirt. (Id. at 138.) "I guess he realized that there was a janitor in the bathroom. When he realized [that] . . . he stepped to the side and began to speak to the guy. After speaking to the guy, he took me out of the room and told me that if I ever were to speak about this, that he would hurt my brothers that were going to the school with me." (Id. at 135–36.) She described the janitor as skinny, bald, and African-American. (Id. at 145.) There was enough space for the janitor not to see her. She said, "I was scared, I didn't know how to react to it. . . . I didn't know if I had done something wrong or like if I had provoked him to do something to me, or if I had said something that was wrong." (Id. at 139.) Although the encounter was brief, "It felt like a really long time." (Id. at 156.) Immediately afterward, she told only her friend C. Sometime later, when she heard that L.A. had touched other girls, her friend C. convinced her to talk to her teacher, Ms. Finley.

When K.O. was asked about a report that she had accused two other older men (one her grandfather) of inappropriate touching, she confirmed saying that to her mother. She said her grandfather's touching did not feel right, and her mother explained that he was probably just trying to be nice to her. (Id. at 155.) She said she "felt like everybody was going to do the same thing to me. Like I didn't feel safe around anyone." With regard to her grandfather, she acknowledged that she "probably misconstrued it." (Ibid.)

K.O. testified that although she received therapy following the incident, she stopped going because she felt it did not help. She said, "I didn't want to keep reliving that," and "they would ask me the same things over and over again, and it's just reliving it all over again." (Id. at 142.)

In this instance, only two eyewitnesses exist—L.A. and K.O.—and their testimony is in direct contradiction to each other. "The determination of factual findings thus requires a weighing of the credibility of the witnesses, i.e., an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it 'hangs together' with other evidence." Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). "A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The fact that someone pleads guilty to a crime does not necessarily link that person to another bad act. In his testimony, L.A. talked about his shock at the allegations, particularly from C.H., to whom he said he was a type of father figure. Since the prosecutor's office did not charge him in relation to C.H., it is likely that the office did not believe it had sufficient evidence to support conviction on a criminal charge. Moreover, L.A. had a long and successful working career, which would seem inconsistent with inappropriate behavior around children. Buying the occasional soda for a student with the principal's knowledge also would seem inconsistent. With regard to K.O., he referenced her wanting to sit on his lap, and generally denied any improper relationship.

Petitioners contend that the idea that L.A. was in the faculty room at the same time that Jerry Sherman was there, without Sherman ever realizing that K.O. was present, is simply incredible. Further, K.O., in various interviews, offered different dates on which the incident occurred, saying on March 23, 2007, that the incident occurred a week ago (an impossibility because L.A. at that point had been charged), and during a deposition in December 2009 that it happened months before she reported it in 2007, also highly unlikely.

K.O.'s testimony was buttressed by the hearsay statement to the DCF investigator by A., who said she lost track of K.O. for a few minutes, and then found her outside the faculty room, upset. Additionally, L.A.'s comment about her wanting to sit on his lap suggests a loss of the professional distance between staff members and students. The photos of the faculty lounge show enough room beside the refrigerator to allow a grownup to miss a child standing to the far side of it, and if it could take a while for L.A. to realize that Sherman was in the janitorial closet off the room, Sherman could equally well have missed the presence of L.A. and K.O. Despite the long period of time since the incident, K.O.'s testimony concerning the difficulties she experienced for a considerable length of time was credible. Her acknowledgment that the amount of time the incident lasted was brief, coupled with her remark that it nonetheless felt like a long time, also was credible, as was her complaint that she felt the therapy made her feel like she was being forced to relive the incident to her detriment. Additionally, her response to the question about telling her mother that her grandfather and another older man had touched her inappropriately, in which she acknowledged she probably misconstrued the situation but had been feeling unsafe around everyone, was consistent with having been victimized. (Tr. at 155.) For these reasons, I **FIND** as **FACT** that K.O. was truthful as to L.A. having touched her improperly during the school day.

## LEGAL ANALYSIS

The statute applicable to the present case is N.J.S.A. 18A:16-6, which is entitled "Indemnity of Officers and Employees Against Civil Actions and Proceedings" and provides in pertinent part:

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any . . . employment under the jurisdiction of any board of education . . . for any act or omission arising out of and in the course of the performance of the duties of such . . . employment . . . , the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.

Analyzing the statute, the Commissioner of Education in Lonky v. Board of Education of Bayonne, EDU 07205-07, Initial Decision (May 22, 2008), adopted, Comm'r (July 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>, stated:

> By its very terms, central to qualifying for protection afforded under this statute is that *the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties*, and 2) occurred in the course of performing those duties. In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied.

There can be no doubt that inappropriate touching of students falls outside the scope of a school security guard's duties. As the Supreme Court noted in L.A., supra, 221 N.J. at 204, indemnification hinges upon the employee having met the burden of showing that he or she was acting within the scope of their employment duties. Here, I **CONCLUDE** that L.A. was not acting within the scope of his duties when he touched K.O. inappropriately. Therefore, he has not met the burden required to support indemnification under the statute.

## ORDER

For the reasons outlined above, the petition for indemnification is hereby **DENIED** and **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 3, 2016
DATE

Laura Sanders
**LAURA SANDERS**
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: November 3, 2016

Date Mailed to Parties: November 3, 2016

/caa

## WITNESSES

For petitioners, L.A. and the Horace Mann Insurance Company

L.A.

Jerry Sherman

For respondent, Board of Education of the City of Trenton

Charmaine Thomas

Nancy Diaz

K.O.

Colleen Burke

## EXHIBITS

Joint Exhibits

J-1 L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192 (2015)

J-2 Appellate Division Order on Interlocutory Motion

J-3 Verified Petition

J-4 Stipulation as to costs and fees dated May 18, 2016

J-5 Photographs of Moot School

J-6 NJ Department of Children and Families IAIU Summary of Findings

J-7 Transcript of interview of K.O. by investigator Nancy Diaz on March 23, 2007

J-8 Video of interview of K.O. by investigator Nancy Diaz on March 23, 2007

J-9 Demand for Written Bill of Particulars concerning N.F. dated August 23, 2007

J-10 Demand for Written Bill of Particulars concerning K.O. dated August 23, 2007

J-11 Screening Summary concerning C.H. dated March 23, 2007

For petitioners, L.A. and the Horace Mann Insurance Company

P-7 No exhibit

P-9 Screening Summary for C.H. dated March 23, 2007

For respondent, Board of Education of the City of Trenton

R-2 Police Reports

R-5 Transcript of Plea Agreement

R-6 Transcript of Deposition of K.O.

426-16

| | | |
|---|---|---|
| M.R., ON BEHALF OF MINOR CHILD, M.R., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

## SYNOPSIS

*Pro se* petitioner challenged the determination of the respondent Board that M.R. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). M.R. – a member of the varsity cheerleading team – alleged that she and three other members of the team had been bullied by the cheerleading coach on two occasions in December of 2014. Petitioner's allegations stem from the coach's negative reaction to receiving a text message from M.R. on the afternoon of a scheduled basketball game, explaining that she could not attend the game because she had other plans. M.R. claimed that the coach responded with a "strong bullying tone", and informed her that she and three other cheerleaders who missed the same game were off the team. M.R. also alleged that the coach's behavior during half time at a basketball game on December 23, 2014 – after the cheerleaders were reinstated to the team following the launch of an HIB investigation – caused her to feel singled out and fearful that she was becoming a target; she further believed that the cheerleading team had become a hostile environment. The Board contended that the investigation did not find evidence that M.R. was the target of HIB because the coach's actions were not motivated by any actual or perceived characteristic, as defined in the Act. The Board filed a motion for summary decision. The petitioner failed to file an answer to this motion, and did not file exceptions to the Initial Decision of the OAL.

The ALJ found that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the issue for resolution in this case is whether the Board's finding that there was no HIB was arbitrary, capricious or unreasonable, in light of the information the Board possessed when it made its determination; and the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication – whether it be a single incident or a series of incidents – that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic. The ALJ concluded that consideration of the alleged actions against M.R. leads to "the inescapable conclusion…that the Board's HIB determination was correct." Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition with prejudice.

Upon review, the Commissioner concurred with the ALJ's conclusion in this matter, but modified his recommended decision to include a factual discussion as required by *N.J.A.C.* 1:1-18.3(c). Accordingly, the Initial Decision was adopted with modification, and the petition was dismissed

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 12/21/16

OAL DKT. NO. EDU 05308-16
AGENCY DKT. NO. 88-3/16

| | | |
|---|---|---|
| M.R., ON BEHALF OF MINOR CHILD, M.R., | : | |
| PETITIONER, | : | |
| V. | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, | : | DECISION |
| RESPONDENT. | : | |

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

This case involves a challenge by petitioner to the Board's determination that his daughter was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* As the Administrative Law Judge (ALJ) did not include a factual discussion, the facts of this matter are summarized as follows.[1] Petitioner filed an HIB report, alleging that his daughter and three other cheerleaders were bullied by the cheerleading coach on December 19 and 23, 2014. (*Certification of Beverly MacKay*, at ¶4) On December 19, 2014, M.R. sent a text message to the cheerleading coach explaining that she could not attend that night's basketball game due to other plans. *Id.* at ¶5. The report claimed that the coach responded with a "strong bullying tone" and informed her that she and the other cheerleaders who missed the game were off the team. *Ibid.* According

[1] Although the ALJ failed to make factual findings as required by *N.J.A.C.* 1:1-18.3(c), the Board's statement of material facts is undisputed as the petitioner did not file opposition to the Board's motion for summary decision, nor exceptions to the Initial Decision.

to M.R.'s statement, she did not attend the game because her friends had planned a holiday party for that night and she did not know that there was a game until a day or two prior. *Id.* at ¶8. Following the launch of an investigation, the cheerleaders were returned to the team and cheered at the basketball game on December 23, 2014. *Id.* at ¶10. During half time, M.R. alleges that the coach singled her out – along with the other girls who missed the game – and told the team that he wants his conversations with them to be kept private and not reported to parents. *Ibid.* M.R. felt fearful that she was becoming a target, and believed the cheerleading team was a hostile environment. *Id.* at ¶11.

The HIB investigation found that the coach did not commit an act of HIB. *Id.* at ¶12. The Superintendent affirmed the findings, as the actions were not motivated by a distinguishing characteristic of M.R. *Id.* at ¶13. At a hearing before the Board, petitioner argued that the school's HIB policy did not require that the HIB action be motivated by an actual or perceived characteristic. *Id.* at ¶14. The Board found that the version of the HIB policy on the school's website that petitioner had seen was a draft policy which inadvertently omitted a line from the definition. (*Certification of Beverly MacKay*, Exhibit H) The omission made it appear as though the HIB policy only required that acts be reasonably perceived as being motivated by any actual or perceived characteristic *or* take place on school property, and substantially disrupt or interfere with the orderly operation of the school or the rights of other students – rather than requiring all of those elements. Accordingly, the Board rejected petitioner's arguments and affirmed the finding of no HIB. *Ibid.*

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB

determination.[2] There is no evidence in the record – nor did petitioner allege – that the cheerleading coach's alleged actions were motivated by a distinguishing characteristic of M.R.

Instead, petitioner alleges that the HIB policy, as written, does not require that the conduct be motivated by a distinguishing characteristic. The Commissioner finds that the Board was not arbitrary, capricious, or unreasonable in determining that – regardless of the phrasing of the draft HIB policy that was inadvertently published on the Board's website – it is a requirement that alleged conduct be motivated by a distinguishing characteristic in order to be considered HIB. Such a requirement is also set forth in the Act:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [*N.J.S.A.* 18A:37-14.]

[2] Although the ALJ included a legal discussion in his Initial Decision, he failed to make conclusions of law as required by *N.J.A.C.* 1:1-18.3(c).

As the Act clearly sets forth that an action must be motivated by an actual or perceived characteristic in order to be considered HIB, the Board was not arbitrary, capricious or unreasonable in determining that the alleged conduct here did not amount to HIB.

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/21/16

Date of Mailing: 12/21/16

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**
**SUMMARY DECISION**
OAL DKT. NO. EDU 05308-16
AGENCY REF. NO. 88-3/16

**M.R. O/B/O MINOR CHILD M.R.,**
Petitioners,
v.
**BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,**
Respondent.

---

**M.R.**, Petitioner pro se

**Stephen R. Fogarty**, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: October 3, 2016 Decided: November 7, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek a determination that Respondent erred in determining that the minor child M.R. was not the victim of harassment, intimidation, or bullying (HIB) within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on April 7, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Respondent filed a motion for summary decision on September 13, 2016. Petitioners were ~~offered~~ had until October 3, 2016 to respond but no response was filed. The record closed that day.

## ISSUE

Did Respondent err in determining that the minor child M.R. was not the victim of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.

## FACTUAL DISCUSSION

The Statement of Undisputed Material Facts, as set forth in Respondent's brief in support of the motion for summary decision are adopted in their entirety and incorporated herein by reference.

## LEGAL ANALYSIS AND CONCLUSION

### Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such

an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. While it is true that a judge is not to "weigh the evidence and determine the truth of the matter," Brill, supra, 142 N.J.at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary-judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615,622 (App. Div. 1987). Failure of the opponent to make such a showing entitles the moving party to summary judgment. Brill, supra, 142 N.J. at 529. The Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases," due to the

perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

I **CONCLUDE** there are no genuine issues of material fact and the matter is ripe for summary decision.

## Anti-Bullying Bill of Rights Act

The Anti-Bullying Bill of Rights Act (Act), N.J.S.A. 18A:37-13 et seq., is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1.(f). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c. 122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24,

2014) (citation omitted), adopted, Comm'r (April 10, 2014), <http://njlaw.rutgers.edu/collections/oal/>. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013) <http://njlaw.rutgers.edu/collections/oal/>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), , adopted, Comm'r (June 24, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student "fat," "fat ass," and "horse." According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., supra, the ALJ also upheld a Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'kool-aid' was directed at [the other student] because of his race; insulted and demeaned [the other student]; and . . . interfered with [the other student's] education" because "[u]pset and embarrassed children are not fully available for learning." However, in J.A.H., supra, the Board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not "contain the more serious and aggravating elements either 'expressed or implied' under [N.J.S.A. 18A:37-14.]" The ALJ found that the incident was not improperly motivated by a distinguishing characteristic and that the facts "only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying."

Here, the inescapable conclusion is that the Board's HIB determination was correct.

I further **CONCLUDE** that Respondent's motion for summary decision be **GRANTED**.

## ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**, and Petitioners' Verified Petition be **DISMISSED** with prejudice.

This Initial Decision disposes of all issues in controversy in this matter.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 7, 2016
DATE

Thomas R. Betancourt
**THOMAS R. BETANCOURT**, ALJ

Date Received at Agency:

NOV 9 2016

November 7, 2016
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

db

# APPENDIX

List of Moving Papers and Pleadings

For Petitioner:

Petition

For Respondent:

Answer to Petition and Separate Defenses

Notice of Motion for Summary Decision

Certification of Beverly Mackay with Exhibits A through H

Brief in Support of Motion for Summary Decision

428-16

OAL DKT. NO. EDU 20234-15, EDU 99966-15 (CONSOLIDATED)
(EDU 7964-15 ON REMAND)
AGENCY DKT. NOS. 79-4/15, 124-6/15

| | | |
|---|---|---|
| H.F., ON BEHALF OF MINOR CHILD, D.F., | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, | : | |
| RESPONDENT. | : | |
| AND | : | COMMISSIONER OF EDUCATION |
| BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, | : | DECISION |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY AND H.F., | : | |
| RESPONDENTS. | : | |

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed by H.F. This consolidated matter stems from H.F.'s dispute concerning the February 3, 2015 decision of the Interim Executive County Superintendent (ECS), who concluded: 1) minor child D.F. is not a "homeless child" pursuant to *N.J.A.C.* 6A:17-1.1 *et seq.* and the McKinney-Vento Homeless Education Assistance Act (McKinney-Vento Act), 42 *U.S.C.* §§ 11431 *et seq.*; and, therefore 2) D.F. is not entitled to a continuation of his education in the Teaneck School District

(Teaneck).[1] H.F. contends that D.F. does meet the definition of a "homeless child" and, therefore, should be permitted to continue his education in Teaneck. Teaneck is seeking tuition reimbursement and other relief from the Cliffside Park School District (Cliffside) because it maintains that D.F. resides in Cliffside and, as such, Cliffside has the responsibility to provide D.F. with a free and appropriate education. In the Initial Decision, the Administrative Law Judge (ALJ) found that the petition of appeal filed by H.F. should be dismissed for failure to comply with the July 12, 2016 discovery Order (July 2016 Order).

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal filed by H.F. should be dismissed for failure to comply with the July, 2016 Order. H.F. has inexcusably and blatantly failed to comply with requests for documents and interrogatories properly served on him by the parties, as well as various interim orders issued by the ALJs in these two consolidated cases, to the detriment of the legal process.[2] As was stated by ALJ Scollo, H.F.'s "failure to obey the Tribunal's July 12, 2016 Order is unreasonable, frustrate[s] the orderly process of the case and makes the desired findings of fact regarding whether D.F. is a 'homeless child' impossible to be determine." (Initial Decision at 5) The Commissioner is not persuaded that the exceptions submitted by the H.F. dictate a different result, as the arguments presented by H.F. did not address his failure to comply with the July 2016 Order; rather, H.F. focused his submission on several alleged conspiracy theories. Despite the dismissal of the petition filed by H.F., there appear to be outstanding issues related to the petition filed by Teaneck against Cliffside and H.F. that still must be resolved at the OAL.

[1] The ECS further determined that H.F. and D.F. are presently domiciled in the Borough of Cliffside Park.

[2] The July, 2016 Order expressly provided that if H.F. failed to comply with the discovery requests, his petition would be dismissed.

Notably, it is not entirely clear from the record which district D.F. is currently attending school in, if any, or whether tuition reimbursement is appropriate in this case.

Accordingly the petition of appeal filed by H.F. is hereby dismissed. The petition filed by Teaneck against Cliffside and H.F. shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/16

Date of Mailing: 12/22/16

***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION -**
**DISMISSAL**

**H.F. ON BEHALF OF MINOR CHILD D.F.,**
Petitioner,
v.
**BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,**
Respondent.

OAL DKT. NO. EDU 20234-15
AGENCY DKT. NO. 79-4/15

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**TEANECK DISTRICT BOARD OF EDUCATION,**
Petitioner,
v.
**CLIFFSIDE PARK BOARD OF EDUCATION & HECTOR FERRER,**
Respondents.

OAL DKT. NO. EDU 09966-15
AGENCY DKT. NO. 124-6/15

**ON REMAND**
OAL DKT. NO: EDU 07964-15

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**H.F.**, petitioner, pro se

**Mariann Crincoli**, Esq., for respondent the Teaneck Board of Education, (Machado Law Group, attorneys)

**Vittorio S. LaPira**, Esq., for respondent the Cliffside Park Board of Education (Fogarty & Hara, attorneys)

Record Closed: August 19, 2016 Decided: September 28, 2016

BEFORE **JOHN P. SCOLLO**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner H.F. on behalf of his child D.F., appealed a residency decision rendered by the Interim Executive County Superintendent for the Department of Education. The Interim Executive County Superintendent determined that Cliffside Park was responsible to provide D.F. with a free and appropriate public education based upon where D.F. resided nightly for approximately one year and a half prior to the February 2015 determination, rather than in Teaneck, where D.F. had previously resided. The matter was initially transmitted to the OAL as Docket No. EDU 07964-15. Upon remand, it was transmitted to back to the OAL as Docket No. EDU 20234-15.

In OAL Docket No. EDU 09966-15, Teaneck seeks an order declaring that D.F. is or was a resident of Cliffside Park and that Cliffside Park has responsibility to provide D.F. with a free and appropriate public education. OAL Docket No. EDU 20234-15 and OAL Docket No. EDU 09966-15 were consolidated on December 14, 2015.

On March 14, 2016, an in-person pre-hearing conference of the consolidated matters were conducted. Discovery deadlines as to the "Nature of the Proceedings' were memorialized in a Pre-Hearing Order dated March 15, 2016.

The Pre-Hearing Order provided that the parties should exchange documents related solely to the "Nature of Proceedings" by April 18, 2016. It also provided that if any party needed further documentation, they could serve a document demand on or before May 13, 2016, which was to be answered on or before June 6, 2016. The Pre-Hearing Order specified: "Discovery shall close on June 20, 2016."

On June 24, 2016, counsel for the Cliffside Park Board of Education advised that OAL that H.F. on behalf of D.F. had failed to provide all parties with requested documents and answers to interrogatories, which were timely served pursuant to the Pre-Hearing Order. Counsel requested a telephone conference.

A telephone conference was scheduled with the parties for June 30, 2016. On the day of the conference, H.F. advised the OAL that he would be unable to participate in the conference and indicated that he would send a letter with his explanation. No letter was ever received either by the parties or by the OAL, nor was a meritorious reason for the failure to participate provided.

On July 8, 2016, Fogarty & Hara, on behalf of the Cliffside Park Board of Education, wrote to Judge Marose informing her that H.F. had not supplied responses to discovery requests and requested that an order Compelling Discovery be entered. (See copy of July 8, 2016 letter attached hereto) On July 11, 2016, the Machado Law Group, on behalf of the Teaneck Board of Education, wrote to Judge Marose informing her that they had not received H.F.'s discovery responses and that they too were seeking an Order compelling discovery. (See copy of July 11, 2016 letter attached hereto).

On July 12, 2016, Judge Marose issued an Order compelling H.F. to fully comply with outstanding discovery requests before July 29, 2016. (See copy of the July 12, 2016 Order attached hereto). The July 12, 2016 Order further provided that should H.F. fail to comply, the Petition would be dismissed.

On August 19, 2016 the Machado Law Group wrote to Judge Marose with copies to all parties stating (1) that H.F. had not complied with the July 12,2016 Order Compelling Discovery (hereinafter "the July 12, 2016 order"); (2) that in the interim, H.F. filed a request for interlocutory review of Judge Marose's July 12, 2016 Order; and, (3) that Machado Law Group was seeking an Order dismissing H.F.'s Petition pursuant to his failure to comply with the July 12, 2016 Order.

The Uniform Administrative Procedure Rules state:

> The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access

> to facts which tend to support or undermine their position or that of their adversary." N.J.A.C. 1:1-10.1(a).

There are sanctions available for a party's failure to comply with the tribunal's Orders, as follows:

> (a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:
> 1. Dismiss or grant the motion or application;
> 2. Suppress a defense or claim;
> 3. Exclude evidence;
> 4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or
> 5. Take other appropriate case-related action.

In the case at bar, the tribunal will follow the above-cited Procedural Rules.

## FINDNGS OF FACT

I **FIND** that H.F. has not provided discovery in accordance with the Pre-Hearing Order dated March 15, 2016 and has not provided discovery in accordance with the Tribunal's Order dated July 12, 2016. I **FIND** that H.F. has not filed opposition papers in response to the motion at bar, and that the time for filing opposition papers has expired. I **FIND** that the movant is not in default of any of its discovery obligations.

## LEGAL ANALYSIS AND CONCLUSIONS

I **CONCLUDE** that H.F. has been afforded reasonable notice to comply with his discovery obligations and that he has failed to comply with the July 12, 2016 Order. I **CONCLUDE** that H.F.'s failure to supply discovery to the other parties is prejudicial to them.

In his decision dated December 14, 2015, the Commissioner of Education reversed Judge Marose's November 4, 2015 grant of Summary Decision in favor of Teaneck Board of Education; consolidated EDU 07964-15 and EDU 09966-15; and

remanded the cases to the OAL for further proceedings, including the rendering of the requisite findings of fact to facilitate a determination as to whether D.F. is a "homeless child" under Federal and state law and regulations.

I **CONCLUDE** that D.H.'s failure to obey the Tribunal's July 12, 2016 Order is unreasonable, frustrate the orderly process of the case and makes the desired findings of fact regarding whether D.F. is a "homeless child" impossible to determine.

I **CONCLUDE** that there have been no circumstances-exceptional or otherwise-presented explaining or excusing H.F.'s non-compliance with the July 12, 2016 Order, and I **CONCLUDE** that good cause exists to dismiss the Petition with prejudice.

## ORDER

It is hereby **ORDERED** that the Motion Dismissing the Petition filed by the Cliffside Park Board of Education is **GRANTED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 28, 2016
DATE

**JOHN P. SCOLLO**, ALJ

Date Received at Agency:

Date Mailed to Parties: SEP 29 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

# APPENDIX

Court Exhibits:

July 8, 2016 letter from Fogarty & Hara;

July 11, 2016 letter from Isabel Machado, Esq.;

July 12, 2016 Order Compelling Discovery

429-16

OAL DKT. NO. EDU 17352-15
AGENCY DKT. NO. 236-9/15

| | | |
|---|---|---|
| T.B., ON BEHALF OF MINOR CHILD, T.B.; L.B., ON BEHALF OF MINOR CHILD, A.B.; L.F., ON BEHALF OF MINOR CHILD, K.F.; L.G., ON BEHALF OF MINOR CHILD, G.C.; L.R., ON BEHALF OF MINOR CHILD, K.R.; AND EDUCATION LAW CENTER, | : | |
| PETITIONERS, | : | COMMISSIONER OF EDUCATION |
| V. | : | DECISION |
| NEW JERSEY STATE DEPARTMENT OF EDUCATION | : | |
| RESPONDENT. | : | |

The record of this matter and the proposed consent order have been reviewed. Upon review, the Commissioner notes that the Department of Education is a party to this matter and the consent order has been signed by an authorized representative of the Department. Accordingly, pursuant to *N.J.A.C.* 1:1-19.1(d), the consent order is deemed the final decision in this matter.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/22/16

Date of Mailing: 12/22/16

ROBERT LOUGY
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for Respondent,
New Jersey Department of Education
Angela.Velez@dol.lps.state.nj.us

By: Angela L. Velez
Deputy Attorney General
(609) 777-4861

| | |
|---|---|
| T.B., et al., | STATE OF NEW JERSEY<br>OFFICE OF ADMINISTRATIVE LAW<br>DOCKET NO. EDU-1732-2015N |
| Petitioners, | Civil Action |
| v. | CONSENT ORDER |
| New Jersey Department of Education, | |
| Respondent. | |

THIS MATTER having been opened to the Office of Administrative Law by way of a Petition of Appeal filed with the Commissioner of Education by Petitioners T.B., T.B., L.B., A.B., L.F., K.F., L.G., G.C., L.R., K.R. and Education Law Center, and the Petitioners and Respondent New Jersey Department of Education, having reached a settlement of this matter;

IT IS HEREBY AGREED by and between Petitioners and Respondent that this matter be placed into abeyance until September 15, 2016, or until regulations amending N.J.A.C. 6A:8 are adopted and published, whichever comes first, in accordance

with the Settlement Agreement dated May 6, 2016 between the aforementioned parties, incorporated herein by reference.

IT IS ALSO HEREBY AGREED by and between Petitioners and Respondent that the Petition in the above-captioned action will be dismissed with prejudice upon the adoption of the proposed amendments to the regulations at N.J.A.C. 6A:8 in accordance with the Settlement Agreement dated May 6, 2016 between the aforementioned parties, incorporated herein by reference.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Angela L Velez
Angela L. Velez
Deputy Attorney General
On behalf of Respondent,
New Jersey Department of Education

Date: 5/6/16

David G. Sciarra, Esquire
Education Law Center
On behalf of Petitioners

Date: 5/6/16

# STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
# BUREAU OF CONTROVERSIES AND DISPUTES
# TENURE HEARING

| | | |
|---|---|---|
| In the Matter of the Arbitration Between STATE-OPERATED SCHOOL DISTRICT CITY OF NEWARK, NJ | ) | |
| **PETITIONER** | ) | **OPINION** |
| And | ) | **AND** |
| CONSTANCE WILEY | ) | **AWARD** |
| **RESPONDENT** | ) | |
| Agency Docket 171-6/16 | ) | |

ARBITRATOR — GERARD G. RESTAINO, ASSIGNED BY NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH CHAPTER 26, P.L. 2012, AND 18A:6-17.1

APPEARANCES:

FOR THE PETITIONER
ROBERT TOSTI, ESQ. — COUNSEL FOR PETITIONER

FOR THE RESPONDENT
JOSEPH FUSELLA, ESQ. — COUNSEL FOR RESPONDENT

## BACKGROUND

Constance Wiley, hereinafter referred to as the Respondent, was a tenured teaching staff member of the State-Operated School District, City of Newark, hereinafter referred to as the Petitioner, and was assigned as a first-grade teacher. On April 12, 2016, Erskine Glover, Principal of Quitman Street Community Renew School, filed a Notice of Conduct Unbecoming (tenure charge) against the Respondent. That charge was filed pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.2(a). On or about June 8, 2016, the above charges were served on the Respondent.

On June 8, 2016, Christopher Cerf, Superintendent of the District, filed a Certification of Determination in support of the Tenure Charge filed by Principal Erskine Glover. Superintendent Cerf also determined that, in accordance with N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, the Respondent is to be suspended without pay for one hundred-twenty (120) days effective June 9, 2016. On that same day the District approved a Resolution in support of the tenure charges.

On June 21, 2016, Robert Tosti, Counsel for the Petitioner, filed the tenure charges with David Hespe, Commissioner of Education. That filing included Notice of Charge, Statement of Evidence in Support of Charge, Supporting Documents, Certification of Determination and Proof of Service.

On June 17, 2016, the Respondent filed an answer to the tenure charges. On July 5, 2016, M. Kathleen Duncan, Director of New Jersey Department of Education's Bureau of Controversies and Disputes, sent a letter to Messrs. Tosti and Fusella (counsel for Respondent) in which she indicated that the *"tenure charges and Respondent's answer were reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of Respondent's*

*defenses and any motions which may be filed with the arbitrator." Additionally, Ms. Duncan stated that the arbitrator "shall review those charges brought pursuant to N.J.S.A. 18A:6-16 which are not dismissed as a result of a motion – under the preponderance of evidence standard."*

Accordingly, on July 5, 2016, the undersigned was appointed arbitrator in the instant matter. Hearings were scheduled for September 19, 21, 2016. At the September 19th hearing the parties entered into settlement discussions, which continued for a period of time. On December 5, 2016, the Respondent signed the stipulation of settlement, and on December 14, 2016, Superintendent Cerf signed that same stipulation, whereby the Respondent resigned her teaching position effective February 1, 2017.

I accept, acknowledge, and agree to the stipulation of settlement and it shall be incorporated into my Award. In view of the Respondent's unilateral resignation, it is my opinion that in accordance with N.J.A.C. 6A:3-5.6 the tenure charges may be considered moot and a review by the Commissioner of Education is unnecessary.[1]

[1] State-Operated School District, City of Jersey City, Hudson County v. Deborah Robinson, Agency 403-11/03 (2004)

## AWARD

Under the auspices of N.J.A.C. 6A:3-5.6 (a), I hereby accept the December 14, 2016, consent settlement entered into evidence by the parties, and Order that the tenure charges filed against Respondent, Constance Wiley , shall be dismissed as moot.

Dated: December 21, 2016

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 21st day of December, 2016, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

PURCELL MULCAHY HAWKINS FLANAGAN & LAWLESS, LLC
One Pluckemin Way
Bedminster, NJ 07921
908-658-3800
Attorneys for the State Operated
School District of the City of Newark
File No. 650-10185

| | |
|---|---|
| IN THE MATTER OF TENURE CHARGES OF CONSTANCE WILEY<br><br>and the<br><br>STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK | AGENCY REF. NO. ~~91-3/16~~ 171-6/16<br><br>**STIPULATION OF SETTLEMENT** |

The State-Operated School District of the City of Newark (the "District"), whose principal office is located at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Constance Wiley, residing at 5 Laurel Avenue, Maplewood, New Jersey 07040 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

**WHEREAS** Respondent is a tenured teaching staff member employed by the District as a teacher; and

**WHEREAS** the State District Superintendent of the School District ("Superintendent") certified tenure charges to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Constance Wiley, State-Operated School District of the City of Newark, Essex County* ("Tenure Charges"), primarily based upon allegations of a classroom incident on October 7, 2015 at the Quitman Street Community Renew School; and

**WHEREAS,** the charges were ultimately assigned to Arbitrator Gerard Restaino for hearing; and hearings were begun before him on September 18, 2016; and

**WHEREAS,** the District is an *Abbott* District, with stringent budget limitations and due to the uncertainty of the outcome of arbitration the Parties wish to resolve this matter in accordance with the terms set forth herein rather than continue with the arbitration; and

**WHEREAS** the proposed Stipulation of Settlement is in the best interest of the Parties and the public by establishing certainty of result and it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

**NOW, THEREFORE,** subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges. The District agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the District retains the right to refile and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against her by the District, and Respondent reserves the right to defend same.

2. In consideration of the withdrawal of the charges, the Respondent Constance Wiley agrees to submit a binding and irrevocable resignation from all employment with the Newark Public Schools, in a form attached hereto as Exhibit A. The resignation is based upon Constance Wiley being returned to the payroll as of September 1, 2016 and thereafter shall continue on a paid administrative leave during which time she shall use her accrued time until February 1, 2017, at which time she intends to retire. Other than her salary payments and medical benefits,

Ms. Wiley waives all other payment, benefits or emoluments of employment with the Newark Public Schools.

3. Except as noted above, Respondent waives all claims of any nature against the District with regard to her employment with the District including fees, or other monetary relief, with the exception of workers' compensation claims for the term of her prior employment until the date of this Agreement. This Stipulation is based upon the understanding that Respondent's separation from employment with the District, effective February 1, 2017, will be deemed a voluntary resignation in good standing. Upon inquiry from any third party to authorized employees or representatives of the District, those employee or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for her separation from employment was her voluntary resignation.

4. In exchange for the consideration set forth in paragraph 3 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that she has or may have against the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the District up to the date of this Agreement. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis,

any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on her employment, including but not limited to any claim for back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers' compensation claims.

5. Notwithstanding the terms of paragraph 9 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any

administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Respondent agrees not to seek or accept any resulting relief whatsoever.

6. Notwithstanding the terms of paragraph 3 of this Stipulation, Respondent does not hereby waive any right she may have to workers compensation benefits or pension benefits.

7. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that she: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that she may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

8. This Agreement shall not constitute a precedent in any matters involving other District employees.

9. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with

any person, other than her accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that she will inform the person to whom she is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

10. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

11. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

12. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as

applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

13. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

14. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

15. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

16. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

17. This Stipulation of Settlement is subject to the final approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter.

18. Additionally, this Stipulation is subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the

Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: December 5, 2016

Constance Wiley
CONSTANCE WILEY

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 12/14/16

Christopher Cerf
By: CHRISTOPHER CERF
State District Superintendent

**CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):**

Dated: 12-15-16

Robert M. Tosti
Attorney for State-operated School District
of the City of Newark

**APPROVED:**

Dated: 12/20/16

Gerard Restaino
Gerard Restaino, Arbitrator

**CERTIFICATION**

I, Constance Wiley, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 5 2016

Constance Wiley

Constance Wiley

# EXHIBIT A

December 5, 2016
~~October __, 2016~~

Christopher Cerf, State District Superintendent
NEWARK PUBLIC SCHOOLS
2 Cedar Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Charges Against Constance Wiley
Agency Ref. No. 171-6/16

Dear Superintendent Cerf:

In accordance with our agreement, I hereby submit my resignation from employment as a Newark Public School teacher effective February 1, 2017.

Very truly yours,

Constance Wiley

Constance Wiley

/rt

437-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

| | |
|---|---|
| IN THE MATTER OF THE TENURE CHARGE OF INEFFICIENCY<br><br>- against -<br><br>DANIELLE CARROLL,<br>Respondent-Teacher<br>- filed by -<br><br>STATE- OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,<br>District-Petitioner<br><br>AGENCY DOCKET NO. 261-9/15 | OPINION AND DECISION |

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Teresa L. Moore, Esq., Counsel,
Riker Danzig Scherer Hyland Perretti, LLP

FOR THE RESPONDENT

Colin M. Lynch, Esq.,
Zazzali Fagella Nowak Kleinbaum & Friedman, P.C.

## BACKGROUND

Notice of Tenure Charges of Inefficiency were served on the Respondent, Danielle Carroll, ("District"), a tenured teacher pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3.[1], by the State-Operated School District of the City of Newark on or about August 7, 2015. The Charges were certified by the District and referred to arbitration.

The bases for the tenure charge was that "Respondent has been rated Partially Effective and Ineffective in two consecutive annual summative evaluations as follows:

1) Respondent was rated Partially Effective in her 2013-14 annual summative evaluation;

2) Respondent was rated Ineffective in her 2014-15 annual summative evaluation."

Section 25 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act requires that in order to bring charges of inefficiency against a tenured teacher, he or she must have had two consecutive annual summative evaluation ratings of either "ineffective," "partially effective," or a combination thereof.

On November 15, 2015, the Respondent filed a Motion to Dismiss the Inefficiency Charge because "Carroll's summative evaluation is fatally flawed and, as a matter of law, may not form the basis of the instant charges."

The Motion was denied without prejudice. In his decision, the Arbitrator wrote:

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[1] By letter dated October 14, 2015, the District indicated that it "is willing to proceed at hearing as if the charge had been brought solely on the basis of N.J.S.A. 18A:6-17.3."

"Since both the District's ultimate burden of proving that the tenure charges against Carroll for inefficiency brought, pursuant to Section 25 of the Act based on two consecutive years (2013-14 and 2014-15) of either partially effective or ineffective annual summative ratings were made in accordance with law and the implementing regulations, and the four statutory defenses to the tenure charges as set forth in N.J.S.A. 18A:6-17.2 can only be determined 'on the merits after a hearing and not procedurally without a hearing,' the District's Motion to dismiss must be denied." *See I/M/O Tenure Charge of Leonard Yarborough*, (Dkt. No. 259-9/15)(Jan. 6, 2016)(Arbitrator Arthur A. Riegel).

"In the event the District either fails to meet its burden or the Respondent establishes that either statutory defense (1) or (4) or both are applicable in the instant case, evidence that the Respondent's 'evaluation failed to adhere substantially to the evaluation process' as a result of the District's omission of a quantitative SGO score, or that such omission constitutes 'arbitrary and capricious' conduct on the District's part, the Arbitrator would be required to determine 'if that fact materially affected the outcome of the evaluation.' N.J.S.A. 18A:16-17.2. A related issue is whether a finding that a deficient SGO score 'materially affected the outcome' of the Respondent's 'evaluation process' is tantamount to a finding that but for her deficient SGO score she would have been rated effective?"

"Considering the remedy proposed by the Respondent of dismissing the tenure charge of inefficiency filed against her by the District based on a partially effective' rating for 2013-14 and an 'ineffective' rating for 2014-15 and 'restoring

the Respondent to employment with full back pay, benefits, seniority, and all other emoluments of her position,' the Arbitrator finds that a factual inquiry is necessary to ascertain whether the District substantially complied with the evaluation process."

## PROCEDURAL HISTORY

Upon referral of the charges, Carroll was on worker's compensation disability leave related to an on-duty injury sustained by her during the course of her employment with the District and was recovering from back surgery.

"Carroll took the position that the hearing could not commence until such time she was cleared to return to work. Ultimately, she was cleared to return to part-time work and Carroll agreed to participate in the hearing which was scheduled for August 15, 2016." (Resp. brief @ 1).

Hearings were conducted on August 15th, August 23rd, August 31st, September 19th, September 27th and October 5th, 2016. The record was closed upon submission of requested documentation by Carroll on October 31, 2016.Over the objection of the Respondent, the District submitted the Certification of Quetzy Rivera dated November 29, 2016. The parties submitted post-hearing briefs dated December 5, 2016.

## RESPONDENT'S EMPLOYMENT HISTORY

Respondent has been employed as a teacher by the School District since 2004, and earned tenure in 2007. She holds a standard New Jersey certification as an elementary school teacher. (Tr.@ 968).

For the first seven years that Respondent taught in the Newark Public Schools, she was assigned to Mt. Vernon, Ivy Hill and Speedway Elementary Schools, and she worked full school years. (Tr. @969-970, 982). During the next two years, Respondent taught for only two months. In the 2011-12 school year, she taught at First Avenue School, but in November 2011 she took a leave of absence that lasted for the balance of the school year. Thereafter, she was designated as having "Employee without Placement Status," known as EWPS. EWPS teachers do not occupy a budgeted role at a school; their salaries are budgeted through the School District's central office. (Tr. @504 -505). With EWPS status, Respondent was eligible to apply for open positions and be interviewed for them in the School District. (Tr. @508) In the 2012-13 school year, however, she did not obtain a teaching position; therefore, she reported to the School District's central office (and was paid).

Respondent's Teaching Performance 2013-2014 School Year

For the 2013-14 school year, the District assigned Respondent to Park Elementary School which serves approximately 900 students in pre-Kindergarten through Grade 8. She was assigned during approximately the third week of September 2013, having previously been EWPS and assigned to Human Resources in the District's Main Office.

At first, she worked as "support staff" where she could be used to serve as a substitute teacher or work in the office. When a vacancy opened up, she was assigned as a 2nd grade classroom teacher. (Tr. @ 619, 622). At some point in the fall, prior to November 27, 2013, the Respondent was designated as the

permanent teacher. (Tr. @ 10002, 11138). Prior to her designation, the teacher of the class was Nataly Farias. Prior to December 7th, Carroll had conducted instruction in Ms. Farias' class on or about four occasions, three of which as a substitute teacher following Ms. Farias' substitute lesson plans. (Testimony of Respondent). Respondent attended 1-2 grade staff meetings beginning on October 10, 2013. Farias' last day on the payroll was December 6, 2013.

Once a permanent teacher, Carroll developed an Individual Professional Development Plan ("IPDP") for the 2013-14 school years. It was dated December 16, 2013. (D. Ex. #2). Every teacher in NPS is required to have an IPDP that sets forth both student learning and teacher improvement goals for the school year. (D. Ex. #38). Her professional growth plan consisted of the following two areas for improvement, both taken from the framework:

> 3b, "Persistence: ('Students show persistence in confronting demanding concepts and tasks…')."
>
> 2a, "Tailored Instruction: ('I will tailor instruction to move all students toward mastery')." (Ex. 2, pp. 4-5.)[2]

On or about November 27, 2013, Carroll was observed for evaluation purposes by Chief Information Officer, Terry Emperio. (D. Ex. #3). On the first observation, her teaching performance was rated as "partially effective," but her performance on the other three observations was rated as "effective." However, she did receive a "partially effective" mid-year evaluation, due predominantly to her record of excessive absences and lateness, not her classroom teaching. As

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[2] Principal Esteves testified that IPDPs are usually developed approximately six weeks after a teacher begins teaching. (Tr. @630) Respondent's IPDP was signed on December 16, 2013, approximately six weeks after she had been assigned as a second grade classroom teacher, approximately late October-early November.

of February 2014, she had been late 48 times and absent on twelve days. (D. Ex. #5 @ 4).

When Respondent's tardiness and absence did not improve after February 2014, she was given several written warnings by Principal Esteves (D. Exs. #20, 21, 22) in accordance with the District's Attendance Improvement Plan ("AIP"). (D. Ex. #44). By May 28, 2014, Carroll had amassed 85 days tardy and 16 days absent. (D. Exs. #8, 39). In total, Respondent took 23 sick and personal days off, and was tardy 95 times in the 2013-14 school year. (D. Ex. 43). As a result, of the 190 teaching days that year, Respondent was present and on time for only 72 of them. (D. Ex. # 43) (Tr.@683).

Eventually, Ms. Esteves referred Carroll to the District's Labor Relations Department for a discipline hearing. (D. Ex. #24). Carroll was disciplined through the imposition of a fine of approximately $1,300.00.

On June 14, 2014, an educator not employed by the School District, known as a "peer validator," observed Respondent teaching an ELA lesson, and provided feedback to Respondent. (Tr. @873). Peer validators are additional forms of support provided to the School District's teachers. Their use has been negotiated in the collective bargaining agreement between Respondent's union and the School District. (Tr. @783-85).

In January 2014, the Respondent sought intermittent Family Medical Leave due to her children's medical conditions, which was approved by the District. (D. Ex. #49).

By the time of Respondent's summative performance evaluation in June 2014, she had only "partially met" the student learning goals that she had set for the year in her IPDP. (D. Ex. #8 @ 6). Her overall performance was rated as "partially effective." Notably, she received an "ineffective" rating on Indicator 5d "attendance and promptness," which resulted in six points being deducted from her overall score. Respondent and Ms. Empiro met on June 2, 2014 to discuss her summative evaluation. The Respondent did not submit a written rebuttal to her summative evaluation, although the framework permits one. Despite that rating, Carroll's subsequent principal testified that Principal Esteves informed him that Carroll was an effective teacher and the only issue involved the tardiness. (Tr. @ 58, 69, 207).

Respondent's Teaching Performance in the 2014-2015 School Year

Following the 2013-14 school year, Carroll was not reassigned to Park, but to the District's Main Office. At first, she had no placement.

Respondent interviewed with the Principal of Miller Street School, Armando Cepero, for a teaching position. Respondent was assigned to Miller Street School by mid-September 2015 and again taught second grade. Miller Street School, like Park Elementary, served students in pre-Kindergarten through Grade 8. There were approximately 540 students, including a significant Spanish-speaking population.

As of October 29, 2013, the Respondent had received a 504 ADA Accommodation, which included a restriction that she be able to use the elevator. (D. Ex. #19). The Respondent discussed her accommodation with

Principal Cepero. (Tr. @ 1039). Respondent's 504 Plan for Park Elementary expired at the end of the 2013-14 school year. She may have presented the expired 504 Plan approval letter to Principal Cepero. (Tr. @ 146, 1159-1160). By March 2015, Miller Street School had not received an approved 504 Plan for Respondent. On April 6, Carroll received a 504 Plan approval. (R. Ex. #1). She advised Cepero of her need to use the elevator, which he permitted, and gave her an elevator key.

On several occasions, staff, such as Ms. Peterson, assisted Carroll in escorting her students up and down stairs. On several occasions, her students were left unattended by an adult, for which she received written warnings on March 12th and March 13, 2015. (D. Exs. #26, #27).

At Miller School, Respondent and Principal Cepero developed a Corrective Action Plan ("CAP") to address areas in which the Respondent wanted to improve. (D. Ex. #9).

Notwithstanding Respondent's Third Affirmative Defense to the Inefficiency Charges, namely, "a CAP was developed by the District and imposed upon Carroll without her input, was not tailored to Carroll's deficiencies, contained inadequate steps for Administration to assist in the improvement of her teaching performance, and failed to contain any timeframes or deadlines, among other deficiencies, as mandated by applicable law," Principal Cepero testified that he engaged Carroll in a collaborative goal setting process. He testified that "as the teacher is entering the information and the administrator is entering information (on the Bloomboard computer system where the documents

are housed) a minimum of probably three conferences [were held] around this document right here to develop it." (Tr. @ 46) (D. Ex. #9).

She identified as her growth areas "Persistence and Tailored Instruction," the same growth areas she had included in her IPDP the year before at Park Elementary. As in the previous year, she set two learning goals for the 2014-15 school year, one each in English Language Arts ("ELA") and Math. (D. Ex. #9 @ 1-2). The initial goal setting conference on the CAP was held on October 8, 2014. (Tr. @ 46-48). The Respondent did not create the "action steps for administrator" section of the CAP.

Since Carroll taught Second Grade, instructing in both Math and English, her SGOs contained objective data-driven measures of student growth in both of those subject areas.

For Math, on page 2 of Carroll's five-page CAP, the students were given a "baseline" assessment. The baseline assessment was the MIF Pre-Test Numbers to 1,000 which is the district's recommended baseline assessment. Based on this assessment 9 students (60%) performed at or above grade level; 6 students performed below grade level." (D. Ex. #9). Predicated on that baseline assessment, Carroll's Math SGO was specifically established as follows:

> The student growth objective for the above students is for 9 students to maintain mastery and an additional three students to perform at or above grade level. By the mid year (sic) assessment 80% of students will be performing at or above grade level. By the May (sic) 14 students (93%) will be performing at or above grade level in mathematics.

Respondent identified several metrics in her CAP, by which she would measure whether her students met their learning goals in Math, as follows:

o Interim Assessment
o Unit Assessment
o PARCC

In her mid-year review, the metric that would be used to measure student progress in Math was changed and listed as follows: "Math in Focus Assessments."

Respondent identified several metrics in her CAP by which she would measure whether her students met their learning goals in ELA as follows:

o DRA2 ["Diagnostic Reading Assessment"]
o KLA Unit Assessments ["Core Knowledge Language Assessment"]
o Weekly Writing Assessment

"In addition to the Math SGO, the CAP also established an SGO for ELA. Here too, the CAP identifies the students' baseline assessment for measuring growth: 'At the time that the DRA 2 assessment was administered 10 students (59%) performed at the suggested DRA2 performance level of a 16 or above for students entering grade 2. 7 students (41%) fell below the suggested benchmark and therefore are performing below grade level.' (See Exhibit 'A')." Predicated on that baseline assessment, Carroll's ELA SGO was specifically established as follows:

> By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skill in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. This will increase the fall projection of 10 students (59%) to 15 students (88%) of students performing on grade level by the mid year (sic) assessment. The remaining two students who are significantly below grade level will move from a 6 DRA level to a

> level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an improvement rate of 67% from January doubling their growth objective for the year.

According to the Respondent, the foregoing SGOs met the legal requirement under NJTEACH to objectively measure student growth. Section (d) of N.J.S.A. 18A:6-17.3 states that tenure charges filed against an employee alleging inefficiency may only be based on "those evaluations conducted in accordance with the rubric adopted by the board and approved by the commissioner pursuant to N.J.S.A. 18A:6-16 et al. The evaluation rubric is governed by another section of the TEACHNJ Act, N.J.S.A. 18A:6-123, which specifies the minimum requirements for its approval. Among other things, the evaluation rubric 'shall' include:

1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher." [emphasis added].

"Evaluation rubrics for all teachers shall include the requirements described in N.J.S.A. 18A:6-123, including, but not limited to... (1) Measures of student achievement pursuant to N.J.A.C. 6A:10-4.2"; (2) Measures of teacher practice pursuant to N.J.A.C. 6A:10-4.3 and 4.4. N.J.A.C. 6A:10-4.2 outlines detail the student achievement components, which includes the SGOs, that must be considered as part of a teacher's annual summative evaluations, as was set forth in N.J.A.C. 6A:10-4.1 as follows:

> The student achievement measure shall include the following components...Student growth objective(s), which shall be specific and measurable, based on available student learning data, aligned to Core Curriculum Content Standards, and based on growth and/or achievement... (i) For teachers who teach subjects or grades not covered by the Core Curriculum Content Standards, student growth objectives shall align to standards adopted or endorsed, as applicable, by the State Board. (emphasis added).

Evaluations underlying inefficiency charges brought pursuant to the Act must be at least partially based on objective measures of student performance, commonly referred to as SGOs.

The District's Framework for Effective Teaching policy manual, specifically the "Overview of Evaluation Components" section, instructs teachers and administrators to "start the yearly evaluation process with a goal setting conference which will focus on setting both specific learning goals (sometimes called Student Growth Objectives or SGOs) and professional development goals for the teachers...[which] are captured in the teacher's Individualized Professional Development Plan ('IPDP') or Corrective Action Plan ('CAP'). The policy goes on to define a student learning goal as a 'long-term objective on which the teacher will focus for his/her classes or groups of students. Each

objective or focus area should be a skill or behavior critical to the students' success in the course and be aligned to the standards and/or curricular objectives. The goals should be measurable and based on available student learning data.'" (Id. at p. A11) (emphasis added).

Each teacher without a student growth percentile ("SGP") (such as Carroll) shall have at least two (2) SGOs developed by the teacher in conjunction with his or her supervisor or a principal's designee. SGOs "and the criteria for assessing teacher performance based on the objectives shall be determined, recorded and retained by the teacher and his/her supervisor by October 31 of each academic year." N.J.A.C. 6A:10-4.2(e)(4). In calculating Carroll's summative evaluation for the 2014-15 school year, the Respondent asserts that the District was required to include scores from Respondent's SGOs based on specific, measurable and available student learning data.

At the required "mid-year review" of Carroll's CAP, the evaluator, Dr. Kar, found that she had made "significant progress" toward her goals and was "effective" in making progress toward her SGOs. (Resp. brief, Ex. #B).

On page 5 of 10 of Carroll's summative evaluation, the Principal listed only her ELA SGO.

Respondent's summative evaluation for 2014-15 included a rating as to whether her student learning goals/student growth objectives were met. In a section called "Competency 4: Reflecting on the Student Learning Plan," the summative noted that "the finding from this section should relate to the ratings that you assigned to the teacher for Indicator(s) 4d, 4e and 4f." (Petitioner's

Statement of Evidence, Ex. #15 @ 4-5). The Evaluator rated Ms. Carroll on Indicators 4d, 4e and 4f, which are subsections of Competency 4, "Student Progress Toward Mastery" as follows:

4d. Partially Effective
4e. Partially Effective
4f. Ineffective

"In addition, the 2014-15 summative includes three questions about student learning goals, and the evaluator gave the following answers to those questions:"

Q. What were the student learning goals set during the creation of the IPDP/CAP, including any revisions made at the mid-year review or after observations?

A. By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skills in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. By the fall 15 students (88%) of students performing on grade level by the mid-year assessment. The remaining two students who are significantly below grade level will move from a 6 DRA to a level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an improvement rate of 67% from January doubling their growth objective for the year. [This goal was not revised during the course of the school year.]

Q. What progress did students demonstrate specifically around the earning [stet] these student learning goals? Please describe what metrics were used to assess progress of these goals.

A. As demonstrated by formal and informal observations, Ms. Carroll has not met students' learning goals. Below is list:

AIP, PLC's, implementation of professional development, lesson plans, unit plans and yearlong plans, quality of student work samples, gradebook, MIF [Math in Focus] training, CLI training and students responses and feedback.

Q. Overall, did the teacher meet the goals?

A. Did Not Meet Goals.

The mid-year review provides the following clarification regarding the "Math in Focus Assessment" metric:

> Yes. Ms. Carroll is on track to meet the goals that were set. Yes. For the DRA, students demonstrated 38% growth from September to January. Math in Focus Mid-Year Assessment: 72% or 16 students received 70% or above on the math mid-year assessment. Additional work with word problems through modeling and guided practice is necessary, as well as continual review of calendar routines to practice value, rounding, etc.

The Respondent received four formal observations at the Miller Street School: two long announced observations, respectively by Mr. Cepero and Vice Principal Kar on October 22nd and December 8, 2014. (D. Exs. #10, #11). Two short unannounced observations were conducted by Mr. Cepero on March 18th and April 7, 2015. (D. Exs. #13 and #14). For the announced observations, both administrators held pre-and post-observation conferences with Respondent to discuss the lesson that Respondent would teach and what they had observed. (Tr. @ 80-81; 838-40). After the unannounced observations, they conducted post-observation conferences.

Respondent's performance was rated "effective" in one announced observation, "partially effective" in another announced observation, and "ineffective" in two unannounced observations. In addition to formal classroom observations, Miller Street administrators also conducted numerous brief "walkthroughs" to observe her teaching and met with her to coach her. (Tr. @ 83, 93, 833). In addition to coaching, Carroll attended grade level meetings with

colleagues. A peer validator observed Respondent teach an ELA lesson and provided feedback. (Tr. @ 871-73).

She received a rating on her 2014-15 midyear evaluation (2/2/2015) of "partially effective." (D. Ex. #12). In the Summary section, Dr. Kar noted, inter alia, that "Ms. Carroll is a second grade teacher with abundant potential to move all her students toward mastery in almost all content areas...In implementing her instructional program, Ms. Carroll needs to be consistent. She needs to ensure that her instructional program is actively implemented daily in all content areas. She should be able to motivate her students and not discourage them about any particular content areas, especially mathematics." In addition to her problems regarding "attendance and promptness" discussed above, Dr. Kar wrote under competency SD: "Ms. Carroll has consistently not been punctual in submitting requested documentation and requirements as they related to student progress. Lesson plans as well as unit plans were delayed or not submitted."

Respondent was rated "ineffective" for her annual summative evaluation dated April 14, 2015. Principal Cepero, relied on non-metrics to assess progress toward the Respondent's student learning goals as set forth in the IPDP/CAP such as "AIP, PLC's implementation of professional development, lesson plans, unit plans, MIF training..." determined that the Respondent "Did not meet goals." (D. Ex. #15).

The Respondent has relied on an undated document showing "Text Level Reading/DRA-2" scores for the fall and mid-year she testified were submitted to Dr. Kar. (R. Ex. #59). "For math, she used the MIF end-of-year assessment. For

ELA, the DRA-2 results are provided to the District on a District generated form and recorded by the District for data assessment. (Tr. @ 1061-1065). Carroll testified that there is no comparable form for Math in Focus ("MIF") to the DRA form. According to Carroll, the District collected the year-end MIF assessment. Dr. Kar and Ms. Quetzy Rivera came with a cart and collected the results.[3] (Tr. @ 1077-78). The District has contested this assertion. See Certification of Quetzy Rivera.

The Tenure Charge of Inefficiency

Based on the Respondent's summative evaluations of "partially effective" and "ineffective" for two consecutive years, in June 2015, Principal Cepero recommended to the State District Superintendent that a tenure charge of inefficiency be filed against the Respondent. (D. Ex. #1).

The State District Superintendent reviewed the charge and Respondent's opposition, and determined that the School District had complied with the evaluation process in all respects in the 2013-14 and 2014-15 school years.[4] He also determined that there was probable cause to credit the evidence in support of the charge, and that the charge, if credited, was sufficient to warrant dismissal or reduction in salary. Accordingly, the State District Superintendent certified the charge to the Commissioner of Education pursuant to N.J.S.A. 18A:6-17.3 and

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[3] These materials were produced after the hearing at the request of the Arbitrator. The District submitted the Certification of Ms. Quetzy Rivera, which is opposed by the Respondent.

[4] The State District Superintendent's Determination and Certification were enclosed with the School District's letter to the Commissioner of Education dated September 10, 2015 certifying the charge to the Commissioner of Education.

N.J.S.A. 18A:6-11. Respondent filed an Answer with the Commissioner of Education denying the charge and asserting thirteen "affirmative defenses."

By letter dated October 13, 2015, the Commissioner of Education referred the matter to arbitration, stating:

> [T]he ... tenure charges [stet] have been reviewed pursuant to N.J.S.A. 18A:6-17.3c. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges [stet] shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges [stet] have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator .... The arbitrator shall review those charges brought pursuant to N.J.S.A. 18A:6-16 – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

In an email sent to the parties' counsel on October 23, 2015, the Arbitrator directed the School District "to begin its case...pursuant to §25 of TEACHNJ, N.J.S.A. 18A:6-17.3." He was "disinclined to permit the District to proceed on alternative grounds [as stated in the Notice of Charge and in the 10/13/15 letter of the Commissioner designee Kathleen Duncan.]

On November 15, 2015 Respondent moved before the arbitrator for summary decision to dismiss the charge, claiming that her two annual summative evaluations failed to include measures of student academic growth as required by N.J.A.C. 6A:10-4.1 and -4.2, and, thus, the charge was unsupportable. The School District vigorously opposed dismissal by demonstrating how its state-approved performance evaluation rubric included in

the NPS Framework incorporated measures of annual student learning goals. In a decision dated March 28, 2016, Arbitrator Robert Simmelkjaer denied the motion without prejudice.

At the request of Respondent, arbitration was delayed almost a year due to her health, during which time she received temporary disability benefits through workers compensation.

## CONTENTIONS OF THE PARTIES

District Position

The District, which has the "ultimate burden" of proving the tenure charge of inefficiency against Carroll brought pursuant to Section 25 of the Act, argues that "the tenure charge of inefficiency should be upheld." Considering the Respondent's two annual summative performance evaluations of "partially effective" and then "ineffective" for the 2013-14 and 2014-15 school years respectively, the District delineates the "four limited defenses" available to the Arbitrator pursuant to "this deferential standard of review under TEACHNJ." Assuming arguendo that "the employee demonstrates the existence of any of these four facts, a second analytical step is necessary. The Act requires the arbitrator to determine whether those facts 'materially affected' the outcome of the employee's evaluation. N.J.S.A. 18A:6-17.2(b). If the arbitrator determines that the facts had no such 'material' effect, the arbitrator is required to render a decision in favor of the School District and the employee must be dismissed. The evidence at the hearing demonstrated no factual basis for any of the four defenses in N.J.S.A. 18A:6-17.2(a)."

The District asserts that "[t]he evidence demonstrated that the School District adhered substantially to the evaluation process." In response to "several separate affirmative defenses that amount to a defense that the School District 'failed to adhere substantially' to the evaluation process," the District addressed the claim of "whether the District incorporated measures of student achievement in Respondent's evaluations." TEACHNJ requires that measures of student achievement be used as part of the performance rating of teachers. N.J.S.A. 18A:6-118 N.J.S.A. 18A:6-123(b). See also N.J.A.C. 6A:10-4.2.

The District relies on the testimony of Larisa Shambaugh, Chief Talent Officer for the District, that Competency 4 called "Student Progress Toward Mastery" addresses the student growth/achievement component in Respondent's summative evaluations. The District further argues: "The School District obtained approval from the New Jersey Department of Education to increase the weighting of Competency 4, in the form of approval of an 'equivalency' application that demonstrated how its scoring system complies with the state's requirements for weighting the student achievement component of a teacher's evaluation." (T496-503).

"The overwhelming evidence at hearing demonstrated that the School District did, indeed, incorporate student achievement in Respondent's summative evaluations. At the beginning of each school year at issue, Respondent set student learning goals in math and ELA (English Language Arts) for her second grade students to achieve during the course of the year. (D. Ex. 2@ 2 [IPDP] and D. Ex. 9@ 2 & 4 [CAP]) (Tr. @187). The student learning goals are

assessed midyear to determine whether the students are on track to achieve the goals that the teacher set. (D. Ex. 5@ 4 and D. Ex. 12 @ 4). At the end of each school year, part of her summative evaluation included a measure of the extent to which she had met those goals. (D. Ex. 8@6) ["partially met goals"] and D. Ex. 15 @ 5 of 10 ["has not met students' learning goals"]). Whether her student learning goals were met was determined by assessment data that she was advised to provide to her administrators. Her administrators confirmed that they considered student achievement when Respondent's annual summative evaluations were prepared. (Tr. @612,458,489-490, 240; Tr.@ 516-517).

"In support of her position that student learning goals were not part of her evaluations, Respondent may rely in her post-hearing brief on statements of the New Jersey Department of Education that are not statutes or regulations, but that demonstrate one method of setting and measuring student learning goals, or 'student growth objectives.' The Department's statements about measuring student growth objectives look different than the method in the School District's Framework for Effective Teaching. Department of Education statements have no legal authority, and should not be used in lieu of the Department's own approvals of the School District's method of evaluating teachers, including its measures of student academic growth." (D. Exs. 40 & 41.)

With respect to the Respondent's defense that the District "failed to adhere substantially to the evaluation process" because it did not provide Respondent "adequate professional support to improve her teaching at the Park Elementary and Miller Street Schools," the District argues that it "provided

numerous forms of support to her, particularly when she was on a corrective action plan in the 2014-15 school year." According to the District, "Carroll was trained in the MIF curriculum, which is highly scripted, and contains all of the materials necessary for a teacher."

"After teaching that curriculum for a year, she received coaching from several math specialists in the following school year at Miller Street School to address her aversion to teaching math. Her administrators walked through her classrooms throughout the year, and from those they gave her informal feedback on her teaching. She had pre-conferences before announced observations in which she and an administrator discussed what she would teach and how, and post-conferences to further discuss the lesson and any improvements needed. While at Miller Street School, she had the opportunity to observe a highly-performing colleague. (Tr. @ 417-418). Grade-level meetings and vertical meetings were held regularly throughout the school year in which ongoing training was provided in effective teaching practice." (Tr. @ 135-136; 414-416; 436-438).

The District further asserts that the Respondent was assisted by the School Improvement Panel, consisting of the principal, vice principal and a teacher. Both Miller Street and Park Elementary Schools had such panels when Respondent taught there. Respondent presented no evidence whatsoever that the panels did not operate as required.

The District refutes the Respondent's third affirmative defense, namely, that the CAP was "imposed on her without her input, was not tailored to her

deficiencies, contained inadequate action steps for the administration to assist her and contained no timeliness or deadlines."

"By its terms, the CAP itself refutes her claims: it states that there was a 'goal-setting conference' on October 8, 2014; it was intended for a 'full year'; it contains student learning goals and teacher goals that the Respondent herself chose; and it identifies supports that the administration would provide to her. Respondent signed off on her CAP without reservation." (D. Ex. #9).

The District notes that Respondent was "observed in accordance with regulatory requirements, participated in pre-and post-observation conferences, received coaching from her administrators and informal walkthroughs to provide feedback; and she was provided on-going professional development opportunities to help improve her performance. In both Park Elementary and Miller Street Schools, she received additional feedback from peer validators who were independent of the School District."

The District discerns "No Mistake of Fact that materially affected the outcome of Respondent's two consecutive summative evaluations. Rather, the evidence demonstrated that Respondent's summative evaluation scores in 2013-14 and 2014-15 were based on formal observations of her teachers as well as her professionalism, all scored in accordance with the School District's Framework for Effective Teaching."

"The evidence at the hearing did not show any mistakes of fact, much less any supposed mistakes of fact that 'materially affected' the outcome of the Respondent's summative evaluations.

The District disputes the Respondent's Tenth and Eleventh Affirmative Defenses alleging that the charge was brought because of 'considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law, and said retaliation materially affected the outcome of the evaluations.' The Eleventh Affirmative Defense claims that the charge is retaliation for Respondent filing workers' compensation claims using FMLA leave, sought and received reasonable accommodations for her disability, and for participating as a witness in a child welfare investigation of another teacher. None of these asserted bases for dismissing the charge were proven."

With respect to the claim of improper motive due to her participation as a witness in a child welfare investigation of another teacher, "[t]here is no evidence whatsoever that her evaluation was adversely affected because she gave an interview to a child welfare official in an investigation of another Miller Street School Teacher."

Also disputed is the Respondent's claim that the District failed to accommodate her disability. No improper motive was proven, given the Respondent's failure to renew her 504 Plan at Miller Street School until April 2015. The District maintains that from Respondent's delayed approval for a new 504 Plan – particularly in view of the principal's reasonable expectation that she escort her students to and from the cafeteria as part of her job responsibilities, his discovery of her students left unattended (Ex. 26, 27 and 29), her unwillingness to rest on stair landings when escorting them (T1146), and the

controversy that resulted from her reliance on other staff to escort her students (T310-313) – that she really did not need an accommodation or that she was neglectful in securing a 504 Plan and preferred to act on her own instead.

The Respondent's Fifth Affirmative Defense, alleging that her "observations and/or evaluations are arbitrary or capricious" is similarly rejected. More specifically, in her answers to interrogatories Respondent contended that the School District failed to provide her with an SGO score as required by applicable law. SGOs, or student growth objectives, are components of teacher's overall performance evaluation. N.J.A.C. 6A: 10-4.2. As discussed fully in Section B above, the School District included in its summative evaluations measures of student achievement, particularly in Competencies 4d, 4e and 4f, and the state Department of Education has approved its method of doing so. Therefore, the School District's method of measuring student academic achievement as part of a teacher's performance rating cannot be found to be arbitrary or capricious."

"As the evidence clearly showed, the charge against Respondent was based on thorough and rational assessments of Respondent's teaching performance by multiple evaluators. The evidence presented at the hearing showed that Respondent's evaluations were, in fact, scored properly according to the School District's State-approved Framework and that they included measures of student learning growth or SGO's."[5]

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[5] The District addressed the scoring of Competencies 1 and 3 in the observation of November 27, 2013. For both Competencies 1 and 3 she received two scores of "partially effective" and two scores of "effective" on individual subparts. The framework states that if there is a "tie" in scoring of an even number of indicators,

Finally, the Arbitrator is urged to reject the Respondent's Sixth Affirmative Defense of Failure to apply the Doctrine of Progressive Discipline. This doctrine has no bearing on a tenure charge of inefficiency since "it originated from and is applied in, an entirely different context-jurisprudence involving discipline for an employee whose employment is subject to New Jersey's Civil Service Act, N.J.S.A. 11A-1 et seq. A tenure charge of inefficiency is not a form of discipline; such a charge is the mechanism for removing a teacher from the classroom whose performance has been unsatisfactory, and who has failed to improve their performance...Furthermore, TEACHNJ provides for only one consequence for a proven tenure charge of inefficiency: dismissal of the teacher."

The District concludes that "[s]ince Respondent has not demonstrated a statutory defense to the tenure charge of inefficiency, the tenure charge of inefficiency against her should be upheld, and Respondent should be dismissed from her employment with the State-Operated School District of the City of Newark."

Respondent Position

In its initial point, the Respondent contends that "her summative annual evaluations are legally void for the lack of statutorily mandated student growth

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the evaluator should use the "preponderance of low-inference evidence" to arrive at a score. (Ex. 38, p. 20; see also definition of "low-inference evidence," (D. Ex. 38 @ 19). Principal Esteves testified that the evaluator must use their judgment, based on the evidence observed, to determine the "preponderance of the evidence" that supports an overall score for a Competency. (Tr. @725). Her testimony was consistent with that of Chief Talent Officer Larisa Shambaugh (Tr. @476,479-483). This policy was applied throughout the School District to reduce discretionary judgments and, thus, cannot be said to be arbitrary and capricious.

objectives and/or scores, and therefore, cannot serve as a basis for inefficiency charges."

The Respondent asserts that her "summative annual evaluation ratings for both 2013-14 and 2014-15 school years contain no SGO scores at all, or if they do, they are not based upon multiple objective measures of student progress as mandated by both statute and regulation."

Referring to the Arbitrator's Interim Decision with respect to "Respondent's Motion to Dismiss," finding that these evaluations are not "objective measures of student growth," the District bore the burden of proving that "it met the statutory mandate to generate a SGO score for a tenured teacher charged with inefficiency."

Considering the evidentiary record adduced at the hearing, the Respondent asserts that "there can be no doubt that for the 2013-14 school year, the District failed to demonstrate that it even understood what an SGO score was, much less demonstrate the existence of any SGOs established at the beginning of the year or any score for Carroll on her progress in meeting her SGOs in her annual summation. With respect to the 2014-15 school year, there is also no doubt that Carroll, with the approval of her Principal established clearly delineated SGOs in both Math and ELA and that they were simply ignored by the District in lieu of apparently subjective criteria or, at best, vague uncorroborated and factually unsupported representations of student progress absent any factual or objective support whatsoever. As such, Carroll's 2013-14 and 2014-15 annual evaluations are substantively and legally deficient and cannot be utilized

in support of the instant Charges. Put differently, they are legally void and rendered a nullity such that they cannot be utilized by the District in connection with the instant Charges, requiring their dismissal."

With respect to the 2013-14 school year, the Respondent, in addition to her claim that the IPDP was imposed on her without any input from her, maintains that "it plainly contains no SGOs." (D. Ex. #2 @ 3). The IPDP does seek to establish 'student starting points,' but does not state or articulate what they are. It merely suggests a means of determining such starting points. Likewise, the IPDP asks for 'student end point,' but, again, does not establish what the end points (or 'objectives') are. (Dist. Ex. 2, at p. 3). Perhaps the SGOs are set forth on some other document or form? Not according to Carroll's Principal that year, Esteves. According to her – that year SGOs were not so 'specific.'" (Tr. @ 713). From Principal Esteves' testimony, the Respondent concludes that it corroborates her testimony that "she made no SGOs that year and no input into her IPDP."

Similarly, Carroll maintains that her annual summative evaluation "confirms the absence of any SGOs." (D. Ex. #8). The evaluation inquires, "What student learning goals were set?" (D. Ex. 8, @ 5 of 8). No "goals" as such, however, are described, only a description of those assessments which may potentially be utilized to track student progress. Likewise, the evaluation inquires, "What was the outcome of these goals? Please describe what metrics were used to assess completion of these goals.(Id.). What follows is a recitation of assessments purportedly utilized by Carroll, but no explanation of any

outcome. In fact, the evaluation references indicator 4(f), which is ostensibly the section of the evaluation relating to scoring of SGOs, but instead refers to such non-objective, non-student progress centered matters, such as teacher/parent communications, etc."

Notwithstanding the "waiver" obtained by the District for 2014-15 school year, the Respondent notes that the "waiver" was not retroactive to 2013-14 as confirmed by Shambaugh. (Tr. @ 529). Moreover, the "'waiver' did not waive the mandates of the law and regulations with respect to the incorporation of objective measures of student growth into summative evaluations."

The Respondent further maintains that "[t]here is no SGO score in Carroll's Summative Annual Evaluation." Contrary to the testimony of Principal Cepero and documents submitted by him, the Respondent rejects the claim that "MIF training" and the District's "attendance improvement plan" (AIP) were somehow objective measures of student growth.

"In any event, the testimony at hearing was undisputed that Carroll established specific measurable SGO's for both Math and ELA in her CAP. It was also undisputed that her SGOs were established utilizing District approved standardized assessments, the MIF assessments for Math and the DRA-2 for ELA. It is undisputed that as of her mid-year evaluation, Carroll was meeting her SGOs and that she presented the available data necessary to demonstrate that she had done so. Even her Vice Principal, Kar, acknowledged as much during his mid-year evaluation, as well as in his testimony at hearing. So what

happened at the end of the year? Did Carroll meet her SGOs? Carroll not only testified that she did so, but provided documentary support for same."

From the Respondent's perspective, "Principal Cepero was, at best, ambivalent about Carroll's SGOs. Kar never reviewed the results of the DRA-2 and MIF assessments upon which Carroll's SGOs were based. Neither did Cepero."

Despite notice of its obligations to produce evidence that Carroll did not meet her SGOs, "[i]nstead what we got was vague subjective innuendo from both Kar and Cepero – that the students did not appear to be progressing, that progress did not align with the assessments, or that they didn't trust the assessments."

Whereas Cepero and Kar, in Respondent's view, "had ample opportunity to validate Carroll's MIF and DRA-2 assessment data if they had any concerns," particularly since "Kar trusted Carroll sufficiently that he had Carroll assess the students of other teachers and provide demonstrations on the subject, at one point describing it as one of her strengths," they did not review her data, which was "openly available at all times on Carroll's data wall." (R. Ex. #73) (Tr. @ 938-939).

According to the Respondent, "[t]he lack of SGO scores render Carroll's Summative Annual substantially void as a matter of law and require dismissal of the charges against her."

In support of its position, the Respondent cites the Legislature's findings regarding the TEACHNJ Act as follows:

a. The goal of this legislation is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions;

b. The New Jersey Supreme Court has found that a multitude of factors play a vital role in the quality of a child's education, including effectiveness in teaching methods and evaluations. Changing the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the federal "No Child Left Behind Act of 2001"; and

c. Existing resources from federal, State, and local sources should be used in ways consistent with this law. N.J.S.A. 18A:6-118.

The importance of goals is set forth in N.J.S.A. 18A:6-17.3, noting that tenure charges brought pursuant to Section 25 of the Act must be based on lawfully conducted evaluations as follows:

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c. 26 (C.18A:6-117 et al.).

The Act mandates that evaluation rubrics be "partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure." N.J.S.A. 18A:6-123.

In turn, the DOE's implementing regulations mandate that teacher evaluations include student achievement components:

(a) The components of the teacher evaluation rubric described in this section shall apply to teaching staff members holding the position of teacher and holding a valid and effective standard, provisional, or emergency instructional certificate.

(b) Evaluation rubrics for all teachers shall include the requirements described in N.J.S.A. 18A:6-123, including, but not limited to:

1. Measures of student achievement pursuant to N.JA.C. 6A:10-4.2; and

2. Measures of teacher practice pursuant to N.J.A.C. 6A:10-4.3 and 4.4.

(c) To earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4.(emphasis added).

Alluding to N.J.A.C. 6A:10-4.1(c), the Respondent notes that "a teacher cannot even earn a summative evaluation rating in the absence of a score...Without an evaluation rating, the District simply does not have the required two years of 'inefficient' or 'partially effective' performance evaluations to pursue charges under Section 25 of the Act. Indeed, N.J.S.A. 18A:6-17.2(d) places the 'ultimate burden' squarely on the District of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met."

Referring to the defenses set forth in N.J.S.A. 18A:6-17.2, the Respondent argues that "defenses (1) and (4) would easily apply to the absence of SGOs. There plainly was no compliance with the 'evaluation process.' Of course, the District's actions were and are also 'arbitrary and capricious.' The substitution of subjective non-metric considerations in allegedly analyzing whether or not Carroll met her SGO's is the very height of arbitrary and capricious conduct – i.e., the District did not like the metrics establish in Carroll's CAP, so it simply thinks it can pick a new one, or none at all. That is not the way the evaluation process is designed to work under the Act and its implementing regulations, and the District knows, or should know, better."

Since "one core purpose of the Act was to infuse teacher evaluation with objective data driven measures of student growth," as noted by the Legislature, the Respondent poses the question: "How could the absence of a SGO score not materially affect the outcome of the evaluation."

The Opinion and Award of Arbitrator Stephen Bluth, Dkt. No. 277-9/15 *I/M/O* Joel Dawkins (October 21, 2016) is deemed relevant to the instant case as follows:

> As for the CAP itself, I see it did not provide a process for assessing student growth. The requirement for this area requires the evaluator to consider the SGO based on available student data and on growth and/or achievement. However, in this instance I find Principal Williams' testimony unconvincing, as she failed to provide a numerical score for the SGO and did not provide any evidence she factored the SGO into Respondent's score. Accordingly, I determine, during the school year 2014-15, the District committed the same error as did the administration in a different building the previous year; that is, it failed to properly compute a separate score for Respondent based on student growth and, therefore, could not have factored this into his Annual Summative Evaluation. Accordingly, I find that evaluation bears no weight in Respondent's evaluation process. It also constitutes a material error, I determine...without valid SGO's and Annual Summative Evaluations there can be no statutory basis for charges against Respondent. (emphasis added).

In its second point, the Respondent argues that "[t]he District's evaluation of Carroll was arbitrary and capricious in that it is undisputed that Carroll was a de facto effective teacher during the course of the 2013-14 school year." In support of this claim, the Respondent considers the four (4) observations Carroll received during 2013-14, with only the first observation on November 27, 2013 rated "partially effective." According to the Respondent, the November 27, 2013 observation should be "discarded as arbitrary" because "Carroll did not even

arrive at Park until approximately the end of September 2013" when she was assigned as "support staff."

The 11/27/13 observation is deemed arbitrary because Carroll was "not assigned to teach the class in which she was observed, she had little to no familiarity with the class, except as a substitute and was not permanently assigned to teach the class until approximately December 7, 2013." Given the absence of any documentation showing when Carroll was actually assigned to teach the class, evidence that Farias was the teacher of record during the period circa October-November 2013 when she gave her 60-day notice of resignation ending December 6, 2013, and dubious reliance by the District on a sign-in sheet dated October 10, 2013 showing that Carroll attended a 2nd grade PLC meeting, the Respondent argues that the November 27, 2013 observation was atypical as "aptly borne out by her three other 'effective' observations occurring during the remainder of the year after she had the opportunity to know her students." Respondent contends that "[p]rior to formally taking over Farias' class on or about December 7th, she had very limited contact with the students, mostly acting as a substitute for other absent teachers, or providing cover for teachers while away from class at PLC meetings."

The Respondent cites arbitration decisions where the observation of teachers have been found to be arbitrary, such as *I/M/O* Jodi Thompson (Newark), Dkt. Nos. 240-8/14 and 16-1/15 (June 19, 2015) where Arbitrator Brent found the "charges arbitrary, in part, where one of the observations

considered occurred on teacher's first day of student contact in the new assignment, undermining the validity of the 2013-14 summative evaluation.

The Respondent also challenges the methodology utilized by the District in weighting her observations, as illustrated by the following chart:

| Competency | 11/13 Observation | 12/13 Observation | Mid-year Evaluation | 3/14 Observation | 5/6 Observation | Final Evaluation |
|---|---|---|---|---|---|---|
| 1 | PE | | E | E | E | PE |
| 2 | PE | E | PE | E | | PE |
| 3 | E | | PE | E | E | E |
| 4 | PE | E | PE | E | | PE |
| 5 | | | PE | | | PE |
| | | | PE | | | PE |

"As the above table makes clear, in her final evaluation, Carroll received a partially effective in Competency 1, despite being rated effective in that Competency since her initial observation. She received a partially effective in Competency 2, despite being effective in observations for that Competency since her first observation. She was rated effective for Competency 3. She received a partially effective on Competency 4 but the central component of that Competency, the SGO scores, were never established or scored. And on Competency 5, she received a partially effective."

"Based on her observations, Carroll should have received an effective rating in Competencies 1, 2 and 3. This would give her 9 points. We should also credit her with a highly effective for Competency 4, since she should not be punished for the District's failure to grant an SGO. That would give her 13 points. Even if we leave Competency 5 as partially effective in light of the tardiness issues, and we deduct 2 points for the partially effective, she would still have 11 points necessary for an effective evaluation."

The Respondent claims that she should not have lost 2 points for Competency 5 notwithstanding her tardies. "If we look at her ratings for that Competency in her final evaluation, we can see that she was scored as follows: "5(c) partially effective; 5(b) effective; 5(c) effective; and 5(d) partially effective." Although Respondent concedes the partially effective for 5(d) based on her absences and tardies, she maintains that the 5(a) "commitment to continuous improvement" is erroneous because the narrative of the evaluation contains the following positive assessment:

> As per the Mid-year review, Mrs. Carroll has attended Math & Focus and Literacy workshops and concepts, strategies and techniques to be integrated into second grade students learning in order for students to demonstrate engaged and interest and develop meaning in their learning. She continues to be involved with professional readings, each utilizing various strategies to help students to learn how to read and write. She continues to read strategic segments of The Skillful Teacher and Teach Like a Champion, discussing findings with colleagues at PLC meetings. She collaborates with her colleagues on lesson planning, sharing and creating new strategies to improve students understanding towards mastery. Mrs. Carroll keeps her mind open to new teaching methods by visiting colleague's lessons. (D. Ex. #8 @ 6).

Given this example of "effective" commitment to continuous improvement, which is also listed as an area of strength in the evaluation, Respondent argues that she should have been rated effective for 5(a) and as a result "would have been rated effective in all Indicators except 5(d) and that should have earned her a 'meets expectations,' with no points deducted off her overall score. In that event, she would have far more than enough points to have been deemed 'effective.'"

The Respondent argues that "tenure charges based upon Carroll's tardies and absences during the 2013-14 school year would constitute quadruple-jeopardy and are arbitrary as based solely on the number of absences or tardies" Respondent reviews three mitigating factors that caused Carroll's absences and tardies, namely: illnesses of her children, her father-in-law had become sick with cancer, and a lack of financial resources due to the loss of her home the prior year in the 2012 Hurricane Sandy.

Moreover, the Respondent notes that she received three separate penalties for her tardies and absences: withholding of her salary increment; non-payment or docking for the time she was tardy; and a disciplinary fine of $1,300 on June 13, 2014. (D. Ex. #47). The Respondent cites various cases such as *I/M/O* Nikita Clarke-Huff (Elizabeth) Dkt. No. 290-9/15 (Nov. 16, 2015) (Arbitrator Moscovitch) ("finding school board could not raise issue of absenteeism where teacher previously disciplined via increment withholding and settlement for the same conduct.")

In its third point, the Respondent argues that "[t]he charges would not have been brought but for considerations of discrimination prohibited by State and federal law or other conduct prohibited by State or federal law."

The Respondent contends that Principal Cepero discriminated against her because she participated in an interview during a DYFS investigation of child abuse and neglect. As a mandated reporter, Carroll was engaged in protected activity either under New Jersey Department of Education regulations or under the Conscientious Employee Protection Act ("CEPA") when she "informed the

DYFS investigator that she brought her concerns regarding the teacher, Lynderia Mansfield, to the attention of Cepero, who did not act upon it...Ultimately, the allegations led to the removal of the teacher at issue and Cepero was a witness in that case." See, *I/M/O* Lynderia Mansfield (Newark), Dkt. No. 64-2/16 (Sept. 26, 2016).

The Respondent further contends that Cepero discriminated against her with respect to "seeking and obtaining a reasonable accommodation for her disability." Referring to the ADA and NJ Law Against Discrimination ("LAD"), Respondent claims that Cepero discriminated and retaliated against her when "she exercised her accommodation – by having other school employees escort her students down and up the stairs to and from lunch, and did so without incident for nearly six months."

According to Respondent, prior to the DYFS interview, she had a positive relationship with Cepero, although rated "partially effective" in her mid-year evaluation in February 2015 by Dr. Kar.. Following the interview, "Cepero began a course of harassment against Carroll for her use of the 504 Accommodation she had obtained from the District and which he had allowed, without any complaint, up to that point." She received several disciplinary memoranda beginning on March 12, 2015 and continuing on March 13, 2015 and March 18, 2015. She obtained an updated 504 Accommodation on April 6, 2015.

The Respondent discerns a nexus between her receipt of an updated accommodation and Cepero's short formal observation on April 7, 2015 wherein she received another rating of "ineffective" in all competencies observed.

Cepero had previously conducted a formal short observation on March 18, 2015 where Carroll was rated "ineffective" on all competencies observed. Given this sequence of events, Respondent poses the query: "How could Carroll's performance have declined so precipitously in the space of just over a single month, since the end of February 2015. Cepero's response on direct examination to this question confirms Respondent's view that her "lawful right to use a reasonable accommodation for her disability" accounted for the transformation as follows:

> What took place was that between her not being in the classroom to attend to students, not walking students to their classes, all those type of things, lunch period, all those kind of things that were her requirements, it wasn't happening. (Tr. @ 125-126).

Since Cepero, based on Respondent's testimony, was aware of her 504 Accommodation from the previous year, fully accepted it and did not request that she review it, the change in attitude "out of the blue – on March 12th, without any prior warning, a situation which had existed without complaint for nearly six months became so intolerable that immediate, aggressive and repeated disciplinary memorandum was necessary. Not so."

"The answer is simple and obvious. His final two observations and his final evaluation of Carroll were a hit job. One was conducted on March 18, 2016, a day his disciplined Carroll in writing for her use of her accommodation. The second was on April 7, the very morning after he received a copy of Carroll's updated and renewed grant of a 504 Accommodation from Homere Breton. That is not a coincidence. The observations were a metaphorical slap in the face. No wonder Carroll may have 'shut down' as he indicated she did in his testimony.

Plainly, Cepero had determined as of March 2015 he was going to terminate Carroll, whether out of anger over her testimony to DYFS during her investigatory interview at the end of February 2015, or for simply abiding by or having the nerve to insist on using her grant of an approved accommodation. Indeed, Cepero notably completed his final summative evaluation of Carroll extremely early in the school year (in April 2015), when over two months remained in the year contrary to the District's Framework and guidance provided by the DOE guidelines."

"Of course, it goes without saying that the discrimination and retaliation evidence by Cepero materially affected the results of her evaluation ... Accordingly, because Carroll's summative evaluation for the 2014-15 school year is at best arbitrary, and at worst, discriminatory and unlawful, the District simply cannot meet its burden of proof necessary to sustain the instant charges."

In its fourth point, the Respondent argues that "Carroll's evaluations for the 2013-14 and 2014-15 school years failed to adhere substantially to the evaluation process." Carroll's 2012-13 IPDP was purportedly "untimely and unilaterally imposed on her without her input and was not individualized to her circumstances." According to Respondent, the IPDP neither created a "goal setting" conference nor was collaborative. The IPDP was untimely issued over 3 months into the school year on December 16th (after Carroll's first observation), was not part of a collaborative process and included no individualized SGOs."

The CAP was also allegedly "imposed on Carroll for the 2014-15 school year, was not individualized to her purported deficiencies and contained no

meaningful 'action steps' for administration to assist in the improvement of her performance, nor any timeframes within which they would occur." Respondent's CAP addresses "persistence" and "tailored instruction," rather than issues from the 2013-2014 school year, which entailed "attendance and tardies." The CAP's generic reference to "lesson plans, unit plans, etc." as well as PD and PLCs are deemed insufficient and contrary to the District's Framework which states the "CAP should explicitly articulate actions the administrator will take to directly support the teacher." (D. Ex. #38).

Finally, on this point, Respondent argues that her 2014-15 Annual Summative Evaluation was issued prematurely on April 14, 2015. "Less than a month passed between Carroll's third formal observation on March 18, 2015 and her final observation on April 7, 2015. This schedule is at odds with the District's own Framework which provides for a third observation in January or February and the fourth observation in March. (D. 38 @ A17). With two months left in the school year ending June 30th, the Respondent did not have meaningful time to improve her performance after her fourth observation. Moreover, this annual evaluation ran counter "to guidance developed by the State Board of Education" wherein "a principal is directed to review and evaluate SGO scores (which obviously did not happen here) between May and June of a given school year."

In point five, Respondent refutes Vice Principal Kar's claim that "she informed a classroom of students that she does not like math, or that they do not need to learn math." Carroll also disputes Kar's claim that she spitefully stripped down her room at some point after the mid-year. Kar's later testimony that it may

have been toward the end of the year is deemed inconsistent and lacking credibility. "The fact is, it was at the end of the year and Carroll was simply cleaning out her room with the assistance of her husband in light of her back condition." (Tr. @ 1081-85).

Lastly, she takes issue with Kar's March 16, 2015 memo describing her as crying in her room on March 13, 2015. She denies children were present "because they were at lunch." Although she was upset because "Cepero was attacking her for her use of her accommodation, upset and contacting her physician," she denies crying in the classroom. "Carroll cannot fully defend the allegations, because (other than the March 16, 2015 Memorandum) they were not referred to in the charges, the discovery, or referenced in any document, observation or evaluation."

Remedy

As a remedy, the Respondent seeks the dismissal of the Tenure Charges, reinstatement with "appropriate back pay, benefits and seniority. Since Carroll was "only cleared to return to limited part-time duty," but "may be available for full-time duty by the time this award is issued," she maintains that "back pay would include compensation for a part-time position" in accordance with "the District's obligation to accommodate her work-related disability." The Arbitrator could retain jurisdiction over that sole issue, if the parties could not work out a settlement. She also should "receive full benefits" (medical, pension credits and contributions) retroactive to the date of the Certification of the charges."

**DISCUSSION**

I. Respondent's Summative Evaluation for 2013-14 and 2014-15 are deficient because they lack Statutorily Mandated Student Growth Objectives ("SGOs").

Considering the evidence in its entirety, the Arbitrator is persuaded that the Respondent's 2013-14 and 2014-15 Annual Summative Evaluations are deficient because they either contain no SGO scores at all (2013-14), and to the extent they do contain SGOs (2014-15), they are not based upon multiple objectives measures of student progress as mandated by statute and regulation, including the District's Framework.

In reaching this determination, the Arbitrator reiterates his opinion set forth pursuant to Respondent's Motion to Dismiss based on her 2014-15 Annual Summative Evaluation that the District's "references to metrics used to formulate a SGO are devoid of data or measurable objective information such as standardized tests. Clearly, neither the MIF/ CLI training nor the lesson plans and student work samples measure student growth."

It is undisputed that SGO scores are a mandated and indispensable component of a teacher's Annual Summative Evaluation. As correctly noted by Respondent, a core objective of the TEACHNJ Act was "to focus on improved student outcomes, including objective measures of student growth..."

Since Section (d) of N.J.S.A. 18A:6-17.3 (Section 25) states that tenure charges filed against an employee alleging inefficiency may only be based on "those evaluations conducted in accordance with the rubric adopted by the board and approved by the Commissioner pursuant to N.J.S.A. 18A:6-16 et al." and N.J.S.A. 18A:-123, which specifies the minimum requirements for approval, states that the rubric (must) be "partially based on multiple measures of student

learning that use student growth from one year's measure to the next year's measure," an annual summative evaluation lacking metrics or SGO scores is fatally flawed.

In addition, the implementing regulations delineate the student achievement components, including SGOs, "which shall be specific and measurable, based on available student learning data...and based on growth and/or achievement." N.J.A.C. 6A:10-4.1.

The District's Framework for Effective Teaching policy manual, specifically the "Overview of Evaluation Components" section, instructs teachers and administrators to "start the yearly evaluation process with a goal setting conference which will focus on setting both specific learning goals (sometimes called Student Growth Objectives or SGOs) and professional development goals for the teachers...[which] are captured in the teacher's Individualized Professional Development Plan ('IPDP') or Corrective Action Plan ('CAP')." The policy goes on to define a student learning goal as a "long-term objective on which the teacher will focus for his/her classes or groups of students. Each objective or focus area should be a skill or behavior critical to the students' success in the course and be aligned to the standards and/or curricular objectives. The goals should be measurable and based on available student learning data." (Id. at p. 11).

Moreover, the DOE's implementing regulations mandate that "[t]o earn a summative rating, a teacher shall have a student achievement score, including

median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4."

The regulations further state that "an evaluation rating may not be provided at all to a teacher in the absence of an SGO score. "[i]f any scores for a teaching staff member's evaluation rubric are not available at the time of the annual summary conference due to pending assessment results, the annual summative rating shall be calculated once all components are available.", See, N.J.A.C. 6A:10-2.4(4)(d).

Given this context, the Arbitrator not only finds that without an SGO Score, Carroll cannot have a valid 2013-14 or 2014-15 Annual Summative Evaluation but also the absence of SGO scores constitutes clear and convincing evidence that the Respondent's evaluation "failed to substantially adhere to the evaluation process." In other words, Annual Summative Evaluations devoid of data-based SGOs in either school year preclude the District from establishing the two consecutive years of "ineffective" or "partially effective" performance evaluations necessary to pursue charges under Section 25 of the Act.

The IPDP for 2013-14 delineates "student starting points" such as "DRA2, ongoing records to show growth, pre and post tests and math in Focus First Grade assessment." The IPDP also indicates "student end points," including the DRA2, Benchmark Assessments and MIF end of the year assessments." Conceivably, some of these points such as the DRA2 and MIF subsume or contain parameters amenable to measurement; however, the objective, measureable elements necessary to establish SGOs lack clarity and specificity.

The testimony of Principal Esteves illustrates the difficulty of identifying the SGOs in the Respondent's 2013-14 IPDP. She testified as follows:

> Q. And does this IPDP identify what Miss Carroll's Student Growth Objectives were for her students in the 13/14 school year?
>
> A. In 13/14, the Student Growth Objectives were less specific than they are in today's current – ...
>
> Q. Are they, Miss Carroll's Student Growth Objectives identified in the IPDP?
>
> THE WITNESS: To my estimation, yes, they're – it's the vehicle that we will be using to assess them is there.
>
> Q. Can you identify – can you point out where they are in that document?
>
> A. Again, so the students would take the DRA. They would establish their starting point. And then at the end of the year, they would end the year with a DRA assessment and we'd have their point.
>
> Q. Do you know what the start points were and the end points were for Mrs. Carroll's students on, say, the DRA for 2013/2014?
>
> A. Miss Carroll and her supervisor at that point would have those documents and would be able to review how the students begin and how they end. (Tr. @ 714)

According to Esteves, "[w]e necessarily in 2013/14 did not write the actual student scores the way we do more recently as we've come to know based on TEACHNJ and Achieve. More specificity is given to SGOs now than [it] was at the time when that was first introduced this year." (Tr. @ 715). Although the District may have been evolving its practice with respect to SGOs shortly after TEACHNJ was enacted, there is no evidence that the District was excused, for example, from producing pre and post scores for the DRA2 or measurable student growth targets to be included in the Respondent's Summative Evaluation

Form. Principal Esteves testified that "Ms. Carroll herself would be producing the scores on the DRA in the beginning of the year and then her assessment at the end of the end. And we'd look for students growth of one year." However, there is no evidence that such assessment took place. (Tr. @ 719).

For its part, the District notes that the "Respondent's IPDP contained student learning goals in English Language Arts and Math. Her professional growth plan consisted of the following two areas for improvement, both taken from the Framework: 3b, "Persistence"; 2a, "Tailored Instruction."

Given this documentation and testimony, the Arbitrator is compelled to find that the Respondent's SGOs – a statutorily mandated component of her annual summative rating for 2013-14 – is deficient for the purpose of sustaining inefficiency charges.

Similarly found defective are the Respondent's SGOs for the 2014-15 school year. As noted in the Arbitrator's decision on the Respondent's Motion to Dismiss the Charges, "MIF training" and the District's "AIP" do not constitute objective measures of student growth. Given evidence that Carroll not only established specific measurable SGOs for both Math and ELA in her CAP, namely MIF assessments for Math and the DRA2 for ELA, but also these measures were acknowledged by Vice Principal Kar in his mid-year evaluation and testimony at the hearing, the District's terse statement in Carroll's Annual Summative Evaluation that "Ms. Carroll has not met student learning goals" is both incomplete and dubious.

Inasmuch as Dr. Kar testified that Respondent in her CAP had set MIF baseline assessment data for her students (i.e., 9 students (60%) performed at or above grade level, 6 students (40%) performed below grade level) and utilized the MIF pre-assessment, post-assessment and unit tests/assessments, and similarly used the DRA-2 assessment to measure ELA progress (i.e., 10 students (59%) performed at the DRA-2 performance level of 16 or above...), the Arbitrator is persuaded that the Miller Street administrators had the means to validate Carroll's MIF and DRA-2 assessment data for her annual summative evaluation. Kar also wrote in the mid-year evaluation that "Yes, Ms. Carroll is on track to meet the goals that were set. Yes, for the DRA students demonstrated 38 percent growth from September to January." (Tr. @ 272).

By accepting Carroll's DRA results and crediting her with making progress toward meeting her SGOs in the mid-year evaluation as delineated in Competency 4f, Kar had the means to follow-up for her summative evaluation. Kar rated Respondent on the DRA measure of student growth (4f) for her mid-year evaluation. Although Kar accepted both her ELA and math assessments at the mid-year for her students as well as had her test the students of other teachers at his request because she was "skilled" in this area, he was uncertain whether Carroll or some other teacher tested Carroll's students in math and reading at the end of the year. (Tr. @ 953-954).

Principal Cepero placed the onus on Carroll for determining whether her students were performing above grade level at the end of the year by using an unidentified standard different from MIF. (Tr. @ 231-232). In the summative

evaluation, Cepero found no growth in student performance since the mid-year, and accorded "low inference" to Kar's report.

According to Cepero, the Respondent's DRA data is missing from her summative evaluation because "Ms. Carroll failed to share her DRA results and therefore I could not determine whether her students met their performance goals. (Tr. @ 350). She established the DRA in the system, but she never provided that information to me." (Tr. @ 354). Despite Cepero's acknowledgement that as Principal he was responsible for "making sure teachers record the data they are supposed to record," she did not provide him with the data for math and he was uncertain as to whether she recorded it in the District's computer system. (Tr. @ 361).

It is noteworthy that since Principal Cepero issued the Respondent's Annual Summative Evaluation in April 2015 – at least one month earlier than the Framework recommends -- without the requisite SGO data, an inference can be drawn that he did not intend to include SGOs in the Respondent's premature summative rating. Given the regulation that "an evaluation rating may not be provided at all to a teacher in the absence of an SGO score," this action is deemed arbitrary and capricious. See, N.J.A.C. 6A:10-2.4(4)(d).

In the Arbitrator's opinion, the Miller School Administration, having confirmed Carroll's SGOs for both Math and ELA in her CAP, namely MIF assessments for Math and the DRA-2 for ELA, and having reinforced those SGOs during her mid-year evaluation in February 2015 via Competency 4(f) as "making significant progress" and "reflect[ing] growth," had an affirmative

obligation to document any deficiencies Carroll had in meeting her SGOs since the mid-year evaluation. Rather than provide a perfunctory statement that Carroll "Did not meet goals" and refer to teacher programs/activities that did not constitute the requisite "metrics," the Miller School Administration had an obligation to confirm or reject her SGO results. Instead, they circumvented their Statutory and Framework responsibility to review the results of the DRA-2 and MIF assessments upon which Carroll's SGOs, and ultimately her summative evaluation, would be based.

Before rating the Respondent as "ineffective" on her SGOS and "ineffective" overall on her summative evaluation, Miller School administrators had an obligation to assess her students' growth using the metrics she had initially provided, Vice Principal Kar had deemed satisfactory, and the Respondent had made available in her classroom rather than wait for her to submit the documentation to Cepero, Kar or Rivera. Had Principal Cepero established a procedure for submitting SGO data that placed the onus for delivery on the Respondent, her non-compliance should have been documented or even subject to discipline.

Notwithstanding the testimony of the District's Chief Talent Officer, Larisa Shambaugh, that the District had obtained a waiver approving its "equivalency application" for the 2014-15 school year that enabled it to place student growth objectives or student learning objectives in competencies 4d, 4e and particularly 4f, there is no evidence that the District's mandate to incorporate SGOs in the summative evaluation were also waived. As Shambaugh testified: "An

administrator must utilize the evidence specifically around the teacher's progress in meeting the student learning goals that were set in the IPDP or CAP" and factor this evidence into the "mid-year evaluation as well as the summative." She further testified that "4d, 4e and 4f reflect both the process for setting SGOs" and "the progress that they set goals, which is in 4f." (Tr. @ 488-489).

In the Arbitrator's opinion, the District's omission of measurable objective SGOs for the 2013-14 and 2014-15 school years rendered its summative evaluations of the Respondent void as a matter of law and provided a preponderance of evidence in support of her statutory defense that the Respondent's evaluation "failed to adhere substantially to the evaluation process."

The Arbitrator further finds that the absence of Carroll's SGO scores materially affected the outcome of her evaluations, particularly the 2014-15 evaluation where she received an overall score of seven (7) points placing her in the ineffective category. Conceivably, the Respondent could have been rated partially ineffective for 2013-14 anyway because six (6) points were deducted from her overall score on Indicator 5d "attendance and promptness," although she was otherwise rated effective on her teacher performance. However, the deduction of six (6) points on Competency 4f for 2014-15, with the SGOs calculated at 20% of the teachers' overall score, adversely impacted the Respondent's annual rating. Since the meeting or exceeding of the teachers' SGOs as measures on Competency 4 is inextricably connected to the summative rating and, in turn, constitutes a 20% factor in determining their

summative score, the District's failure to properly evaluate the Respondent's SGOs invalidated the annual summative evaluation.

The Arbitrator further finds that the deficiency in determining the Respondent's SGOs was arbitrary and capricious. The substitution of non-metric considerations in the 2013-14 summative evaluation and the omission of any SGO score for 2014-15 was arbitrary. As noted above, the factors utilized by the District in 2014-15 such as AIP and MIF training deviated from the metrics set forth in the Respondent's CAP, namely the MIF and DRA-2, that were validated during the mid-year but not addressed in the summative. The failure of the District to review the Respondent's metrics yet rate her ineffective with respect to her SGOs was not only a material error that failed to adhere substantially to the evaluation process, it was also constituted arbitrary and capricious action on the District's part.

The Arbitrator, having found that the District failed to incorporate multiple objective measures of student growth or SGOs into either the Respondent's 2013-14 or 2014-15 summative evaluations, further finds that the District not only did not meet its statutory obligation to include SGOs as part of the Respondent's annual summative evaluations as required by N.J.A.C. 6A:10-4.1, supra, but it also failed to meet its "ultimate burden of demonstrating to the Arbitrator that the statutory criteria for tenure charges have been met."

Accordingly, the District, in the absence of two lawfully conducted summative evaluations, cannot sustain its charges of inefficiency pursuant to Section 25 of

the TEACHNJ Act, N.J.S.A. 18A:6-17.3 based on two consecutive years of "ineffective" and/or "partially effective" performance.

II. Respondent's Claim that the District's Evaluation of her was arbitrary and capricious because she purportedly was a *defacto* effective teacher for the 2013-14 school year

The crux of the Respondent's claim is that her first observation on November 27, 2013 where she was rated as "partially effective" should be disregarded as arbitrary. While the Arbitrator concurs with the Respondent that her first observation in the 2013-14 school year was premature and probably unfair because she had recently been assigned to the class, was unfamiliar with the students except as an occasional substitute, and had not taught in the 2012-13 school year, her "partially effective" rating was due in large part to her excessive absences and tardiness.

Unlike the cases cited by the Respondent where observations have been found to be arbitrary after teachers have returned from extended leave, the Respondent's absences and tardiness, even excluding her November 27, 2013 observation, rendered her "ineffective" as an instructor who provided a continuous quality educational experience for her students. Clearly, her attendance as of May 28, 2014, 85 days tardy and 16 days absent, negate any reasonable claim to effective performance. Although Respondent was rated "effective" on three subsequent observations, her record of excess absence/tardiness disrupted her teaching practice and warranted the "partially effective" rating.

Moreover, the Arbitrator rejects the Respondent's claim of quadruple jeopardy predicated on the Respondent's attendance. There is no evidence that the District brought the Section 25 inefficiency charge because of the Respondent's absence/tardiness, but rather in assessing her entire two-year record of performance properly considered her "attendance and promptness," which is specifically identified as a competency in 5(d) of the 2013-14 summative evaluation. As the District correctly notes, had it had intended to bring inefficiency charges based on excessive absence/tardiness alone, it had the capacity to do this at the end of the 2013-14 school year.

The Arbitrator dismisses the Respondent's claim that her observation performances in 2013-14 were not properly weighted. The Respondent has recalculated the Respondent's observations for all five (5) competencies, changed the deduction for attendance in Competency 5 from 6 points to 2 points, and concluded that, based on her favorable revisions, she should have been rated effective. As the District correctly notes, "TEACHNJ expressly prohibits the arbitrator from second-guessing the evaluator's determination regarding the quality of a teacher's classroom performance." N.J.S.A. 18A:6-17.2(c). This prohibition extends to the evaluator's judgment regarding the scoring of ties between the sub-parts of a competency. As Principal Esteves, corroborated by Chief Talent Officer Shambaugh, testified, the evaluator has the discretion to determine the "preponderance of the evidence" that supports an overall score for a competency (i.e., "What is going to be driving the most amount of student learning across those competencies?") (Tr. @ 480, 725).

III. The Respondent's claims of discrimination

The Respondent alleged but did not prove that her participation in a February 2014 DYFS interview in Cepero's presence concerning allegations of abuse or neglect of students by another teacher was the impetus for her subsequent negative classroom observations. She reported to the interviewer that she had brought the situation to Cepero's attention, yet he had nothing. According to Carroll, harassment concerning her use of the 504 Accommodation, specifically the disciplinary memoranda of March 12, 13 and 18, 2015 began after and resulted from the DYFS interview.

In the Arbitrator's opinion, the Respondent failed to establish a nexus between the DYFS interview and her 504 Accommodation issue. Inasmuch as the Respondent did not have a valid 504 Accommodation renewal as of February 2014 and did not obtain one until April 7th, she cannot reasonably claim that Principal Cepero discriminated against her. While the evidence indicates that prior to March 2015 she was provided the functional equivalent of her 2013-14 504 Accommodation, which entailed relief from walking down the stairs, the use of the school's elevator, and assistance from other school employees in escorting her students up and down stairs and to lunch, this support exceeded the letter of her 504 Accommodation, which was limited to elevator access and was "provided to you as long as it does not interfere with your assignment."

Clearly, the Respondent, notwithstanding voluntary assistance she had received from other teachers in transporting her students, was not permitted to leave them unescorted – a subject that the April 23, 2015 memo addressed (i.e.

"You continue, daily, to not escort your students to and from the cafeteria"). (D. Ex. #30). The principal had an obligation to ensure the safety of the students in Respondent's class and avoid an undue burden on the staff.

On this record, the Arbitrator cannot sustain the Respondent's claim of discrimination based on her 504 Accommodation. There is no evidence that the charges would not have been brought but for considerations of discrimination because the Respondent was rated "partially effective" in 2013-14 and "ineffective" in 2014-15 and pursuant to TEACHNJ Section 25, the District was required to file inefficiency charges.

IV. 2013-14 IPDP

The Arbitrator does not sustain the Respondent's claim that her 2013-14 was unilaterally imposed on her without her input. Since the Respondent was not assigned as a permanent teacher until after approximately six weeks of the semester had elapsed, her IPDP was developed on December 16, 2013. She signed off on two areas of improvement for her professional growth plan, namely "persistence" and "tailored instruction." The record indicates that Carroll and her supervisor, Ms. Empirio, collaborated on her student growth objectives designated, "start points/end points" for 2013-14 using, inter alia, the DRA – albeit lacking specificity with respect to SGOs. The Arbitrator discerns no reason to infer that the Respondent lacked the opportunity to revise her IPDP.

On her Mid-Year Review, specifically in the section "Revisiting the Student Learning Plan," she is reported to be making progress toward meeting the targeted objectives outlined in her IPDP "centered around writing," with a

focus on math. (D. Ex. #5). Here again, the Respondent signed off without any additions or subtractions. The Respondent's vague recollection about her role in developing the IPDP cannot suffice as preponderant evidence in support of this claim. (Tr. @ 1010-1013).

Accordingly, Respondent's IPDP claim is dismissed.

V. 2014-2015 CAP

The evidentiary record indicates that the same teacher growth areas set forth in the Respondent's IPDP, namely 3b, "persistence" and 4a "tailored instruction" were also incorporated into her CAP. Principal Cepero recalled "dialoguing" with Carroll regarding these teacher growth areas. A goal setting conference was held on October 8, 2014, at which time Cepero and Carroll were expected to collaborate on developing a CAP "tailored for teachers who require additional support."

In addition to her SGOs, which she admittedly prepared, the Respondent maintains that her CAP was not individualized for her deficiencies. This aspect of the CAP was problematic because, but for the Respondent's absences and tardies in 2013-14, she would have been rated effective. The Arbitrator concurs with Respondent in finding that the "action steps" for administration to assist were generic as opposed to indicating the specific help that the administration would provide. Given evidence that Carroll provided the student learning goals, the assessment metrics for ELA and Math as well as reiterated (or at least did not object to) the teacher growth objectives, the Arbitrator is not persuaded that she passively conceded to a CAP developed exclusively by the administration.

Since the action steps for the teacher growth are virtually identical in the IPDP (i.e., "I will use the first weeks of school to teach routines, procedures and expectation of how to work independently and use resources in the classroom to help them complete their assignment"), it strains credulity to propose that Carroll was an inactive bystander during the entire CAP development process. (D. Ex. #2 @ 4; D. Ex. #9 @ 4).

Inasmuch as her retention as a tenured teacher depended upon fulfillment of the goals and objectives, student and teacher, set forth in the CAP and she knew or should have known that she could make changes to meet her individual needs, the Arbitrator is disinclined to place the sole burden on the administration in a "collaborative process." On balance, the Arbitrator finds that, despite some procedural irregularities, the District substantially complied with the CAP protocol.

Accordingly, the Respondent's CAP claim is dismissed.

Finally, the Arbitrator concurs with Respondent that Carroll's 2014-15 Summative Evaluation was issued prematurely on April 14, 2015 – at least a month earlier than the State and District guidelines suggest. In contrast, Carroll's 2013-14 Annual Summative Evaluation was issued on May 28, 2014. However, there is no evidence that one (1) additional observation would have changed the outcome. Therefore, this technical deviation from practice does not rise to the level of a statutory material error in the evaluation process.

## VI. Other Claims

With respect to other allegations made by the District and disputed by the Respondent, the Arbitrator expresses no opinion as they were not the subject of the inefficiency charge.

## VII. Conclusion

For the reasons set forth above, the Respondent's Summative Annual Evaluations for 2013-14 and 2014-15 are legally void due to their lack of statutorily mandated student growth objectives (SGOs). The District's evaluation of the Respondent "failed to adhere substantially to the evaluation process" and this deviation from the statutorily mandated procedures and regulations materially affected the outcome of her evaluation pursuant to N.J.S.A. 18A:6-17.2(b). As such, these evaluations cannot serve as the basis for inefficiency charges pursuant to Section 25 of the TEACHNJ Act, N.J.S.A. 18A:6-17.3.

Accordingly, the tenure charge of inefficiency filed by the State-Operated School District of the City of Newark, County of Essex, Dkt. No. 261-9/15, is dismissed.

## Remedy

As a remedy, the Respondent, Danielle Carroll, shall be reinstated to her position as an elementary school teacher with the State-Operated School District of the City of Newark, effective immediately. She is further awarded appropriate back pay for the period she was medically able to return to work on a full-time basis – less Worker's Compensation payments. She shall also receive commensurate benefits (medical, pension credits and contributions) retroactive to the date of the Certification of the Charges.

The Arbitrator will retain jurisdiction *sine die* to address any issues that may arise in the interpretation or implementation of the remedy portion of this award, including the compensatory effect of the Respondent's current availability on a limited part-time basis until such time that she is medically cleared to return to full duty.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

**AWARD**

(1) The District failed to adhere substantially to the evaluation process and engaged in actions that were arbitrary and capricious, which

materially affected the outcome of the Respondent's summative annual evaluation, when it did not include statutorily mandated student growth objectives (SGOs) based on multiple objective measures of student progress in either Respondent's 2013-14 or 2014-15 summative annual evaluation.

(2) Pursuant to the TEACHNJ Statute, the Respondent, Danielle Carroll, shall be reinstated to her position as a teacher with the State-Operated School District of the City of Newark.

(3) The Respondent shall be reinstated with appropriate back pay for the period she was medically able to return to work as a full-time teacher – less Workers' Compensation payments.

(4) Carroll shall also receive commensurate benefits (e.g., medical, pension credits and contributions) retroactive to the date of the Certification of Charges.

(5) The Arbitrator will retain jurisdiction *sine die* to address any issues that may arise in the interpretation or implementation of the remedy portion of this award, including the compensatory effect of the Respondent's current availability on a limited part-time basis until such time she is medically is cleared for full-duty.

*Robert T. Simmelkjaer*
Robert T. Simmelkjaer
Arbitrator

December 30, 2016

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 30th day of December 2016, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 261-9/15 dismissing tenure charges as set forth above.

December 30, 2016

Notary Public

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

## AWARD

(1) The District failed to adhere substantially to the evaluation process and engaged in actions that were arbitrary and capricious, which materially affected the outcome of the Respondent's summative annual evaluation, when it did not include statutorily mandated student growth objectives (SGOs) based on multiple objective measures of student progress in either Respondent's 2013-14 or 2014-15 summative annual evaluation.

(2) Pursuant to the TEACHNJ Statute, the Respondent, Danielle Carroll, shall be reinstated to her position as a teacher with the State-Operated School District of the City of Newark.

(3) The Respondent shall be reinstated with appropriate back pay for the period she was medically able to return to work as a full-time teacher – less Workers' Compensation payments.

(4) Carroll shall also receive commensurate benefits (e.g., medical, pension credits and contributions) retroactive to the date of the Certification of Charges.

(5) The Arbitrator will retain jurisdiction *sine die* to address any issues that may arise in the interpretation or implementation of the remedy portion of this award, including the compensatory effect of the Respondent's current availability on a limited part-time basis until such time she is medically is cleared for full-duty.

December 30, 2016

Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 30th day of December 2016, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 261-9/15 dismissing tenure charges as set forth above.

December 30, 2016

Notary Public

IRISH JACKSON NOTARY PUBLIC THE GREAT SEAL OF THE STATE OF NEW JERSEY My Comm. Exp.